4-18

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing between:

STATE-OPERATED SCHOOL DISTRICT, CITY OF CAMDEN,
Petitioner

-and- Docket No. 218-9/17

CHRISTINA VAUGHN,
Respondent

Before: Susan Wood Osborn, Arbitrator

CONSENT AWARD

Christina Vaughn ("Vaughn") was a math teacher employed by the Camden City School District. On August 15, 2017, the District served Vaughn certain Tenure Charges and a Statement of Evidence. Vaughn was charged with inefficiency.

On October 6, 2017, M. Kathleen Duncan, Director of the New Jersey Department of Education, Bureau of Controversies and Disputes, appointed me to hear and decide the above tenure matter, pursuant to P.L. 2015, c. 109 [N.J.S.A. 18A:6-16, as amended by P.L. 2012, c. 26.] I scheduled hearings for November 14 and 16, 2017. By email on November 6, 2017, followed by a letter dated

November 8, 2017, the attorney representing the Respondent Vaughn notified me that the parties had entered into settlement discussions and were executing a Settlement Agreement and General Release, including the Respondent's execution of an irrevocable letter of resignation. Thereafter, I adjourned the scheduled hearings pending the parties' ratification of the Settlement Agreement and General Release.

On December 22, 2017, the parties submitted an executed Settlement Agreement and General Release, including an irrevocable letter of resignation by Respondent Vaughn and the District's ratification by signature of the State-Appointed District Superintendent.

I have carefully considered the submitted documents as the basis for issuing the following Award. The Settlement Agreement was signed by Vaughn on November 9, 2017 and by the District superintendent on December 21, 2017. Pursuant to the terms of settlement, Vaughn resigns effective December 31, 2017, and the parties mutually desire to resolve the Tenure Charges and all other matters relating to Vaughn's employment with the District, effective December 31, 2017. Accordingly, the parties negotiated a Settlement Agreement and General Release, summarized here:

Vaughn shall irrevocably resign effective December 31, 2017, and will not re-apply for nor be re-hired by the District.

Vaugh releases the District from all charges, claims, grievances, and causes of action, of any nature whatsoever that Vaughn has, ever had, or may have had, against the District for anything that has happened up to the effective date of the Agreement. Vaughn affirms she has not initiated any lawsuits against the District.

In consideration of Vaughn's irrevocable resignation, and general release of claims, the District agrees not to pursue the Tenure Charges against Vaughn, to pay Vaughn two months wages minus normal payroll deductions/withholdings in a lump sum, continue coverage of Vaughn's healthcare insurance, deducting Vaughn's portion of the premium payment through December 31, 2017, and to refrain from pursuing any disciplinary action against Vaughn.

The District agrees to provide Vaughn with a neutral reference of only what is required by law. Vaughn agrees to safely return all District property in an undamaged condition.

Vaughn does not waive claims she can file under any state workers' compensation law, unemployment law, any claim arising from a breach of this agreement; or challenges to the validity of this Agreement under the Older Workers Benefits Protection Act ("OWBPA").

Pursuant to the requirements of the ADEA and OWBPA, Vaughn specifically acknowledges that:

(a) She has been advised to consult with an Attorney of her choosing concerning the legal significance of this Agreement and has done so;

(b) This Agreement is written in a manner that she understands;

(c) The consideration set forth this Agreement consists of benefits to which she is not entitled and is adequate and sufficient to support her promises, covenants and releases as set forth in this Release;

(d) She has been afforded twenty-one (21) days to consider this Agreement before executing it, that any changes thereto subsequently agreed upon by the parties whether material or immaterial, do not restart this period for consideration, and that by signing and returning this Agreement before the end of the twenty-one (21) day period she will have knowingly and voluntarily waived the right to consider this Agreement for the full consideration period; and

(e) She has been advised that during the seven (7) day period following her execution of this Agreement, she may revoke her acceptance of this Agreement by delivering written notice to counsel for the District and that this agreement shall not be enforceable until after the revocation period has expired.

The parties agree the Agreement is not, and may not construed as, an admission of liability by either Party.

Vaughn understands that if she breaches any provision of the Agreement, the District will file an action to enforce the Agreement. Likewise, the District understands that if it breaches any provision of this agreement Vaughn will file an action to enforce the Agreement. Any action to enforce this Agreement shall be brought in Camden County Superior Court.

Finally, the parties acknowledge that by signing the agreement they have read it, they understand it and know they are giving up important rights, they agree with everything in it, their respective attorneys negotiated it with their knowledge and consent, they have consulted with their respective attorneys about it and they sign it knowingly and voluntarily.

The standards for approving the parties' agreement are set forth in N.J.A.C. 6A:3-5.6, "Withdrawal, Settlement, or Mooting of Tenure Charges." This regulation provides, in relevant part:

> (a) Once tenure charges are certified to the Commissioner, they may be withdrawn or settled only with approval. Any proposed withdrawal or settlement . . . shall address the following standards:
>
> 1. Accompaniment by documentation as to the nature of the charges;
>
> 2. Explication of the circumstances justifying settlement or withdrawal;
>
> 3. Consent of both the charged and charging parties;
>
> 4. Indication the charged party entered into the agreement with a full understanding of his or her rights;
>
> 5. A showing the agreement is in the public interest; and
>
> 6. If the charged party is a teaching staff member, a showing the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.
>
> (b) A settlement agreement shall not propose terms that would restrict access to information or records deemed public by law or result in misrepresentation of the reason for an employee's separation from service. If tenure charges have been certified to the Commissioner by a district board of education, any proposed settlement shall indicate, by signature of the district board of education attorney or inclusion of a district board of

> education resolution authorizing settlement, that the district board of education has consented to the terms of the settlement.

I find the terms and conditions in the parties' executed Settlement Agreement and General Release satisfy the conditions of N.J.A.C. 6A:3-5.6. I am satisfied, based on her signature to and acknowledgements of the terms of the Settlement Agreement and General Release, that Respondent Vaughn understands and accepts the consequences of accepting and signing the terms, and that her signature constitutes her informed consent. Similarly, the signature of the State-Appointed District Superintendent signifies the District's acceptance of the terms. The parties have indicated by their signatures that they entered into the agreement with a full understanding of their respective rights. Both parties were represented by Counsel, who negotiated the terms with their clients' consent and understanding.

Respondent Vaughn's attorney stated, in a letter dated November 8, 2017, that Vaughn does not possess any District-owned property as her supplies were turned in at the end of the 2016-2017 school year. Vaughn submitted a signed letter of irrevocable resignation.

I find the parties have satisfied N.J.A.C. 6A:3-5.6 (a) 6, requiring that teaching staff members have been advised of the Commissioner's duty to refer

tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate. As this matter does not involve any charges or allegations of criminal activity or child abuse or neglect, I find none of the conditions in N.J.A.C. 9B-4.3(a) are present.[1]

I further find the Settlement Agreement and General Release satisfies Paragraph (b) of N.J.A.C. 6A:3-5.6(b), providing that any settlement agreement shall not propose terms that restricts access to information or records deemed public by law, or results in any misrepresentation of the reason for an employee's separation from service. Here, the District agrees to comply with the law and nothing in settlement agreement and release restricts information otherwise available to the public. Moreover, nothing in the Settlement Agreement and Release misrepresents the reasons for Vaughn's separation from service available to the public.

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[1] This provision provides: The chief school administrator shall notify the Board of Examiners when: 1. Tenured teaching staff members who are accused of criminal offenses or unbecoming conduct resign or retire from their positions; 2. Nontenured teaching staff members, including substitute teachers, who are accused of criminal offenses or unbecoming conduct resign, retire, or are removed from their positions; 3. A certificate holder fails to maintain any license, certificate, or authorization that is mandated pursuant to this chapter for the holder to serve in a position; 4. He or she becomes aware that a certificate holder has been convicted of a crime or criminal offense while in the school district's employ; or 5. He or she has received a report from the Department of Children and Families substantiating allegations of abuse or neglect, or establishing "concerns" regarding a certificated teaching staff member.

As there are no allegations of child abuse or criminal activity and the settlement of disputes is generally favored in law and as policy, I find the agreement to be in the public interest.

Finally, there is no evidence in the record that Vaughn has revoked her acceptance of the Settlement Agreement and Release within the agreement's stated period for such revocation by sending written notice to the District of any revocation. Accordingly, by reason of the foregoing, I issue the following:

CONSENT AWARD

Based on the facts regarding the Tenure Charges brought by the State-Operated School District of the City of Camden against Respondent Christina Vaughn, and having examined and considered the terms of the Settlement Agreement and General Release, I find that the Agreement is reasonable, consistent with the TEACHNJ Statute and regulations and in the public interest. The Settlement Agreement and Release was executed by Respondent Vaughn on November 9, 2017, and by the State District Superintendent on December 21, 2017. Therefore, I endorse and approve the parties' Settlement Agreement and General Release as appropriate under the circumstances and as satisfying the requirements of the TEACHNJ statute.

Susan W. Osborn

Susan W. Osborn
Arbitrator

Dated: December 28, 2017
Trenton, New Jersey

State of New Jersey)
County of Mercer)

On this 28th day of December, 2017, before me personally came and appeared Susan Wood Osborn to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

BHARAT P. PATEL
Commission # 2333509
Notary Public, State of New Jersey
My Commission Expires
September 01, 2020

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("this Agreement") is entered into by and between Christina Vaughn ("Vaughn") and the Camden City School District (the "District"). Together, Vaughn and the District may be referred to herein as "the Parties."

WHEREAS, Vaughn is a Teacher of Math employed by the District;

WHEREAS, the District served on Vaughn on August 15, 2017 certain Tenure Charges and a Statement of Evidence (the "Tenure Charges");

WHEREAS, Vaughn wishes to resign effective December 31, 2017;

WHEREAS, the Parties mutually desire to resolve the Tenure Charges and all other matters relating to Vaughn's employment with the District;

NOW, THEREFORE, IT IS HEREBY AGREED by and between the Parties as follows:

1. Effective Date: This Agreement shall take effect on the date it is fully executed by the Parties, and as such, deemed ratified by the State Superintendent as the authorized representative of the District in accordance with N.J.S.A. 18A:7A-35.

2. Separation from Employment:

   (a) Vaughn shall provide the District immediately, through its counsel, Brown & Connery, LLP with an irrevocable letter of resignation effective December 31, 2017, which shall be attached as Exhibit "A" to this Agreement;

   (b) In consideration for Vaughn's irrevocable letter of resignation effective December 31, 2017, and general release of claims and covenant not to sue in accordance with Sections 5 and 6 of this Agreement, the District agrees not to pursue the Tenure Charge against Vaughn and Vaughn shall receive the Payment in accordance with Section 3 of this Agreement;

   (c) The District agrees not to pursue any disciplinary action including under N.J.S.A. 18A:28-8 against Vaughn as a result of her executing this Agreement;

   (d) The District shall provide Vaughn with a neutral reference of only what is required by law, namely, her employment time period, where she was employed, and her final annual salary.

3. Wages and Medical Benefits:

   (a) The District shall pay Vaughn in one lump sum payment her wages equal to two months of her salary, subject to all applicable and normal payroll deductions and withholdings, including Vaughn's portion of the premium for

her District medical benefits as set forth in Section 3(b) (hereinafter, the "Payment"), upon the District's receipt and prompt verification and examination of District property as set forth in Section 4.

(b) The District shall continue coverage for medical benefits for Vaughn under the District's healthcare insurance through December 31, 2017 and the amount due for Vaughn's portion of the premium payment for health care insurance coverage through December 31, 2017 shall be deducted from the Payment.

4. Safe Return of all District Property: Vaughn's Payment set forth in Section 3 above is expressly contingent upon her safely returning all District property in her possession without damage and in property working order.

(a) Upon execution of this Agreement, Vaughn must immediately provide Brown & Connery, LLP (360 Haddon Avenue, Westmont, New Jersey 08108) with all District property in her possession. Brown & Connery, LLP, within two (2) days of receipt of the property, will then submit the property to the District for prompt verification and examination. If the District property is not damaged and is in proper working order, the District will ensure Vaughn receives Payment as set forth in paragraph 3 above.

(b) In the event Vaughn fails to return all District property in her possession and/or the property returned is damaged and not in proper working order, the District shall determine its total loss and deduct this amount from her Payment as set forth in Section 3 above.

5. General Release: In consideration of the Payment in Section 3 above, Vaughn releases the District from all known and unknown charges, complaints, claims, grievances, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts, penalties, fees, and expenses (including attorneys' fees and costs actually incurred) of any nature whatsoever that Vaughn has, ever had, or may have had, against the District, whether or not apparent or yet to be discovered, or which may hereafter develop, for any acts or omissions relating to or arising from anything that has happened up to the Effective Date of this Agreement. This includes, but is not limited to, any claims that Vaughn asserted, or may have asserted, under the following: the National Labor Relations Act; the Civil Rights Act of 1964; Sections 1981 through 1988 of Title 42 of the United States Code; the Employment Retirement Income Security Act; the Immigration Reform Control Act; the Americans with Disabilities Act; the Age Discrimination & Employment Act; the Fair Labor Standards Act; the Occupational Safety & Health Act; the Family & Medical Leave Act; the Equal Pay Act; the New Jersey Law Against Discrimination; the New Jersey Wage Payment Law; The New Jersey Minimum Wage Law; the Equal Pay Law for New Jersey; the New Jersey Worker Health & Safety Act; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; N.J.S.A. 18A; The Teacher Effectiveness and Accountability for the Children of

New Jersey (TEACHNJ) Act; N.J.A.C. 6A; any constitution, statute, regulation, ordinance, executive order, public policy or common law; any written, verbal or implied contract; and any other authority or basis for seeking damages or relief of any kind. This release is intended to be broadly construed and applies to any and all claims and potential claims whatsoever, including those of which Vaughn is not aware, resulting from anything that has happened up to the Effective Date of this Agreement.

6. Covenant Not to Sue: Vaughn warrants she has not commenced any legal proceedings of any type (including but not limited to charges filed with any governmental agency) against the District. Further, Vaughn agrees that she will not commence any legal proceedings against the District arising from or relating to anything that has happened up to the Effective Date of this Agreement. Should any such legal proceedings be commenced on Vaughn's behalf, Vaughn agrees that she will not seek or accept any relief or recovery therefrom. In the event of a violation of this paragraph, Vaughn agrees that the District shall be entitled to immediate dismissal of the legal proceedings, and that she shall be responsible for the District's attorneys' fees and costs incurred in connection with those legal proceedings. Should any entity, agency, commission, or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Section 5, Vaughn agrees not to seek or accept any resulting relief whatsoever, in accordance with this section.

7. Claims Not Released: Notwithstanding Sections 5 and 6 of this Agreement, it is understood and agreed that Vaughn is not waiving: (a) claims that were filed or could be filed under any state workers' compensation or unemployment law or any claim arising from a breach of this agreement; or (b) challenges to the validity of this Agreement under the Older Workers Benefits Protection Act. Vaughn represents that she is not aware of any present basis for such claims. Should any entity, agency, commission, or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Section 5, Vaughn agrees not to seek or accept any resulting relief whatsoever, in accordance with Section 6, above.

8. Older Workers Benefit Protection Act: The releases in Section 5 above include a waiver and release of all claims under the Age Discrimination in Employment Act ("ADEA") and the Older Workers Benefit Protection Act ("OWBPA"). Therefore, pursuant to the requirements of the ADEA and OWBPA, Vaughn specifically acknowledges that:

(a) She has been advised to consult with an attorney of her choosing concerning the legal significance of this Agreement and has done so;

(b) This Agreement is written in a manner that she understands;

(c) The consideration set forth this Agreement consists of benefits to which she is not otherwise entitled and is adequate and sufficient to support her promises, covenants and releases as set forth in this Release;

(d) She has been afforded **twenty-one (21) days** to consider this Agreement before executing it, that any changes thereto subsequently agreed upon by the parties, whether material or immaterial, do not restart this period for consideration, and that by signing and returning this Agreement before the end of the **twenty-one (21) day** period she will have knowingly and voluntarily waived the right to consider this Agreement for the full consideration period; and

(e) She has been advised that during the **seven (7) day** period following her execution of this Agreement, she may revoke her acceptance of this Agreement by delivering written notice to counsel for Company (as identified below), and that this Agreement shall not become effective or enforceable until after the revocation period has expired:

Louis R. Lessig, Esquire
Brown & Connery, LLP
360 Haddon Ave.
Westmont, NJ 08108

9. Not Eligible for Rehire: Vaughn acknowledges and agrees that her employment with the District is irrevocably severed upon the effective date of this Agreement and that she is ineligible for re-hire as an employee of the District. Vaughn agrees not to apply for re-employment with the District. If, for some reason, the District receives an application for Vaughn's employment, the District shall have no obligation to consider or review her application for employment.

10. No Admission of Liability: This Agreement is not, and may not be construed as, an admission of liability by either Party.

11. Entire Agreement: This Agreement encompasses the sole and entire agreement between the Parties and fully supersedes any and all prior agreements or understandings pertaining to the subject matter hereof. No other promises or agreements shall be binding unless in writing, signed by the Parties, and expressly stated to represent an amendment or supersession to this Agreement.

12. Severability: If any portion of this Agreement is deemed unenforceable, the remainder will be fully enforceable.

13. Applicable Law and Construction: This Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey; however, since each party to this Agreement and their counsel have reviewed and negotiated this Agreement, the general rule of construction that any ambiguity or uncertainty in a writing shall be interpreted against the party drafting the writing shall not apply to any action relating to this Agreement. Any action to enforce or interpret this Agreement shall only be brought in a court of competent jurisdiction in Camden County, New Jersey.

14. Counterparts: This Agreement may be executed in more than one counterpart and each counterpart shall be considered an original, but all of which together shall constitute one and the same.

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

16. Breach: Vaughn understands that if she breaches any provision of this Agreement, the District will file an action to enforce this Agreement. Likewise, the District understands that if it breaches any provision of this Agreement, Vaughn will file an action to enforce this Agreement. Any action to enforce this Agreement shall be brought in Camden County Superior Court.

17. Notices: Any notice given or demand made pursuant to this Agreement shall be made by certified mail, return receipt requested, to the following persons at the following addresses:

If to Vaughn:

Christina Vaughn
3827 Deacon Avenue
Pennsauken, NJ 08110

With a copy to:

Amy L. Gillette, Esquire
Zeller & Wielkzko, LLP
120 Haddontowne Court
Cherry Hill, New Jersey 08034

If to the District:

Camden City School District
Business Administrator/Board Secretary
201 N. Front Street
Camden, New Jersey 08102

With a copy to:

Louis R. Lessig, Esquire
Brown & Connery, LLP
360 Haddon Avenue
Westmont, New Jersey 08108

18. Facsimile or Electronic Signature Fully Binding: The Parties agree that a facsimile or electronic signature herein shall be deemed to have the same force and effect of an original.

BY SIGNING THIS AGREEMENT, THE PARTIES ACKNOWLEDGE:

A. THEY HAVE READ IT;

B. THEY UNDERSTAND IT AND KNOW THEY ARE GIVING UP IMPORTANT RIGHTS;

C. THEY AGREE WITH EVERYTHING IN IT;

D. THEIR RESPECTIVE ATTORNEYS NEGOTIATED IT WITH THEIR KNOWLEDGE AND CONSENT;

E. THEY HAVE CONSULTED WITH THEIR RESPECTIVE ATTORNEYS ABOUT IT; AND

F. THEY SIGN IT KNOWINGLY AND VOLUNTARILY.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties hereby execute this Agreement.

Christina Vaughn

Date: 11/9/17

Paymon Rouhanifard
State Superintendent
Camden City School District

Date: 12/21/17

EXHIBIT "A"

November 9, 2017

Paymon Rouhanifard, State District Superintendent
Camden City School District
201 N. Front Street
Camden, New Jersey 08102

Dear Superintendent Rouhanifard:

I, Christina Vaughn, hereby submit this irrevocable letter of resignation from my position as Teacher of Math with the Camden City School District. This irrevocable letter of resignation from my position will become effective on December 31, 2017.

Sincerely,

Christina Vaughn

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
APRIL GONZALEZ, FOUNDATION	:	DECISION
ACADEMIES CHARTER SCHOOL,	:	
MERCER COUNTY.	:	

SYNOPSIS

In October 2017, the Commissioner of Education issued an Order to Show Cause requiring respondent to show cause why an order should not be entered suspending her teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:28-10 for resigning her position without giving the notice required for tenured employees.. 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.

January 12, 2018

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.

5/18
AGENCY DKT. NO. 237-10/17

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
APRIL GONZALEZ, FOUNDATION	:	DECISION
ACADEMIES CHARTER SCHOOL,	:	
MERCER COUNTY.	:	

For Petitioner, John A. Boppert, Esq.

No appearance by or on behalf of respondent

This matter was opened before the Commissioner of Education on October 5, 2017, by way of an Order to Show Cause served by petitioner (Foundation Academies Charter School) upon respondent (April Gonzalez), 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 October 6, 2017, 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 October 27, 2017, the Bureau sent respondent a second and 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 notice sent by certified mail was returned by the postal service as unclaimed; however, 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.

The certification submitted by the petitioner in this matter states that: respondent entered into a contract from November 10, 2016 through June 30, 2017; respondent entered into a subsequent contract for an 11-month term, from August 3, 2017 through June 30, 2018; respondent was expected to report to work on August 7, 2017 for the start of the 2017-2018 school year, but failed to report and instead submitted her letter of resignation, effective that day, without providing any notice. The respondent has not denied these allegations; therefore, the Commissioner deems such allegations to be admitted pursuant to *N.J.A.C.* 6A:3-1.5(e), and further deems them sufficient to justify suspension of respondent's teaching certification pursuant to *N.J.S.A.* 18A:26-10.

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.*

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 1/11/18
Date of Mailing: 1/12/18

* 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).

SCHWARTZ SIMON
EDELSTEIN & CELSO LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981
T: (973) 301-0001; F: (973) 993-3152
Attorneys for Foundation Academies

IN THE MATTER OF THE CERTIFICATE(S) OF APRIL GONZALEZ, FOUNDATION ACADEMIES BOARD OF TRUSTEES, MERCER COUNTY.	BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION ADMINISTRATIVE ACTION **ORDER TO SHOW CAUSE**

THIS MATTER being opened before the Commissioner of Education by John A. Boppert, Esq., Attorney for Foundation Academies Board of Trustees, on Motion for an Order to Show Cause before the Commissioner of Education, and the Commissioner having read and considered the Affidavit of Graig Weiss, CEO, Foundation Academies, and, for good cause shown,

IT IS on this 27 day of September 2017;

ORDERED that April Gonzalez shall show cause before the Commissioner of Education by written answer within twenty (20) days of receipt of this Order, why an Order should not be entered suspending her teaching certificates for unprofessional conduct pursuant to N.J.S.A. 18A:26-10; and, it is further

ORDERED that a true copy of this Order to Show Cause and the Affidavit upon which same is based, duly notarized, be served upon April Gonzalez by certified mail, return receipt requested, within ten (10) days of the date of this Order.

Kimberley Harrington

Kimberly Harrington
Commissioner of Education

SCHWARTZ SIMON
EDELSTEIN & CELSO LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981
T: (973) 301-0001; F: (973) 993-3152
Attorneys for Foundation Academies

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CONTROVERSIES & DISPUTES

2017 SEP 15 A 11:05

IN THE MATTER OF THE CERTIFICATE(S) OF APRIL GONZALEZ, FOUNDATION ACADEMIES BOARD OF TRUSTEES, MERCER COUNTY.	BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION ADMINISTRATIVE ACTION **PETITION**

Petitioner, Foundation Academies Board of Trustees ("Board"), having its administrative offices located at 363 West State Street, Trenton, New Jersey 08618, hereby petitions the Commissioner of Education pursuant to N.J.S.A. 18A:26-10 to take action against the certificate(s) of April Gonzalez, whose last known address is 1 Makefield Road, Apt. G315, Morrisville, PA 19067, by reason of the following facts:

FIRST COUNT

1. Foundation Academies, a charter school management organization established in 2007 pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1, et seq., presently educates students in kindergarten through the twelfth grade at four campuses in Trenton: Foundation Academy Primary, Intermediate, Middle School, and Foundation Collegiate Academy. (Weiss Affidavit ¶1).

2. April Gonzalez is the holder of the following certificate(s) issued by the State Board of Examiners: Certificate of Eligibility with Advanced Standing, with a Teacher of English endorsement. (Weiss Affidavit ¶2 and Exhibit A).

3. On or about November 10, 2016, Ms. Gonzalez entered into an Employment Agreement and commenced employment with Foundation Academies as a teacher for a term beginning November 10, 2016 through June 30, 2017. (Weiss Affidavit ¶3 and Exhibit B).

4. On or about May 15, 2017, Ms. Gonzalez entered into a subsequent Employment Agreement with Foundation Academies, for an eleven-month term beginning August 3, 2017 through June 30, 2018. (Weiss Affidavit ¶4 and Exhibit C).

5. To date, Ms. Gonzalez has not attained tenure in her position. (Weiss Affidavit ¶5).

6. As a non-tenured teacher, the manner by which Ms. Gonzalez may lawfully terminate her employment with Foundation Academies is governed by her current Employment Agreement (See Weiss Affidavit, Exhibit C), and by applicable law and regulations. Paragraph 3 (b) of the Employment Agreement states:

> Employee may terminate his/her employment with Foundation Academies only by providing 60 days advance written notice of his/her intention. Foundation Academies shall have the option, in its sole discretion, to make Employee's termination effective at any date prior to the end of such notice period.

(Weiss Affidavit ¶6 and Exhibit C).

7. Applicable law and regulations provide, in pertinent part, as follows:

> Any teaching staff member employed by a board of education [including the board of trustees of a charter school, see N.J.A.C. 6A:3-1.2]. . . 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. See N.J.S.A. 18A:26-10.

(Weiss Affidavit ¶7).

8. All teaching staff at Foundation Academies were required to report to school on August 7, 2017 for their first day of duty of the 2017-2018 school year. Ms. Gonzalez failed to report as required. (Weiss Affidavit ¶8).

9. Instead, by email dated August 7, 2017 with the subject "Letter of Resignation," Ms. Gonzalez advised her Principal, Markita Floyd, as follows:

> It is with regret that I am resigning my position at Foundation Academy Charter School. Unfortunately, my mother's mental health is deteriorating and I can not provide the effort students need to grow and care for my mother at the same time. I have tried to find ways to make this possible during the summer but none have come to fruition. I will mail in the school's cell phone and computer this week and pay for any damages.

(Weiss Affidavit ¶9 and Exhibit D).

10. On even date, Principal Floyd responded as follows:

> Thank you for reaching out. You have signed a contract that requires you to give 60 days notice. You must honor that contract or your certification will be in jeopardy.
>
> Please call me as soon as possible to discuss. However, I am expecting you to be present until October 7th.

(Weiss Affidavit ¶10 and Exhibit D).

11. To date, Ms. Gonzalez has neither responded to Principal Floyd, nor has she reported to work. (Weiss Affidavit ¶11).

12. Prior to her email dated August 7, 2017, Ms. Gonzalez provided Foundation Academies with no advance written notice of her intention to resign, despite the fact that her Employment Agreement specifically provides that she may terminate her employment "only by providing 60 days advance written notice of his/her intention" to do so. (Weiss Affidavit ¶12 and Exhibit C).

13. Ms. Gonzalez willingly entered into her Employment Agreement, and therefore either knew or should have known she was required to provide 60 days' advance written notice of her intent to terminate her employment with Foundation Academies. Having first given notice of her resignation on August 7, 2017, Ms. Gonzalez is obligated to work for Foundation Academies through October 6, 2017. (Weiss Affidavit ¶13).

14. Ms. Gonzalez has not reported to work at all for the 2017-2018 school year, and thus has ceased to perform her duties before the expiration of the term of her employment, in violation of N.J.S.A. 18A:26-10. (Weiss Affidavit ¶14).

15. Ms. Gonzalez's failure to provide Foundation Academies with the contractually required period (i.e., 60-days) regarding her notice to resign, and her complete cessation of the performance of her duties, has had a direct and negative impact on Foundation Academies by denying its students a full-time teacher who would have been able to provide them with continuity of instruction until such time as a full-time replacement was found. (Weiss Affidavit ¶15).

16. Foundation Academies has been forced, on no advance notice, to look for and secure the services of a substitute teacher until a permanent replacement for Ms. Gonzalez can be secured. This has negatively impacted school operations. (Weiss Affidavit ¶16).

WHEREFORE, Petitioner respectfully requests that the Commissioner of Education enter an Order to Show Cause why the most stringent penalty available, up to and including suspension of April Gonzalez's teaching certificate(s) for a period of one (1) year, should not be entered.

SCHWARTZ SIMON
EDELSTEIN & CELSO LLC
Attorneys for Petitioner,
Foundation Academies Board of Trustees

By: _____
JOHN A. BOPPERT

Dated: September 13, 2017

CERTIFICATION PURSUANT TO RULE 4:5-1

Pursuant to R. 4:5-1, it is hereby stated that the matter in controversy is not the subject of any other action pending in any other court, or of a pending arbitration proceeding to the best of my knowledge and belief. Also to the best of my knowledge, no other action or arbitration proceeding is contemplated.

SCHWARTZ SIMON
EDELSTEIN & CELSO LLC
Attorneys for Petitioner,
Foundation Academies Board of Trustees

By: _____
JOHN A. BOPPERT

Dated: September 13, 2017

DESIGNATION OF TRIAL COUNSEL

John A. Boppert, Esq. is hereby designated as trial counsel.

SCHWARTZ SIMON
EDELSTEIN & CELSO LLC
Attorneys for Petitioner,
Foundation Academies Board of Trustees

By: _____
JOHN A. BOPPERT

Dated: September 13, 2017

6-18

6-18L

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

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

KIMBERLEY HARRINGTON
Commissioner

January 11, 2018

Sabino Valdes, *pro se*
P.O. Box 463
Paramus, New Jersey 07653

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

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 submissions in connection with Sabino Valdes' motion to reopen "an unsettled interim order" in the above referenced matter.[1] This is Mr. Valdes' fourth motion to reopen the matter.[2] Mr. Valdes filed his first motion to reopen in April 2014, which was denied by the Commissioner in a decision dated June 14, 2014. Mr. Valdes then filed his second motion to reopen in August 2016, which was denied by the Commissioner in a decision dated November 3, 2016. Mr. Valdes then filed an appeal of the Commissioner's November 3, 2016 decision before the Superior Court of New Jersey, Appellate Division.[3] During the pendency of

[1] The Commissioner is also in receipt of Mr. Valdes' most recent correspondence dated December 26, 2017, wherein he asserts that the Commissioner's decision on his pending motion to reopen was due on December 22, 2017, pursuant to *N.J.A.C.* 1:1-12.2(e). The Commissioner clarifies that *N.J.A.C.* 1:1-12.2(e) applies to motions filed before an Administrative Law Judge (ALJ) and not an agency head; therefore, the Commissioner is not constrained by the same timelines for disposing of motions such as the present.

[2] Although previously detailed in the Commissioner's September 7, 2017 decision, the Commissioner notes that characterizing the present motion to reopen as a motion to "re-open order" does not change the fact that a motion to "re-open, consider, and vacate an unsettled interim order" entails reopening the above-captioned tenure matter.

[3] Mr. Valdes also filed a motion for reconsideration of the Commissioner's November 3, 2016 decision, which was denied for lack of jurisdiction pursuant to *R.* 2:9-1(a).

his appeal, Mr. Valdes filed a third motion to reopen, which contained substantially the same facts and issues raised in his previous motions. In the third motion, however, Mr. Valdes also argued that the ALJ's Order of August 9, 2001 – denying his motion to dismiss the tenure charges – was "void" because the Commissioner and the State Board affirmed the ALJ's Initial Decision without reviewing and affirming the Order. Mr. Valdes' third motion was denied by the Commissioner on June 29, 2017 for the reasons thoroughly set forth in the decision. Subsequently, Mr. Valdes filed a motion for reconsideration of the Commissioner's denial of his third motion to reopen, which was denied on September 7, 2017. In his present motion, Mr. Valdes artfully reiterates the arguments previously set forth in his third motion, relying on the same underlying facts and legal authority.

Upon careful review of the submissions and the record of the above-captioned matter, I find that Mr. Valdes has failed to establish good cause to reopen this case and review the ALJ's August 1, 2001 Order. Additionally, I find that Mr. Valdes did not make his request with reasonable time or diligence. 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 time or diligence. *See Duvin v. State of New Jersey, Dep't of the Treasury, Public Employees' Retirement System*, 76 *N.J.* 203, 207 (1978); *see also Skulski v. Nolan*, 68 *N.J.* 179 (1975) and *Ruvoldt v. Nolan*, 63 *N.J.* 171 (1973). Mr. Valdes' request to review the August 1, 2001 Order is over 16 years late.[4] More importantly, in his present motion, Mr. Valdes has not provided any new evidence or alleged the existence of any new information that was not previously argued throughout his disquieting pursuit of litigation in this matter.[5] Significantly, Mr. Valdes' submissions continue to assert unsubstantiated claims of fraud, collusion, and conspiracy as reasons for seeking review of this case.

The arguments raised by Mr. Valdes in his current motion do not amount to new evidence or information that would suggest a need to review the August 1, 2001 Order and revisit the tenure charges filed against him in this case. Although the matter has been thoroughly litigated, Mr. Valdes has not ceased filing various motions and appeals with the same set of facts and legal arguments; it is evident that no good cause has been shown to compel the reopening of the case. Continuing to entertain this matter every time Mr. Valdes desires vindication is an inefficient use

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[4] Pursuant to *N.J.A.C.* 1:1-14.10, any request for interlocutory review must be made within five business days of receipt of the order or ruling. Mr. Valdes not only failed to request interlocutory review of the subject order at the time, he also disingenuously raises it as an issue after several failed attempts to have this case reopened on other bases.

[5] Over the course of the last 17 years, the various allegations and issues raised by Mr. Valdes have been exhaustively addressed and rejected by different tribunals. Most recently, the Appellate Division denied Mr. Valdes' appeal of the Commissioner's November 3, 2016 decision relating to his second motion to reopen. Notably, the Appellate Division stated that this was the "fourth time" that the tribunal had been "asked to consider . . . appellant's argument that he was improperly dismissed from his tenured position" and that "[a]ppellant has not shown good cause to reconsider or reopen the matter."

of the Department's time and resources. Therefore, if Mr. Valdes fails to allege any additional facts or arguments that would constitute good cause – with reasonable time or diligence – to reopen this matter (and the August 1, 2001 Order), the Commissioner will not open Mr. Valdes' subsequent submissions as a contested case.

Accordingly, the fourth motion to reopen the above referenced matter is hereby DENIED.[6]

Sincerely,

Kimberley Harrington
Commissioner

c: County Superintendent
State Law Library

KH/SLP/ATA

Via Regular Mail

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

7-18
OAL DKT. NO. EDU 01720-16
AGENCY DKT. NO. 4-1/16

H.M., on behalf of minor children, S.K. and C.K.,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY.	:	
	:	
RESPONDENT.	:	

On October 30, 2017, a final agency decision was rendered in this matter, wherein the Commissioner adopted the Administrative Law Judge's finding that H.M. was not a domiciliary of Ewing between September 30, 2015 and January 19, 2016; therefore, S.K. and C.K. were not entitled to a free education in the District's schools during that time. The Commissioner assessed petitioner, Holli Middleton, $10,366.62 in tuition costs, to be reimbursed to the Ewing Board of Education for S.K. and C.K.'s period of ineligible attendance in the District's schools pursuant to *N.J.S.A.* 18A:38-1. The Board subsequently notified the Commissioner that petitioner had failed to reimburse respondent as directed in the final decision, and has 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. Petitioner offered no reasons why the judgment against her should not be so docketed, although given an opportunity to do so by this agency.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Holli Middleton is now subject to entry of a judgment by the court in the amount of $10,366.62, which represents the total payment

ordered at the conclusion of the contested case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 1/11/18

Date of Mailing: 1/16/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01720-16
AGENCY DKT. NO. 4-1/16

H.M. ON BEHALF OF MINOR CHILDREN S.K. AND C.K.,
Petitioner,
v.
BOARD OF EDUCATION TOWNSHIP OF EWING, MERCER COUNTY,
Respondent.

H.M., petitioner, pro se

Joseph L. Roselle, Esq. for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: March 2, 2017 Decided: August 30, 2017

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves a residency dispute and a claim for reimbursement of tuition from September 30, 2015 through January 19, 2016, for the two minor children of H.M. Petitioner requested a hearing. The Ewing Township Board of Education, Mercer County (District) seeks reimbursement of a total of $10,366.62 for sixty-six school days

for each of H.M.'s children times the per diem rate for each school they attended while not residing in the district.

On February 2, 2016, this 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 21, 2016, the OAL conducted a hearing. The parties were afforded the opportunity to submit post-hearing closing memoranda. Respondent made a submission and the record closed on March 2, 2017. Extensions of time to file the Initial Decision were granted by the Acting Director and Chief Administrative Law Judge.

FACTUAL DISCUSSION AND FINDINGS

Prior to February 2014, H.M. and her children resided in Ewing Township, Mercer County. In February 2014, H.M. and her children no longer resided on Lower Ferry Road, Ewing. She denied homelessness. In September 2015, H.M. claimed her residence at XX Steinway Avenue, Ewing. This address is H.M.'s sister's address in Ewing. She claims her sister accommodates her residence there without a lease or payment. H.M. acknowledges there are no household bills in her name at the Steinway Avenue address. H.M. testified that a few days a week her children either shared a room or slept on the couch at the Steinway Avenue address. From February 2014 through September 2015, H.M. claims to have resided at XXX Carteret Avenue in Trenton. H.M. did not notify the District of her Trenton address, however, she registered her children in September 2014 and September 2015 as residing in Ewing.

L.M., H.M.'s sister, testified that she lived with her at times over the past ten years. They had confusion regarding the residency. The address at XX Steinway Avenue is a two-family house. Also residing there were L.M.'s son and his fiancée and their two children. H.M. fully moved out as of February 2016. She claimed the investigation only occurred for ten days.

David Mikalauskas, the district attendance and residency officer, noted the February 2014 eviction from the Lower Ferry Road address when he first started to

investigate petitioner's residency. They did not take H.M. off the rolls of residents until the 2015/16 school year, at which time an investigation commenced. He testified that the daily rates for Ewing High School and Fisher Middle School reimbursement is based on the annual amount of $13,762 and $14,984 respectively. There are 183 school days in a year. v So the per diem reimbursement amount is $75.20 and $81.87, respectively. He testified that the time period the district seeks reimbursement is sixty-six days from September 30, 2015 through January 19, 2016. These amounts total $4,963 and $5,403.42, respectively for a total amount for both students of $10,366.62.

Peter L. Manetto, Jr. testified to part-time employment with the District. He commenced an investigation of H.M.'s residence on September 30, 2015, at XXX Carteret Avenue, Trenton. He surveilled the location on ten separate days through November 3, 2015. H.M.'s children on nine of the ten surveillance days left the Carteret Avenue property and arrived at the Ewing High School and Fisher Middle School driven by H.M. on at least six of those occasions in a vehicle registered in her name showing the address at Steinway Avenue, Ewing.

H.M. and her sister tried to explain that the children reside at the Steinway address, however, this tribunal cannot accept their testimonies as explanations for the facts that on nine of ten occasions during an approximate twenty-five school day period H.M.'s children traveled from the Carteret Avenue location to the Ewing schools.

After consideration of the documentary evidence and testimony of the witnesses, I **FIND** as **FACT** the following:

1. Prior to February 2014, H.M. and her children resided in Ewing Township, Mercer County.

2. H.M.'s children respectively attended Fisher Middle School and Ewing High School during the time period reimbursement is sought.

3. H.M. acknowledged that from February 2014 through September 2015, H.M. resided at XXX Carteret Avenue in Trenton.

4. H.M. did not notify the District of her Trenton address, however, she registered her children in September 2014 and September 2015 as residing in Ewing.

5. The district commenced an investigation at sometime in September 2015 of the residency of H.M. and her children.

6. The investigation (R-1) reveals that nine of twenty-five school days during the period from September 30, 2015 through November 4, 2015, H.M.'s children were dropped off at the Ewing schools from a location in Trenton where she claims to have resided from February 2014 through September 2015.

7. H.M.'s children resided in Trenton from September 30, 2015, until she removed herself from the district on January 16, 2016, a period of sixty-six school days.

8. Respondent's reimbursable tuition for Ewing High School is $75.20 per day, for Fisher Middle School is $81.87 per day.

9. The time period for which tuition is sought is sixty-six school days

10. The total reimbursable tuition is $5,403.42 for C.K.; and $4,963.20 for S.K., for a total of $10,366.62.

LEGAL DISCUSSION

Petitioner has the burden of proof in a determination of residency ineligibility N.J.S.A. 18A:38-1. Here petitioner complains of the finding of the District but cannot dispute the investigative report that a substantial time in October 2015, her children were taken to the school from out of the district. The location was the residence petitioner claimed she resided at until the start of the investigation. While she may have desired to be in the Ewing District to finish her children's education, she did not maintain residency within the district during the time period the District seeks reimbursement.

CONCLUSION

I **CONCLUDE** petitioner has not met her burden of proof that the District acted arbitrarily or capriciously in determining to remove H.M. from the residency roll of Ewing School District and seek tuition reimbursement during the time from September 30, 2015 through January 19, 2016.

I **CONCLUDE** petitioner has not met her burden of proof that she resided within the district during the time from September 30, 2015 through January 19, 2016.

ORDER

It is **ORDERED** that the petition is **DENIED** based upon petitioner's failure to meet her burden of proof that the District acted arbitrarily or capriciously in disputing H.M.'s residency and entitlement to reimbursement.

It is **ORDERED** the respondent is entitled to be reimbursed from petitioner the amount of $10,366.62 for tuition for her two children for a total of sixty-six days.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 30, 2017
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 8/30/17

Date Mailed to Parties: 8/31/17

/lam

APPENDIX

LIST OF WITNESSES

For Petitioner:

H.M.

L.M., sister of parent petitioner

For Respondent:

David Mikalauskas, Residency Officer, Ewing Township BoE

Peter L. Manetto, Jr., Residency Investigator, Ewing Township BoE

LIST OF EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Investigative Report September 30 through November 3, 2015

10-18

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

SYNOPSIS

Petitioning Board certified tenure charges of unbecoming conduct, incapacity and other just cause against respondent – a tenured Health/Physical Education teacher under the Board's employ – and sought to terminate her employment with the district. The record shows that since the start of her employment with the Trenton School District in December 2000, respondent has been excessively absent on an annual basis; more specifically, Ms. Ansuini has been absent approximately forty percent (40%) of the total days she was required to report to work. Neither respondent nor any attorney acting on her behalf filed an answer to the tenure charges following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that the allegations – which respondent has chosen not to deny – may be deemed admitted and warrant the termination of the respondent. Accordingly, the Commissioner granted summary decision to the petitioner, and dismissed the respondent from her tenured position in petitioner's school district. The matter was transmitted to the State Board of Examiners for action against the respondent's certificate(s) 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.

January 12, 2018

10-18

AGENCY DKT NO. 272-11/17

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

For the Petitioner, Adam S. Herman, Esq.
No appearance by or on behalf of Respondent, Michele Ansuini

This matter was opened before the Commissioner of Education on November 22, 2017, through tenure charges of conduct unbecoming and other just cause certified by Jayne Howard, Board Secretary/School Business Administrator of the Trenton School District, together with supporting evidence against respondent, Michele Ansuini, 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 overnight mail on November 20, 2017.

On November 27, 2017, the Commissioner directed the respondent – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. No reply to the tenure charges was received from or on behalf of respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate that respondent has been employed as a tenured teacher in the District since December 2000. During the course of her teaching career with the District, the respondent has been excessively absent on an annual basis. For example, during the 2015-2016 school year the respondent was absent on approximately 68.5 days; 118 days during the 2016-2017 school year; and 25 days during the 2017-2018 school year. On average, respondent has been absent approximately 40% of the total days she was required to report to work since she was hired by the District.

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 charge of conduct unbecoming a teaching staff member has been proven and overwhelmingly warrants the 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.*

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 1/12/18

Date of Mailing: 1/12/18

* 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)

11-18

AGENCY DKT. NO. 279-11/17

IN THE MATTER OF ERIC HAMILTON,	:	
BOARD OF EDUCATION OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF HAMILTON, MERCER COUNTY.	:	DECISION

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC) – finding that respondent violated *N.J.S.A.* 18A:12-24(b) of the School Ethics Act (SEA) when he "engaged in a brief conversation with a candidate for the position of interim superintendent, and also discussed with [the candidate] the general nature of the community and school system." SEC Decision at 5 (internal quotation marks omitted). The SEC's decision was forwarded – pursuant to *N.J.S.A.* 18A:12-29 – for the Commissioner's final determination on the recommended penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty, nor has he instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC in consequence of respondent's conduct. Accordingly, respondent is hereby reprimanded as a school official found to have violated *N.J.S.A.* 18A:12-24(b).

IT IS SO ORDERED.[1]

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 1/16/18
Date of Mailing: 1/16/18

[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)

IN THE MATTER OF ERIC HAMILTON, *HAMILTON TOWNSHIP BOARD OF EDUCATION*, MERCER COUNTY	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**OAL DKT. NO. EEC 4384-14**
	:	**SEC DKT. NO.: C39-13**
	:	**FINAL DECISION**

I. PROCEDURAL HISTORY

This matter arises from a Complaint filed on December 5, 2011, by George W. Fisher (Fisher), alleging that Eric Hamilton (Respondent), a member of the Hamilton Township Board of Education (Board), violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. By correspondence dated December 5, 2011, Complainant was notified that his Complaint was deficient and required amendment. On December 9, 2011, Complainant cured all defects and filed an Amended Complaint (Complaint) that was deemed compliant with the requirements detailed in N.J.A.C. 6A:28-6.7. The Complaint alleges that Respondent violated N.J.S.A. 18A:12-24(b), as well as N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members (Code).

On January 17, 2012, and after being provided with an extension, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and also alleged that the Complaint is frivolous. On February 6, 2012, Fisher filed a written response to the Motion to Dismiss, and to the allegation of frivolous filing. By correspondence dated January 25, 2012, the School Ethics Commission (Commission) notified the parties that this matter would be placed on the Commission's agenda for its meeting on February 28, 2012, in order to make a determination regarding the Motion to Dismiss, and the allegation of frivolous filing.

At its meeting on February 28, 2012, the Commission voted to grant the Motion to Dismiss, and to find the Complaint not frivolous. On May 9, 2012, Fisher filed a timely appeal of the Commission's decision in Superior Court, Appellate Division (Appellate Division), arguing that the Commission required an additional element not mandated by N.J.S.A. 18A:12-24(b), and that he had pled sufficient facts to withstand Respondent's Motion to Dismiss. On July 17, 2013, the Appellate Division found that the Commission had erred in granting Respondent's Motion to Dismiss, and remanded the matter to the Commission for further development.

At its meetings on December 19, 2013, and January 28, 2014, the Commission discussed the Appellate Division's decision. More specifically, it discussed the Appellate Division's finding that although Complainant did not plead that Respondent sought a personal benefit or that he made personal promises to Rodecker, the Complaint was sufficient to withstand the Motion to Dismiss because the public may construe the existence of the phone conversation with the candidate as a benefit to the candidate or as a basis to infer that promises were offered. According to the Appellate Division, such inferences may create the impression that the public trust may have been violated. As a result, and based on the Appellate Division's guidance, the

Commission found probable cause that Respondent violated N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A:12-24.1(e), and transmitted the matter to the Office of Administrative Law (OAL) for a plenary hearing.

II. INITIAL DECISION

At the OAL, the parties filed cross motions for summary decision. After closing the record on September 1, 2017, the Honorable Solomon A. Metzger, Administrative Law Judge Solomon A. Metzger (ALJ Metzger) issued his Initial Decision on September 13, 2017.

In his Initial Decision, ALJ Metzger noted that the following "relevant facts" were undisputed: In June 2011, Respondent was a member of the Board. At that time, the Board was seeking an interim superintendent, and John Rodecker (Rodecker) was one of four candidates invited to interview for the position in the Hamilton Township School District (District). Initial Decision at 2. Rodecker was set to retire as superintendent in another school district, and an administrator, Gregg Ficarra (Ficarra), from that district told Rodecker that he (Ficarra) was "friendly" with Respondent. *Id.* Rodecker and Respondent spoke by telephone on June 20, 2011. *Id.* When Rodecker appeared at the Board meeting that evening, he was asked whether he knew anyone on the Board, and subsequently disclosed the conversation with Respondent. *Id.* A member of the public found the conversation between Rodecker and Respondent to be objectionable, and filed a Complaint with the Commission. *Id.*

The motion record, which included certifications from both Respondent and Rodecker, contain additional background information, "but nothing more on the nature of the interaction between" Respondent and Rodecker. Initial Decision at 2. Although the certifications are "largely aligned," they are not completely consistent. *Id.* Both Respondent and Rodecker state that their conversation was "brief, no more than ten minutes," and that they discussed "the general nature of the community and school system." *Id.* According to the certifications, "[n]either sought nor offered a benefit or advantage of any kind in connection with the Board's pending interim appointment." *Id.* Both deny that, other than "brief" conversation on June 20, 2011, they had ever met or had any other discussions. *Id.* The motion record also indicates that Respondent was not present at the Board meeting on June 20, 2011, and did not participate in the vote for the interim superintendent. *Id.* In addition, Rodecker withdrew his candidacy for the position of interim superintendent because of a "pension issue," and he so advised the Board before the vote to appoint the interim superintendent. *Id.*

The dissonance in the certifications is whether Respondent knew that Rodecker was going to call him. Initial Decision at 2. Rodecker certified that Ficarra told him (Rodecker) that he (Ficarra) had spoken to Respondent, and Respondent indicated "it would be alright" for Rodecker to reach out to him (Respondent). *Id.* However, Respondent denies that he had a conversation with Ficarra, and was not expecting a call from Rodecker on June 20, 2011. *Id.* In ruling on the cross motions for summary decision, ALJ Metzger assumed Respondent "knew a call might be coming and that he was willing to engage Rodecker in some general talk about the community." *Id.* at 3.

Based on the foregoing facts, ALJ Metzger granted Respondent's motion for summary decision and, thereby, dismissed the complaint. Initial Decision at 4. In granting Respondent's motion for summary decision, ALJ Metzger found that the case law cited by the Attorney

General, namely Lesinski v. Smallwood, School Ethics Commission Docket No. C14-14 (October 28, 2014), bore "little resemblance" to this matter. *Id.* at 3. ALJ Metzger also stated, "I have not been made aware of any broad principle that prohibits contact between Board members and candidates for school positions." *Id.*

The Initial Decision was electronically transmitted to the Commission on September 13, 2017, and was also mailed to the parties on this same date; therefore, the forty-five (45) day statutory period for the Commission to issue a Final Decision was October 30, 2017. Prior to October 30, 2017, the Commission requested a forty-five (45) day extension of time to issue its decision so as to allow the Commission, which only meets monthly, the opportunity to receive and review the full record, including the parties' Exceptions. Pursuant to N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.8, and for good cause shown, the Commission was granted an extension until December 14, 2017.

III. EXCEPTIONS

A. Petitioner's Exceptions

Petitioner's Exceptions to the Initial Decision were received by the Commission on September 26, 2017. As detailed therein, Petitioner disagrees with ALJ Metzger's legal conclusion that "there is no evidence of impropriety" by Respondent. Because Respondent admitted that he was a member of the Board, that he had contact with Rodecker prior to his interview, and that "the substance of the conversation" between he and Rodecker "concerned the background and logistics of the" District, Petitioner argues that a finding should be made that Respondent violated N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A:12-24.1(e). By having a conversation with Rodecker, Petitioner contends that "Respondent bestowed an unfair advantage on the candidate," as no other candidate was afforded this "benefit." In addition, Respondent's conduct "leaves the justifiable impression that the public's trust is being violated."

In support of this position, Petitioner cites language from the decision rendered in the Appellate Division, namely that Respondent's conduct, if true, would violate the Act because it could "reasonably be inferred that [Respondent's] conversation [with the candidate] provided an advantage to the candidate, an advantage not offered to any of the other prospective candidates." The Superior Court, Appellate Division, also found that Rodecker's withdrawal from candidacy was of no consequence, because it is Respondent's actions, not those of the candidate, which are at issue.

Petitioner also cited the factual similarity between this matter and Lowell v. Smallwood et al., 2017 N.J. Super. Unpub. LEXIS 1267 (May 22, 2017) (Lowell). In Lowell, the Appellate Division affirmed the penalty of censure for school board members who went on an unauthorized site visit to meet with a candidate for employment. By having contact with a candidate for employment without first securing authorization from the Board, the Appellate Division found that such action had the potential to compromise the Board in violation of N.J.S.A. 18A:12-24.1(c) and (e). As in Lowell, Petitioner argues that Respondent had a conversation with a candidate for the position of interim superintendent without first securing authorization from the Board. Consequently, Petitioner argues that Respondent violated N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A:12-24.1(e).

B. Respondent's Exceptions

Respondent's Exceptions to the Initial Decision were received by the Commission on November 2, 2017.[1] In his Exceptions, Respondent urges the Commission to adopt the Initial Decision as ALJ Metzger's findings were "sound and unassailable." The issue, according to Respondent, is whether Respondent, "by participating in a brief, unsolicited, innocuous telephone conversation with a candidate for an interim superintendent position regarding the general nature of the school district and municipality" before the Board voted to hire an interim superintendent, and a vote in which Respondent chose not to participate, violated the Act. Respondent argues that ALJ Metzger's finding that "there is no evidence of impropriety, nor would such an impression be justified," is sound and should be adopted.

Respondent further contends that Petitioner's argument that the Appellate Division "previously held that [Respondent's] conduct" violated the Act is mistaken, as the Appellate Division only determined that, based on the facts alleged in the Complaint, Petitioner met his burden of proof for filing a cause of action. It did not, as Petitioner argues, find that Respondent's conduct violated the Act.

Finally, Respondent argues that Lowell is inapposite because, in that matter, the Board members were specifically directed not to take action on an interim superintendent's candidacy prior to consulting with the school district's State monitor but, nonetheless, intentionally disregarded that directive. It was the Board members' actions in disregarding instructions/directive and actively advocating for a specific candidate that resulted in the finding of a violation of the Act. Those facts, according to Respondent, are not present here. Therefore, Respondent urges the Commission to adopt ALJ Metzger's Initial Decision.

At its meetings on October 31, 2017, and November 28, 2017, the Commission considered the record in this matter, including ALJ Metzger's Initial Decision and the parties' Exceptions. At its meeting on November 28, 2017, and for the reasons more fully discussed below, the Commission voted to adopt ALJ Metzger's findings of fact; to adopt the legal conclusion that Respondent did not violate N.J.S.A. 18A:12-24.1(e); to reject the legal conclusion that Respondent did not violate N.J.S.A. 18A:12-24(b); and to recommend a sanction of reprimand for the violation of N.J.S.A. 18A:12-24(b).

IV. ANALYSIS

Upon careful and independent review, the Commission **adopts** ALJ Metzger's factual findings as set forth above. Based on ALJ Metzger's findings of fact, the Commission **adopts** ALJ Metzger's legal conclusion that Respondent did not violate N.J.S.A. 18A:12-24.1(e). Although Petitioner cited the Lowell case for the proposition that an unauthorized conversation with a candidate for employment is sufficient to sustain a violation of the Act and a penalty of

[1] The deadline for submission of Exceptions was, pursuant to N.J.A.C. 1:1-18.4(a), "within 13 days from the date the judge's initial decision was mailed to the parties," or by September 26, 2017. As such, Respondent's Exceptions were untimely. In addition, although N.J.A.C. 1:1-18.8(d) provides that a request to extend the time limit for filing exceptions "shall be submitted in writing to the transmitting agency head," Respondent did not submit such a request to the Commission.

censure, the Commission finds that the conduct of Respondents in Lowell was far more complicated than one (1) unauthorized, and potentially unexpected, telephone conversation.

However, based on the findings of facts as set forth above, the Commission **rejects** ALJ Metzger's legal conclusion that Respondent did not violate N.J.S.A. 18A:12-24(b). As argued by Petitioner, and as established in the record, Respondent admitted that, while serving as a Board member, he had a "brief" conversation with a candidate for the position of interim superintendent, and also discussed with him the "the general nature of the community and school system." The record is clear that Rodecker was the only candidate for the position of interim superintendent who was afforded the benefit and advantage of a conversation with a Board member about "the community and school system" *before* his formal interview with the Board. The fact that Respondent did not participate in the vote to appoint a candidate for the interim superintendent position, and that Rodecker withdrew from consideration, does not negate the fact that Rodecker was provided with the benefit and advantage of a conversation that was not offered to any other candidate. If, as Respondent argues, he was not "expecting" a telephone call from Rodecker, he should have politely ended the conversation before discussing anything related to the position that Rodecker was applying for in the District. Instead, Respondent chose to engage Rodecker in a ten (10) minute conversation that directly related to the position for which he was applying. As a result, the Commission finds that Respondent used his official position to secure an unwarranted privilege, advantage or employment for an "other," and in this case, Rodecker.

V. DECISION

For the reasons more fully discussed above, the Commission adopts the findings of fact issued by ALJ Metzger, and also adopts the legal conclusion that Respondent did not violate N.J.S.A. 18A:12-24.1(e). However, the Commission rejects the legal conclusion that Respondent did not violate N.J.S.A. 18A:12-24(b) when he, as a Board member, engaged in a "brief" conversation with a candidate for the position of interim superintendent, and also discussed with him the "the general nature of the community and school system." The record is clear that Rodecker was the only candidate for the position of interim superintendent who was afforded the benefit and advantage of a conversation with a Board member about "the community and school system" *before* his formal interview with the Board.

VI. PENALTY

Based upon its finding that Respondent violated N.J.S.A. 18A:12-24(b) for the reasons set forth above, the Commission recommends that the Commissioner of Education (Commissioner) impose a sanction of reprimand. If additional facts had been proven regarding the exact nature and detail of the conversation between Respondent and Rodecker, the Commission may have recommended a greater sanction. However, based on the findings of fact issued by ALJ Metzger, and because Respondent should not have engaged Rodecker, to any extent, in a conversation while he was a Board member and Rodecker was a candidate for employment, the Commission believes that the recommended sanction of reprimand is appropriate. Although Rodecker is not a named Respondent in this matter, the Commission notes that it was not appropriate for him, as a candidate for the position of interim superintendent, to contact a member of the Board to discuss any aspect of the position, including "the general nature of the community and the school system."

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education (Commissioner) for review of the 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 a violation; or 3) file both exceptions to the recommended sanction and an appeal of the finding of a violation.

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

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

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

Mailing Date: November 29, 2017

RESOLUTION ADOPTING DECISION – C39-13

WHEREAS, on January 28, 2014, the School Ethics Commission (Commission) voted to transmit C39-13 to the Office of Administrative Law (OAL) for a plenary hearing; and

WHEREAS, at the OAL, the parties filed cross motions for summary decision; and

WHEREAS, in his Initial Decision dated September 13, 2017, the Honorable Solomon A. Metzger, Administrative Law Judge Solomon (ALJ Metzger) granted Respondent's motion for summary decision and, thereby, dismissed the allegations that Respondent violated N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A:12-24.1(e); and

WHEREAS, Petitioner filed timely Exceptions on September 26, 2017, and Respondent filed untimely Exceptions on November 2, 2017; and

WHEREAS, at its meetings on October 31, 2017, and November 28, 2017, the Commission considered the record in this matter, including ALJ Metzger's Initial Decision and the parties' Exceptions; and

WHEREAS, at its meeting on November 28, 2017, the Commission voted to adopt ALJ Metzger's findings of fact; to adopt the legal conclusion that Respondent did not violate N.J.S.A. 18A:12-24.1(e); to reject the legal conclusion that Respondent did not violate N.J.S.A. 18A:12-24(b); and to recommend that the Commissioner of Education impose a sanction of reprimand; and

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

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at its public meeting on November 28, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director
School Ethics Commission

12-18

OAL DKT. NO. EDU 14168-16
AGENCY DKT. NO. 222-8/16

JOHN SMATLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FAIRFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Under the terms of the Agreement, petitioner was to be paid a certain sum of money in total satisfaction of his claims by December 31, 2017 – which date has preceded the consideration of the Agreement 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 light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms, or have agreed upon mutually satisfactory alternate dates for the effectuation of the settlement payment. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 1/16/18
Date of Mailing: 1/16/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 14168-16

AGENCY DKT. NO. 222-8/16

JOHN SMATLA,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF FAIRFIELD ESSEX COUNTY,

Respondent.

Carol R. Smeltzer, Esq., for petitioner

Eric L. Harrison, Esq., for respondent (Methfessel & Werbel, attorneys)

Peter B. Fallon, Esq., Intervenor for Ray Santana

Richard A. Friedman, Esq., Intervenor for Michael Trabucco (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Record Closed: December 13, 2017 Decided: December 13, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

On or about August 24, 2016, petitioner John Smatla filed a Petition of Appeal with the Commissioner of Education against respondent Fairfield Board of Education (Board) alleging his tenure and seniority rights were violated. The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on September 19, 2016, for hearing as a contested case. During a telephone conference on January 9, 2017, counsel requested the matter be resolved by way of summary decision and hearing dates were tentatively scheduled for June 19, 27 and 30, 2017. By letters dated March 23, 2017 and March 24, 2017, Richard A. Friedman, Esq., and Peter B. Fallon, Esq., respectively, requested intervenor status on behalf of Michael Trabucco and Ray Santana. On April 18, 2017, I entered an Order granting counsel's applications to intervene in this matter on behalf of their clients. During a telephone conference on May 2, 2017, the parties requested an extension for discovery and the June 2017 hearing dates be adjourned. The hearing was rescheduled to February 13, 2018, February 21, 2018 and March 2, 2018. Subsequently, under cover letter dated December 12, 2017, counsel for the Board submitted the attached Settlement Agreement, along with the Board resolution, indicating the terms of agreement between the parties.

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

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

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

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

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

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

12/13/17
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: December 15, 2017

Date Mailed to Parties: December 18, 2017

jb

Laura Sanders
~~DIRECTOR AND~~
CHIEF ADMINISTRATIVE LAW JUDGE

Eric L. Harrison - ID #033381993
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Attorneys for Fairfield Board of Education
Our File No. 83380 ELH

JOHN SMATLA Petitioner, V. FAIRFIELD BOARD OF EDUCATION Respondent.	NEW JERSEY OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO.: 222-8/16 OAL DOC. NO.: EDU 14168-2016 **SETTLEMENT AGREEMENT**

RECITALS

WHEREAS, the Fairfield School District ("District"), which is operated by the Fairfield Board of Education ("Board" or "Respondent"), consists of two schools; Churchill Middle School ("Churchill"), which serves students from 4th through 6th grade; and Stevenson Elementary School ("Stevenson"), which serves students from preschool through 3rd grade.

WHEREAS, Petitioner John Smatla ("Smatla" or "Petitioner") acquired tenure in the District as a principal on or about July 17, 2010, and was serving as a tenured Principal at Churchill during the 2015-2016 school year.

WHEREAS, intervenor Michael Trabucco ("Trabucco") was hired by the Fairfield Board of Education ("Board") on or about July 14, 2004, and

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was serving as a tenured Principal at Stevenson during the 2015-2016 school year.

WHEREAS, intervenor Ray Santana ("Santana") was hired by the Board on or about August 14, 2015, and was serving as non-tenured Supervisor of Special Services during the 2015-2016 school year.

WHEREAS, on June 28, 2016, the Board approved the Superintendent's recommendation to abolish the two (2) principal positions in the District along with the position of Supervisor of Special Services, effective September 1, 2016, based on reasons of economy, decrease in number of pupils, and administrative reorganization.

WHEREAS, on June 28, 2016, the Board, upon the recommendation of the Superintendent, approved the creation and job descriptions for two unrecognized titles, effective September 1, 2016: 1) Director of Curriculum and Instruction/Principal; and 2) Director of Special Services/Principal.

WHEREAS, the Board obtained approval from the County Superintendent to use the aforementioned unrecognized titles during the 2016-2017 school year.

WHEREAS, the County Superintendent approved the Director of Curriculum and Instruction/Principal to serve (and accrue seniority upon the attainment of tenure) under the legal title of Assistant Superintendent, and the Director of Special Services/Principal to serve (and accrue seniority upon the attainment of tenure) under the legal title of Director.

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WHEREAS, in July 2016, the District's interview committees interviewed external and internal applicants-including Smatla, Santana, and Trabucco-for the two aforementioned positions.

WHEREAS, on August 2, 2016, the Board, upon the recommendation of the Superintendent, approved Mr. Ray Santana as the Director of Special Services/Principal, effective September 1, 2016.

WHEREAS, on August 2, 2016, the Board, upon the recommendation of the Superintendent, approved Michael Trabucco as the Director of Curriculum and Instruction/Principal, effective September 1, 2016.

WHEREAS, in August 2016, Smatla filed a petition of appeal with the Commissioner of Education, which was thereafter transmitted to the New Jersey Office of Administrative Law ("OAL") for a hearing.

WHEREAS, the parties, desiring to settle this dispute amicably without the need for lengthy and costly litigation, and in a manner through which no party admits any liability whatsoever; and

WHEREAS, it is understood and agreed by Petitioner that Respondent, and its heirs, executors, administrators, officers, employees, successors, and assigns, by reason of the payment, consideration, and any other terms made on behalf of Respondent, do not admit any liability nor have they made any agreement to make any payment or to take any action not reflected in this Agreement. Further, it is understood and agreed by the parties that the allegations set forth in petition of appeal (EDU 14168-2016) remain disputed, inconclusive, and expressly denied. Further still, it is understood and agreed by Petitioner that Respondent and its insurer underwent a cost-benefit analysis and determined that it was

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appropriate to resolve this matter at this stage of the litigation based upon purely financial considerations; and

WHEREAS, it is understood and agreed that in releasing any and all claims Petitioner has asserted or could have asserted against Respondent, Smatla intends to release any and all claims he has asserted or could have asserted against all former and current employees, agents, and elected/appointed representatives of Respondent that exist through the date this Agreement is signed; thus, the term "Respondent" shall be understood to include all former and current employees, agents, and elected/appointed representatives of Respondent.

NOW, IN CONSIDERATION of the payment to Petitioner, as provided for herein, and other good and valuable consideration, and the promises and covenants contained herein, the receipt and sufficiency of which is acknowledged, the parties do hereby agree as follows:

1. **Non-Admission**. This Agreement is not, and shall not in any way be considered or construed as an admission of liability by Respondent of discrimination, retaliation, tortious conduct, or of any violation of any law, common law, or federal, state or local statute or regulation, or of any education policy, practice, contract or agreement, or of any alleged duty owed by Respondent, or of any unlawful or wrongful acts whatsoever by Respondent. Respondent specifically denies any wrongdoing of any kind.

2. **Consideration**. the Parties agree to the following good and valuable consideration:
    (a) Respondent Board will pay Petitioner a lump sum amount of seventy eight thousand dollars ($78,000) on account of lost wages, of which thirty nine thousand

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dollars ($39,000) will come from Respondent's insurance carrier; and

(b) Said lump sum payment shall be subject to and less all mandatory and usual deductions; and

(c) This consideration shall be paid by December 31, 2017, following the execution of the Agreement, which is subject to ratification by the Board of Education on December 5, 2017.

3. **Dismissal of Lawsuit, and Covenant Not to Sue.** In exchange for the consideration set forth in paragraph 2, Petitioner agrees to dismiss the petition of appeal with prejudice, and he agrees not to appeal from the dismissal of, re-file, revive or reopen the petition of appeal in any way.

Petitioner further agrees that neither he, nor any person, organization, agency, or other entity acting on his behalf, will file, charge, claim or sue, or cause to be filed, charged, claimed or sued, any other lawsuit, legal proceeding, action, grievance, or claim of any nature with any court, agency, or tribunal (including any action for damages, attorneys' fees, injunction, declaratory, monetary, equitable or other relief) against the Respondent, based on any matter, fact or event occurring prior to the effective date of this Agreement, whether now known or unknown, or involving any continuing effects of any acts or practices which may have arisen or occurred prior to the effective date of this Agreement, whether now known or unknown.

4. **Waiver of Tenure Rights.** In exchange for the consideration set forth in paragraph 2, Petitioner agrees to forfeit any and all tenure

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and/or seniority rights he has accrued while working under Respondent's employ as to any position in the District.

5. **General Release and Waiver of all of Petitioner's Claims**. In exchange for the consideration set forth in paragraph 2, Petitioner fully releases and forever discharges Respondent of and from any and all claims, actions, causes of action, back pay, front pay, contracts, agreements, promises, charges, judgments, grievances, obligations, rights, demands, debts, physical injury, pain, suffering, emotional distress, compensatory damages, punitive damages, attorneys' fees, expenses, costs, losses, liabilities, damages, or accountings of whatever nature, whether known or unknown, disclosed or undisclosed, asserted or unasserted, in law or equity, contract or tort or otherwise (herein collectively designated "Claims"), through the effective date of this Agreement, including, but not limited to, any and all Claims of harassment, discrimination, retaliation, and any and all tort Claims or contract Claims for general damages, and any and all Claims arising under, made, regarding, or involving: any federal, state, or local laws or under the common law; violations of any federal, state, or educational practices or civil rights laws or ordinances; Claims for personal injury, failure to reinstate, wrongful conduct, or discrimination; New Jersey Department of Education regulations and related statutes; the Civil Rights Acts of 1866 and 1871, as amended, 42 U.S.C. §1981; the Civil Rights Act of 1964, as amended, including Title VII; the Age Discrimination in Employment Act, as amended; the New Jersey Law Against Discrimination; the Employee Retirement Income Security Act; the Fair Labor Standards Act; the National Labor Relations Act, as amended; the American's with Disabilities Act; Fair Housing Act; Section 504 of the Rehabilitation Act; any and all state wage

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payment and collection laws; the Respondent's policies, practices, collective bargaining agreements, contracts, benefits, or understandings; any Claims arising out of any relationship, including employer/employee relationship, between or among Petitioner and Respondent predating the effective date of this Agreement; and any and all grievances or demands for mediation or arbitration, or Claims or demands under Respondent's policies and procedures; and any and all Claims asserted, or which could have been asserted, in the petition of appeal referenced above, including any Claims against any current or former agents or employees of Respondent.

Petitioner hereby specifically waives, releases, and gives up all Claims and rights, as described in the preceding paragraph, whether now known or unknown, which he has or may have against Respondent, based on any fact, act, event, or omission, whether now known or unknown, occurring before the Effective Date of this Agreement. Petitioner understands that he is waiving, releasing, and giving up all Claims and rights that he knows about and all Claims and rights that he may not know about.

6. **Liens and Indemnification by Petitioner**. It is further understood that as a condition of this settlement, all claims, and/or liens, past, current, and/or future arising out of this settlement or asserted against the proceeds of this settlement are to be satisfied by Petitioner and/or his Attorneys, including but not limited to any Medicare or Medicaid claims and/or liens, Child Support claims and/or liens; Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician or attorney claims and/or liens, or any of the statutory, equitable,

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common law or judgment claims and/or liens, including but not limited to claim based on subrogation or any other legal or equitable theory. Petitioner therefore agrees, upon prompt presentation of any such claims and/or liens, to defend Respondent and its insurer against any such claims and/or liens, and to indemnify and hold Respondent and its insurer harmless against any judgment entered against Respondent and its insurer based on such claims and/or liens, including the payment of any fines, charges, and attorneys' fees incurred as a result of any such lien.

7. **Prevailing Party Status**. Petitioner understands and agrees that he will not be considered a prevailing party under any statute, common law, or otherwise as a result of this Agreement.

8. **Payment**. Payment to Petitioner is subject to Respondent's receipt of Petitioner's signed and notarized Agreement, as well as a child support search report.

   Petitioner represents and warrants that neither Respondent nor its attorneys provided any advice regarding the taxability of the settlement amounts paid pursuant to this paragraph. Petitioner acknowledges and agrees that he is solely responsible for payment of any and all federal, state, and local taxes which may be due from the settlement sum in the event that it is determined that any taxes are owed based on the taxation laws in effect on the date of execution of this Agreement or become due at any time in the future because of a change to the laws governing the taxation of such settlement proceeds. Petitioner further acknowledges and agrees to indemnify and hold harmless Respondent and its attorneys harmless in the event that any federal, state, or local

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taxing authority asserts against any claim for unpaid taxes, failure to withhold taxes, or interest based upon the payment of the settlement sum to Petitioner.

9. **Effective Date**. The effective date of this Agreement shall be the day following the date upon which the signed and notarized Agreement is received by Respondent's attorneys, Methfessel & Werbel, P.C, and ratified by Respondent's Board of Education.

10. **Applicable Law**. This Agreement shall be governed by and construed in accordance with the laws of New Jersey, except where federal law controls. Should any provision of this Agreement be declared or determined by any Court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not to be a part of this Agreement or may be modified as necessary.

11. **Entire Agreement**. This Agreement sets forth the entire agreement between the parties and fully supersedes any and all prior agreements or understandings between the parties.

12. **Signatures**. This Agreement may be signed in counterparts. However, this Agreement will not be binding among the parties until it has been executed by and among the Parties, ratified by Respondent's Board of Education, and subject to Respondent's receipt of Petitioner's signed and notarized Agreement, and a completed child support search report.

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JOHN SMATLA FURTHER CERTIFIES, ACKNOWLEDGES, AND REPRESENTS THAT HE IS ABLE TO READ AND UNDERSTAND ENGLISH, THAT HE UNDERSTANDS ALL OF THE PROVISIONS HEREIN, WITH THE ADVICE AND ASSISTANCE OF HIS ATTORNEY, AND THAT HE MAKES THIS RELEASE KNOWLINGLY AND VOLUNTARILY.

JOHN SMATLA ACKNOWLEDGES THAT HE HAS NO PHYSICAL OR MENTAL PROBLEM, CONDITION, OR IMPAIRMENT OF ANY KIND WHICH HAS INTERFERED WITH HIS ABILITY TO READ AND UNDERSTAND THE MEANING OF THIS RELEASE OR ITS TERMS.

JOHN SMATLA FURTHER REPRESENTS THAT IN SIGNING THIS RELEASE, HE DOES NOT RELY ON ANY PROMISES OR REPRESENTATIONS MADE BY ANYONE OTHER THAN THOSE STATED SPECIFICALLY HEREIN.

JOHN SMATLA FURTHER WARRANTS, REPRESENTS, AND AGREES THAT IN SIGNING THIS RELEASE, HE DOES SO WITH FULL KNOWLEDGE OF ANY AND ALL RIGHTS WHICH HE MAY HAVE WITH RESPECT TO RESPONDENT AND THE LAWSUIT.

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IN WITNESS WHEREOF, and intending to be legally bound, the Parties have executed this Settlement Agreement and General Release as of the dates set forth below.

By: _____ Dated: Nov 6, 2017
JOHN SMATLA

By: _____ Dated: 12-5-17
ANDREA JANDOLI
BOARD PRESIDENT

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STATE OF NEW JERSEY,
COUNTY OF ESSEX : SS.: 302-48-6750

I CERTIFY that on the 6th day of November, 2017

John Smatla personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as her act and deed.

Notary Public

[Notary Seal]

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FAIRFIELD BOARD OF EDUCATION
OFFICIAL CERTIFIED EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF FAIRFIELD ESSEX COUNTY, NJ, AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Township of Fairfield in the County of Essex, NJ, convened in a Regular Board of Education meeting on December 5, 2017 at 7:30 p.m. in the Library of the Adlai Stevenson Elementary School, 15 Knoll Road, in the Township of Fairfield, New Jersey.

The following members of the Board of Education were present:
Mr. Jeffrey Didyk, Mr. Pat Freda, Mr. Brian Egan and Mrs. Andrea Jandoli.

The following resolution was offered by Mr. Jeffrey Didyk and seconded by Mr. Pat Freda and adopted by the Board of Education by the following roll call vote: 3 Ayes; 1 abstain; Carries.

Settlement Agreement

NOW THEREFORE BE IT RESOLVED, that the Board of Education, upon the recommendation of the Superintendent, approve the settlement agreement Docket # EDU 14168-2016, as discussed in Executive session

I, Yvonne Hellwig, Secretary of the Board of Education of the Township of Fairfield, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of Fairfield Township was duly called and held on December 5, 2017 and has been compared by me with the original minutes as officially recorded in my office in the minute book of the Fairfield 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 the Fairfield Board of Education this 5th day of December 2017.

Ms. Yvonne Hellwig
School Business Administrator
Board Secretary
State of New Jersey
County of Essex
Township of Fairfield
Board of Education

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13-18

OAL DKT. NO. EDU 05483-17
AGENCY DKT. NO. 11-1/17

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
LORENA PORTILLO,	:	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 continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 1/12/18

Date of Mailing: 1/16/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 05483-17
AGENCY DKT. NO. 11-1/17

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,
Petitioner,
v.
LORENA PORTILLO,
Respondent.

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

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

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE

The West New York Board of Education (petitioner/Board) filed an emergent motion to obtain an Order immediately removing Lorena Portillo (respondent/Portillo) from the Board of Education of West New York based on her alleged non-residency in the Town of West New York.

PROCEDURAL HISTORY

On January 17, 2017, petitioner filed a petition for due process with the Bureau of Controversies and Disputes of the New Jersey Department of Education, seeking to have the respondent removed from the Board. On April 18, 2017, the respondent filed a motion for summary decision. After the petitioner filed opposition papers, the undersigned entered an Order denying the respondent's motion for summary decision finding material facts in dispute. On December 14, 2017, an emergent motion was filed by the petitioner with the Office of Administrative Law (OAL). Respondent filed opposition papers to the petitioner's motion with an attached certification of Lorena Portillo on December 28, 2017. Oral argument was held on January 3, 2018.

FACTUAL DISCUSSION

In this emergent application, petitioner seeks an order immediately removing Portillo from the West New York Board of Education. At oral argument, the petitioner also sought a temporary suspension of Portillo pending a full hearing in this matter. The basis for this application is its allegation that Portillo's continuous service on the Board will create irreparable harm and thus its seeks an Order requiring her to resign (or temporary suspension) from her position immediately due to her alleged non-residency of West New York.

Petitioner's motion for emergent relief is supported by a certification of Israel Rodriguez. Rodriguez stated in his certification that he is employed by the West New York Board of Education as the Director of Registration. Rodriguez further stated that respondent is a trustee for the Board and was appointed to the Board in October 2014; subsequently, she was elected to the Board in November 2015 for a three-year term. Rodriguez alleged that in or about October 2016, it became "apparent" to the Board that the respondent was not a resident of West New York. Rodriguez was then directed by the Board to investigate Portillo's address. Rodriguez stated that Portillo failed to provide him with proof of her change of address to his satisfaction. Rodriguez further alleged that Portillo's son told a bus driver that Portillo was lying about her residence in West New York (how he came upon this information is not fully

explained). Petitioner then started an investigation into Portillo's residency which was conducted by Rodriguez.

Rodriguez stated that he was aware that the respondent would be residing at 6017 Hudson Avenue in West New York. On December 15, 2016, Rodriguez went to this address, which "upon information and belief" is rented and/or owned by the respondent's uncle. In response to a question to the respondent as to whether this was her address, Rodriguez alleged that Portillo stated that she moved to 45A – 66th Street, Apartment #1. When Rodriguez went to this second address, he found that a different tenant was renting the apartment (#1). Once again Rodriguez stated that "upon information and belief," the 66th Street apartment building is owned and occupied by the respondent's uncle and occupied by the respondent's cousin, who confirmed that Portillo lived at his father's house at 6017 Hudson Avenue in West New York.

Rodriguez stated that he asked Portillo for proof of her residence in West New York and the respondent told him that she would be moving to 41 – 62nd Street, Apartment 12 and living at 6017 Hudson Avenue, Apartment 23 in West New York. Portillo stated that she signed a lease for 41 – 62nd Street in West New York on December 14, 2016. Rodriguez maintains that at no point did Portillo mention or provide him with the lease signed on December 14, 2016 for the 41 – 62nd Street apartment.

On January 13, 2017, due to the fact that Rodriguez's "inability to verify" Portillo's residence, the petitioner filed a petition with the Commissioner of Education. On February 6, 2017, Rodriguez was able to verify that Portillo was living at 41 – 62nd Street, Apartment 12 in West New York.

In response to the above and in support of her opposition to the Motion for Emergent Relief, the respondent filed a brief with a Certification from Lorena Portillo which seeks to confirm that Portillo moved to West New York on or about January 20, 1990 and continues to live in West New York to this date. Portillo recites her address as being 6029 Hudson Avenue from 2009 through May 2014 and from May 2014 through July 2015, Portillo lived at 6315 Madison Street and at 6220 Park Avenue, Apartment 3 from July 1, 2015 through October 17, 2016. Portillo then notified the District that she planned to move to 45A – 66th Street (a house

owned by her uncle). However, Portillo did not move there after inspecting the apartment and not being satisfied with the apartment. On or about November 15, 2016, Portillo alleged that she informed the District that she would be residing at 6017 Hudson Avenue. Portillo further maintains that she and her children lived at 6017 Hudson Avenue from about October 18, 2016 through December 2016. Petitioner's counsel argued that Portillo's certification contained gaps, during the critical time of October to December 2016 in her alleged addresses in West New York, which upon my review of her certification I was unable to find. Thereafter, Portillo stated in her certification that she found a permanent apartment and that from the last week of December 2016 until the present, she and her children live at 41 – 62nd Street, Apartment 12, on a month to month lease which she attached as an exhibit. Portillo maintains that all of these addresses are in the Town of West New York.

In its brief in support of the application for emergent relief, petitioner contends that it will suffer irreparable harm because a non-eligible Board member will be permitted to serve on the Board without being qualified because she failed to continuously maintain her residence in the Town of West New York. The Board alleged that by permitting Portillo to serve on the Board without being qualified, her presence on the Board and participation in the Board's actions are illegal as it is contrary to the legal requirement that all Board members be residents of West New York. (See Board's Brief p. 3.) Petitioner further argued that as a member of the Board, without being a resident of the Town, Portillo has improper access to confidential student and employee information and would be unlawfully participating in the Board's decisions, forming Board policies and taking action in violation of N.J.S.A. 18A:12-3. At oral argument, petitioner's legal counsel advised the undersigned that Portillo was no longer eligible to vote in West New York, thus further causing a disqualification of her to serve on the Board. Respondent's counsel was unable to address this issue as it was the first time she was made aware of this allegation. Based on the very late timing of raising this issue regarding ineligibility of Portillo to vote, I am unable to factor this information into this decision.

In response, the respondent argued that there is no emergency here because the petitioner failed to establish what harm it will suffer if Portillo remains on the Board pending the outcome of the petition. Respondent also argued that Portillo has already served on the Board after the allegation was made by the petitioner of Portillo's non-residency and Portillo fully participated on the Board. Respondent also stated, without opposition, that it was

conceded by the petitioner that Portillo currently resides in the Town of West New York. Respondent stated that "Petitioner relies on its own conclusion that Respondent is no longer a bona fide resident of the Town of West New York and thus claims that her participation and service on the Board is illegal." (See Respondent's Brief p. 3.) Respondent argued that petitioner has failed to submit evidence which fully supports this allegation. In addition, Portillo also submits a certification maintaining that she was and is a resident of West New York during all relevant time frames.

LEGAL DISCUSSION

The standards which must be met by the moving party in an application for emergent relief 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.

Petitioner must meet all four criteria to prevail. See Crowe v. DeGioia, 90 N.J. 126 (1982); DEC Electric, Inc. v. Bd. of Educ. of the S. Gloucester County Reg'l High Sch. Dist. and USA Elec. Contractors, Inc., 96 N.J.A.R.2d (EDU) 789, 790 (citing DEC Electric, Inc. v. S. Gloucester County Reg'l High Sch. Dist. Bd. of Educ. and USA Elec. Contractors, Inc., EDU 10833-95, Order Denying Emergent Relief (Dec. 6, 1995) adopted, Comm'r (Dec. 26, 1995) (denied unsuccessful bidder's request for emergent relief because it was unable to establish that it would suffer immediate and irreparable harm, although it was able to establish a reasonable likelihood of success on the merits and that the parties opposing the motion would not suffer undue harm)). The moving party bears the burden of proving each of the elements for emergent relief "clearly and

convincingly". Waste Mgmt of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

"Irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, supra, 90 N.J. at 132-33. In addition, the irreparable harm standard contemplates that the harm be both substantial and immediate. Subcarrier Communications v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). However, pecuniary damages may sometimes be inadequate because of the nature of the injury or the right affected. Crowe, supra, 90 N.J. at 133. For example, in Crowe the Court determined neither an unwarranted eviction nor reduction to poverty could be compensated adequately by monetary damages awarded after a distant hearing. Ibid.

Petitioner argued that it will suffer irreparable harm if immediate relief is not granted because it will be illegal for Portillo to serve on the Board because she is unqualified. (Petitioners' Brief, p 3.) This alleged harm is directly tied to its success in proving that Portillo did not maintain her residence in West New York. This fact is vigorously disputed by the respondent in her submission and is directly tied to the issue as to whether the petitioner's claim is well settled. Accordingly, the petitioner has failed to prove any harm, let alone any irreparable harm, it will suffer if its motion for emergent relief is not granted.

For the foregoing reasons, I **FIND** that petitioner has failed to demonstrate that it will suffer irreparable harm if emergent relief is not granted. Accordingly, I **CONCLUDE** that petitioner has failed to meet this requirement.

As for the second requirement for the granting of emergent relief, petitioner argued there is a clear legal right underlying its claim. Petitioner has thus also failed to show that its claim is settled. In order to grant a motion for emergent relief in advance of a plenary hearing, a judge must be satisfied that "[t]he legal right underlying petitioner's claim is settled." N.J.A.C. 6A:3-1.6(b)(2). In the present matter, petitioner's claim that Portillo's presence and service on the Board is illegal, requires a factual determination by this forum that Portillo was not a resident of West New York during the alleged time-period. Petitioner has conceded that Portillo is currently a resident of West New York.

Petitioner cites two applicable statutes which prohibits the respondent (if she was and is not a resident to West New York) from serving on the Board. Although this position is correct, it is only correct if the petitioner is successful in proving that Portillo ceased being a West New York resident. At this point in time, as set forth in detail herein, the petitioner has failed to prove such a fact in its motion. Thus, I **FIND** the legal right underlying petitioner's claim is not settled here.

In addition, in order to obtain emergent relief, a petitioner must also demonstrate a likelihood that they will prevail on the merits of the underlying claim. There is no doubt that there is a clear dispute between the parties as to whether Portillo was or was not a resident of West New York as any point. Without a full hearing, it is impossible to determine this issue via the petitioner's motion for emergent relief. In addition, the facts upon which the petitioner bases its motion is the Certification of Israel Rodriguez which draws a conclusion of non-residence of Portillo upon conversations with a number of individuals which are clearly hearsay. With this conclusion being based on such evidence, a finding that the petitioner would be likely to succeed on the underlying petition would be without a proper factual foundation.

I **CONCLUDE** that petitioner has not demonstrated a likelihood of succeeding on the underlying petition. It is stressed that this analysis does not represent a conclusion that either party is more or less likely to prevail at hearing, but only articulates that certain questions are not settled to a point that petitioner is deemed, for purposes of emergent relief, sufficiently likely to succeed at hearing, and that litigation of the underlying petition will be helpful in resolving the main issue presented, i.e., Portillo's continued residence in West New York.

As to the fourth and final prong, each party argued that they will suffer greater harm if they do not prevail on the question of emergent relief. Both parties present arguments in their favor. Portillo, a legally elected individual to the Board, would be removed from her position without proper basis if she is successful at a full hearing. The Board, on the other hand, would have an individual serving on the Board who is not qualified, if it is successful at a full hearing. When the equities and interests of the parties are balanced, petitioner will not suffer greater harm than the respondent will suffer if the requested relief is not granted.

Accordingly, I **CONCLUDE** that the balance of equities argument is equal and that petitioner has failed to satisfy this prong.

Consequently, the petitioner's request for emergency relief is **DENIED**.

ORDER

Having **CONCLUDED** that petitioner is not entitled to the requested emergent relief, it is hereby **ORDERED** that the petitioner's request for emergency relief be **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 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 3, 2018
DATE

MICHAEL ANTONIEWICZ, ALJ

jb

OAL DKT. NO. EDU 13582-17
AGENCY DKT. NO. 153-7/17

J.G., on behalf of minor child, M.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC 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 settlement becomes effective upon the Administrative Law Judge's approval. 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. This matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 1/16/18
Date of Mailing: 1/16/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 13582-17
AGENCY DKT. NO. 153-7/17

J.G. on behalf of minor child M.L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,
Respondent.

Matthew A. Stoloff, Esq., for petitioner (Jardin, Meisner & Susser, attorney)

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

Record Closed: December 13, 2017 Decided: December 13, 2017

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

This matter was transmitted to the Office of Administrative Law on September 14, 2017 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 and the attached Board resolution.

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

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

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

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

December 13, 2017
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: December 15, 2017

Mailed to Parties: December 15, 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/sej

Frances L. Febres, Esq. (ID No. 018542012)
CLEARY GIACOBBE ALFIERI JACOBS, LLC
169 Ramapo Valley Road – Upper Level Suite 105
Oakland, New Jersey 07436
Telephone: (973) 845-6700
Facsimile: (201) 644-7601
Attorneys for Respondent

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

J.G. o/b/o minor child, M.L.,

Petitioner,

v.

CITY OF CLIFTON BOARD OF EDUCATION,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

DOCKET NO.: EDU 13582-2017N
AGENCY REF. NO.: 153-7/17

SETTLEMENT AGREEMENT

WHEREAS, M.L. is an eleven-year-old student residing within the Clifton Public School District ("District"), a public school district operated by the Clifton Board of Education ("Board"); and

WHEREAS, J.G. ("J.G.." or "Petitioner") is the parent of M.L.; and

WHEREAS, on or around April 25, 2017, the Petitioner reported an alleged act of harassment, intimidation or bullying ("HIB") to the District; and

WHEREAS, after conducting an HIB investigation, the District found that the reported incident did not constitute HIB; and

WHEREAS, on or about July 11, 2017, Petitioner filed a Petition of Appeal with the Commissioner of Education to contest the District's harassment, intimidation or bullying ("HIB") investigation findings and determination; and

WHEREAS, on or about September 8, 2017, the Respondent filed its Response to the Petition of Appeal; and

WHEREAS, the Petition of Appeal was transmitted to the Office of Administrative Law ("OAL") as a contested case; and

WHEREAS, the Board maintains that it conducted a thorough, timely and complete HIB investigation in accordance with the Anti-Bullying Rights Act, codified at N.J.S.A. 18A:37-13 et seq., and corresponding regulations, which also afforded all parties of their due process rights under the law; and

WHEREAS, the parties are desirous of resolving the issues raised by the Petition of Appeal, and have reached an amicable resolution thereby avoiding the time and expense associated with further litigation.

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

1. The District agrees to conduct HIB investigations into the March 16, 2017, May 12, 2017 and May 17, 2017 incidents that were alleged in the Petition of Appeal, on the conditions asserted herein.

2. In exchange for the District's commencement of HIB investigations into the alleged incidents that are referenced in Paragraph 1, the Petitioner agrees to execute a Stipulation of Dismissal, with prejudice, of the instant Petition of Appeal. Petitioner acknowledges that she shall not contest or appeal any aspect of the April 25, 2017 HIB investigation or findings.

3. In exchange for the District's promises set forth in Paragraph 1, Petitioner further agrees that she is limited to contesting only the District's and/or Board's HIB determinations regarding the March 17, 2017, May 12, 2017 and May 17, 2017 incidents. Accordingly, Petitioner acknowledges and agrees that she shall not contest any alleged or perceived prior procedural deficiency as it regards the agreed-upon investigations referenced in Paragraph 1, nor

shall she contest the period of time when the investigations are conducted. Rather, the Petitioner shall be limited to solely contesting whether the District conducted a thorough investigation and/or whether the District's investigation necessitates a finding of HIB.

4. Except as set forth in this Agreement, Petitioner agrees to refrain from filing any proceeding, action or complaint regarding any prior allegations of HIB as it regards M.L. It is expressly understood and agreed, however, that the parties reserve the right to bring a claim before any tribunal of competent jurisdiction to enforce their rights under this Agreement.

5. The parties further agree that this Agreement may not be altered, amended, modified, superseded, canceled or terminated except by an express written agreement duly executed by all of the parties or their attorneys on their behalf, which makes specific reference to this Agreement.

6. Neither party shall be considered a "prevailing party," for any purpose whatsoever. Accordingly, each party shall bear their own attorney's fees and legal costs.

7. 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 as to any wrongdoing or noncompliance with law, including, but not limited to, the Anti-Bullying Bill of Rights Act, codified at N.J.S.A. 18A:37-13 et seq., and corresponding regulations.

8. The parties recognize that they sign this Agreement as their own voluntary act and deed, and that they fully understand the duties, obligations, requirements and limitations enumerated herein. The drafting and negotiation of this Agreement have been participated in by each of the parties and 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 hereby acknowledge that they have been represented by counsel throughout the above-referenced matter, throughout the negotiation of this Agreement, and at the execution of this Agreement, and have read and consulted with counsel regarding this Agreement. Petitioner acknowledges and agrees that she is satisfied with her legal representation in this matter.

9. This Agreement shall be governed by the laws of the State of New Jersey and constitutes a complete legal release and waiver of any and all claims, known or unknown, that were or could have been raised by Petitioner against the Board from the beginning of time until execution and/or entry of this Agreement, as well as any and all claims that were or could have been raised by the Board against Petitioner.

10. A fully executed copy of this Agreement shall be forwarded to the Administrative Law Judge assigned to this matter. This Agreement shall become effective upon the Administrative Law Judge's approval.

11. This Agreement contains the entire agreement between the parties hereto and is intended to resolve any and all disputes and issues, known or unknown, between them as of the date of execution of this Agreement. The undersigned represent that they have the requisite authority to sign this Agreement on behalf of the respective party. This Agreement may be signed by the parties in counterparts on separate copies of the Agreement, and all signature pages shall be incorporated into the Agreement as if all the signatures are affixed on one (1) page.

[INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth below.

CLIFTON BOARD OF EDUCATION

DATED: 12-6-17

PETITIONER:

J.G. o/b/o M.L.

DATED: 11/21/17

CLEARY | GIACOBBE | ALFIERI | JACOBS LLC

FRANCES L. FEBRES, Counsel
ffebres@cgajlaw.com

Reply to: Oakland Office

RECEIVED
2017 DEC 12 P 6:16
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

December 12, 2017

VIA EMAIL AND REGULAR MAIL
Hon. Ellen S. Bass, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: J.G. o/b/o minor child M.L. vs. Clifton Board of Education, Passaic County
OAL Docket No: EDU 13582-2017N

Dear Judge Bass:

This firm represents the Respondent, Clifton Board of Education, with regard to the above-referenced matter. Please allow this correspondence to confirm that the Settlement Agreement, which was previously provided under cover letter dated December 7, 2017, was approved by the Clifton Board of Education on December 6, 2017.

Counsel appreciates Your Honor's attention to this matter.

Respectfully submitted,

Frances L. Febres, Esq.

c: Matthew A. Stoloff, Esq. (via email and regular mail)
Mark Tietjen, Assistant Superintendent of Schools (via email)

16-18

STATE OF NEW JERSEY
DEARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing:

School District of the City of Trenton
Mercer County
Petitioner
and
Jean Claude Striplet
Respondent

Agency Docket No.: 200-9/17

Before: Stephen J. Rosen, Arbitrator

APPEARANCES:

For the Petitioner:
ADAMS GUTIERREZ & LATTIBOUDERE, LLC
BY: Adam S. Herman, Esq.
Julianne Navarrete, Esq.

For the Respondent:
BERMAN & BARRETT
By: Michael T. Barrett, Esq.

This matter arises out of tenure charges filed with the Commissioner of Education by the City of Trenton Board of Education against the Respondent, Jean Claude Striplet, and received by the Department of Education on September 5, 2017. After determination that the charges warranted further action, the Bureau of Controversies and Disputes forwarded the applicable documents to me on, or about September 25, 2017.

A conference call with attorneys Herman and Barrett took place on October 8, 2017, at which time three hearings were scheduled for November 28, 29 and 30, 2017.

The parties met on November 28 and 29, 2017. On the second day of hearing

it was revealed that Mr. Striplet had decided to submit a letter of resignation, effective on the close of business, December 31, 2017. The terms of the resignation were read into the record in the presence of the arbitrator and attorneys Herman and Barrett and acknowledged by the Respondent.

Upon approval by the Trenton Board of Education and Certification of Consent to Settlement Terms Pursuant to N.J.A.C. 6A:3-5.6(b):, the Stipulation of Settlement was approved by the arbitrator.

1/12/18
Date

Stephen D. Rosen
Stephen J. Rosen, Arbitrator

ADAMS GUTIERREZ & LATTIBOUDERE, LLC.
The Legal Center
1037 Raymond Boulevard, Suite 900
Newark, New Jersey 07102
(973) 735-2742
Attorneys for the Trenton Board of Education

In the matter of	:	
JEAN CLAUDE STRIPLET	:	AGENCY REFERENCE NO.: 200-9/17
TRENTON BOARD OF EDUCATION	:	**STIPULATION OF SETTLEMENT**

The Trenton Board of Education (the "Board"), whose principal office is located at 108 North Clinton Avenue, Trenton, New Jersey, and its successors, assigns, officers, employees, agents and representatives (collectively, "School Board"), and Jean Claude Striplet, residing at 1234 Ohio Avenue, Trenton, New Jersey 08638 ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

WHEREAS Respondent is a tenured teaching staff member employed by the Board as a teacher; and

WHEREAS the Board certified tenure charges to the Commissioner of Education of the State of New Jersey, captioned *In the Matter of Tenure Charges Against Jean Claude Striplet, Trenton Board of Education* ("Tenure Charges"), under Agency Reference Number 200-9/17; and

WHEREAS, Respondent filed an answer opposing the charges; and

WHEREAS the Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator Stephen Rosen ("Arbitrator") for a hearing; and

WHEREAS, Respondent has denied the allegations set forth in the tenure charges; and

WHEREAS, the Parties are aware of the uncertainty of the outcome of arbitration; and

WHEREAS, the Board with stringent budget limitations and due to the expenditure of resources due to multiple days of hearings with numerous witnesses; the concern that school personnel will be removed from their educational duties and responsibilities during that time; and the concern of having several pupils participate in the litigation and being removed from instructional time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

WHEREAS the proposed Stipulation of Settlement is in the best interest of the Parties and the public because Respondent resigns from his employment without further litigation and avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Concurrent with the execution of this Stipulation, Respondent shall submit an irrevocable letter of resignation to the Board, which shall provide for his resignation from the Board effective December 31, 2017, ("Effective Date"). (See Exhibit "A," to the Stipulation, a copy of Respondent's signed letter of resignation).

2. Upon final approval of the signed Stipulation by the Arbitrator, the Board shall and hereby does withdraw the instant Tenure Charges. The Board agrees to not pursue the subject

Tenure Charges against Respondent as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the Stipulation is voided, the Board retains the right to file and consider for certification, tenure charges against Respondent, including those tenure charges which have been previously filed against him by the Board, and Respondent reserves the right to defend same.

3. Upon final approval of the signed Stipulation by the Arbitrator, Respondent will be returned to the payroll retroactively to October 1, 2017 and will remain on the payroll through December 31, 2017. Respondent will be deemed to have been on an administrative leave without pay for the entire month of September 2017. All salary paid for said three (3) month period shall be subject to all applicable and mandatory salary withholdings and deductions, excluding health insurance premium contributions, which have been waived by the Board.

4. Respondent shall not earn any paid vacation, sick or personal days for any portion of the 2017-18 school year.

5. This Stipulation is based upon the understanding that Respondent's separation from employment with the Board, effective December 31, 2017, will be deemed a voluntary resignation–in good standing. Upon inquiry from any third party to authorized employees or representatives of the Board, those employees or representatives will provide no information other than to confirm Respondent's employment, position, salary and dates of employment, and state that the reason for his separation from employment was his voluntary resignation.

6. The Board expressly reserves the right to oppose any application by Respondent for unemployment benefits.

7. In accordance with N.J.A.C. 6A:3-5.6 (a)6, Respondent has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State

Board of Examiners. Additionally, pursuant to N.J.A.C. 6A:9B-4.3(a)1, Respondent has been advised of the Board's duty to notify the State Board of Examiners he has resigned. The Board is legally required to participate in proceedings initiated against Respondent's license by the State Board of Examiners resulting from the Commissioner's referral. Aside from such requirements, pursuant to the above-referenced regulation, the Board agrees to not independently seek the suspension or revocation of Respondent's teaching certification or license or seek to prevent him from applying for or receiving pension benefits on any grounds related to the Tenure Charges or his resignation pursuant to this Stipulation of Settlement.

8. As of the Effective Date, all of Respondent's rights of employment with the Board, including but not limited to accrued salary, benefits, tenure and seniority, will permanently end.

9. Respondent will not apply for reemployment with the Board at any time. If Respondent does apply for reemployment with the Board and is approved for employment, the terms of this Agreement shall control and shall be grounds for termination of Respondent's employment.

10. In exchange for the consideration set forth above, the sufficiency of which is hereby acknowledged, Respondent, through the date of his resignation, hereby waives, releases and discharges any and all claims or rights that he has or may have against the Board, the Superintendent, Board members, and any and all other Board officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the Board or separation from employment with the Board. It specifically includes, without limitation, all claims which Respondent may

have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on his employment by and/or termination of her employment with the Board, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, wages, attorneys' fees, costs, and/or future

wage loss. Respondent agrees to withdraw any and all other pending complaints or actions that have been filed against the Board or any of its employees or representatives.

11. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that he: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has seven (7) days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that he may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Board either by hand or by certified mail within the seven (7) day period.

12. Respondent warrants that he has not commenced any legal proceedings of any type (including but not limited to charges filed with any governmental agency) against the Board or School Board. Further, Respondent agrees that he will not commence any legal proceedings against the Board or School Board arising from or relating to anything that has happened up to his date of resignation. Should any such legal proceedings be commenced on Respondent's behalf, Respondent agrees that he will not seek or accept any relief or recovery therefrom. In the event of a violation of this paragraph, Respondent agrees that the Board and School Board shall be entitled to immediate dismissal of the legal proceedings, and that he shall be responsible for the Board and School Board's attorneys' fees and costs incurred in connection with those legal

proceedings. Should any entity, agency, commission, or person file a charge, action, complaint or lawsuit against the Board or School Board based upon any of the above-released claims in Paragraph 10, Respondent agrees not to seek or accept any resulting relief whatsoever, in accordance with this paragraph.

13. This Stipulation and all of its terms, are and will remain confidential to the maximum extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et al. Respondent is expressly forbidden from discussing this Stipulation with any person, other than his accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Stipulation or to which he is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Respondent agrees that he will inform the person to whom it is making the permitted disclosure that the existence and substance of this Stipulation, the settlement giving rise to this Stipulation and the sum of money paid pursuant to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. Respondent specifically agrees not to discuss the nature, terms, conditions of this Stipulation with others, any representative of the media, or any past, present, or prospective employee of the Board, or its agents or attorneys. Respondent understands that this provision is not a simple recital but is an important, integral part of this Stipulation. The Board agrees that it will keep this Stipulation confidential to the extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA"). In the event that the Board receives an OPRA request, for which this Stipulation would be responsive to, the Respondent understands that the Board is legally obligated to disclose same under OPRA and that such disclosure would not be a breach of this Stipulation.

14. This agreement shall not constitute a precedent in any matters involving other Board employees.

15. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

16. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

17. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

18. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

19. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

20. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

21. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

22. This Stipulation is subject to formal approval by the Board.

23. Additionally, this Stipulation is subject to final approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

Dated: 12/1/17

JEAN CLAUDE STRIPLET

TRENTON BOARD OF EDUCATION

Dated: _____

By: _____

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):

Dated: 1/10/18

Adam S. Herman, Esq.

ADAMS GUTIERREZ & LATTIBOUDERE
Attorneys for the Trenton Board of Education

APPROVED:

Dated: 1/12/18

Stephen Rosen, Arbitrator

CERTIFICATION

I, Jean Claude Striplet, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this 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: 12/1/17

JEAN CLAUDE STRIPLET

RESOLUTION AUTHORIZING APPROVAL OF SETTLEMENT AGREEMENT WITH JEAN CLAUDE STRIPLET

WHEREAS, the Trenton Board of Education has reviewed the Settlement Agreement between Jean Claude Striplet and the Board of Education in regard to Agency Reference No. 200-9/17 and

WHEREAS, the Board has voted on this date to accept the Settlement Agreement with Jean Claude Striplet; and

WHEREAS, the Board designates and authorizes the Board President to execute the Settlement Agreement on the Board's behalf; now therefore be it

RESOLVED that the Trenton Board of Education approves the Settlement Agreement between Jean Claude Striplet and the Board of Education

Gene Bouie
Board President

Jayne S. Howard
School Business Administrator/Board Secretary

December 18, 2017
ADOPTED

EXHIBIT "A"

Jean Claude Striplet
1234 Ohio Avenue
Trenton, New Jersey 08638

December 1, 2017

Lissa Johnson
Assistant Superintendent
Chief Talent Officer
Trenton Board of Education
108 North Clinton Avenue
Trenton, New Jersey 08609

Dear Ms. Johnson:

Please accept this letter as my irrevocable resignation from employment with the Trenton Public Schools, effective at the close of business on December 31, 2017.

Very truly yours,

JEAN CLAUDE STRIPLET

cc: Fred McDowell, Superintendent
Perry L. Lattiboudere, Esq., General Counsel
Michael T. Barrett, Esq.

18-18

G.G., ON BEHALF OF MINOR CHILD, N.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY.	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In June 2017, *pro se* petitioner appealed the determination of the respondent Board that her child, N.G., is not entitled to a free public education in Fair Lawn schools. Petitioner subsequently retained counsel to represent her in this matter. Petitioner contended that she owns a home in Fair Lawn where she and her son are legally domiciled, but maintains an office in the out-of-district home of her husband, where she spends her workday. The Board argued that G.G. is not legally domiciled within the Fair Lawn school district. Prior to a scheduled hearing at the OAL, the parties reached an amicable resolution in this matter, and advised the ALJ that the respondent Board had agreed not to challenge the eligibility of N.G. to attend school in the Fair Lawn school district.

Accordingly, the ALJ issued an Initial Decision in which she concluded that this matter is no longer a contested cast before the OAL; the ALJ ordered the matter dismissed.

Upon review, the Commissioner concurred with the ALJ's conclusion, 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.

January 25, 2018

18-18

OAL DKT. NO. EDU 09889-17
AGENCY DKT. NO. 108-6/17

G.G., ON BEHALF OF MINOR CHILD, N.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN 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.

Upon such review, the Commissioner is in accord with the ALJ's conclusion – for the reasons set forth in the Initial Decision – that this matter is no longer a contested case before the Commissioner. The Board is permitting the minor child to attend school in the district at no expense, so long as he is domiciled in Fair Lawn.

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.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/25/18
Date of Mailing: 1/25/18

* 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
DISMISSAL
OAL DKT. NO. EDU 09889-17
AGENCY DKT. NO. 108-6/17

G.G. ON BEHALF OF MINOR CHILD N.G.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY
Respondent.

Robert Chery, Esq. on behalf of petitioner

John P. Allen, for respondent (Schenck, Price, Smith & King, LLP)

Record Closed: December 08, 2017 Decided: December 15, 2017

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

STATEMENT OF THE CASE

Petitioner, G.G., filed a residency appeal on behalf of her child, N.G. Shortly thereafter the Board of Education of the Borough of Fair Lawn (Respondent) filed an Answer with the State Department of Education. The matter was transmitted to the

Office of Administrative Law (OAL) on July 13, 2017, for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. A hearing was scheduled for October 6, 2017 which was adjourned due to the parties reaching an amicable resolution in this matter. A telephone status conference was scheduled for October 30, 2017. On that date petitioner's counsel advised that the matter was resolved and there was no need for a hearing. Petitioner's counsel also attached an email from respondent stating that, "Fair Lawn Board of Education has agreed to not challenge the eligibility of N.G. to attend District schools. Therefore, N.G. shall be permitted to attend District schools at no expense so long as he is domiciled in Fair Lawn. . . ." Said correspondence is attached hereto for reference.

Based on the foregoing, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is therefore **ORDERED** that this matter be and is hereby **DISMISSED**.

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

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

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

December 15, 2017
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: December 15, 2017

Date Mailed to Parties: December 19, 2017
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

19-18
OAL DKT. NO. EDU 12726-13
AGENCY DKT. NO. 161-7/13

ROBIN MARTIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, it is noted that – to the extent that Paragraph 2 of the settlement agreement provides for confidentiality – the parties are reminded that the settlement agreement and its attached exhibit may be subject to disclosure pursuant to the Open Public Records Act, *N.J.S.A.* 47:1A-1, *et seq.*

Subject to the foregoing, 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: 1/25/18
Date of Mailing: 1/25/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12726-13
AGENCY DKT. NO. 161-7/13

ROBIN MARTIN,
Petitioner,
v.
CITY OF LONG BRANCH BOARD OF EDUCATION, MONMOUTH COUNTY,
Respondent.

Stephen B. Hunter, Esq., for petitioner (Detzky, Hunter & DeFillippo, LLC, attorneys)

Peter J. Sokol, Esq., for respondent (McOmber & McOmber, attorneys)

Record Closed: December 5, 2017 Decided: December 7, 2017

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

This matter was transmitted to the Office of Administrative Law on September 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.

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

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

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

December 7, 2017
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency: 12/13/17

Date Mailed to Parties: 12/13/17

/cb

Detzky
Hunter
& DeFillippo, LLC

*Michael L. Detzky, Esq.
Stephen B. Hunter, Esq.
David J. DeFillippo, Esq.

*Also Member of NY Bar

Reply to: Somerville

Somerville Office:
33 North Bridge Street
Somerville, New Jersey 08876
908-707-1560
Fax: 908-707-0899
dhlaw@optonline.net

Freehold Office:
45 Court Street
Freehold, New Jersey 07728
732-780-3090
Fax: 732-308-3866
mldetzky@detzkylaw.com
davedefillippo@aol.com

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December 5, 2017

BY FAX & REGULAR MAIL

Honorable Susan M. Scarola
Office of Administrative Law
P.O. Box 049
9 Quakerbridge Plaza
Trenton, N.J. 08625-0049

RE: ROBIN MARTIN and CITY OF LONG BRANCH BOARD OF EDUCATION
OAL DOCKET NO. EDU-12726-2013S
AGENCY REFERENCE NO. 161-7/13

Dear Judge Scarola:

Enclosed please find the fully executed Settlement Agreement in the above referenced matter, along with Mr. McOmber's cover letter.

Please accept this letter, consistent with the Settlement Agreement, as the Petitioner's request for the withdrawal of her Petition, with prejudice.

I have also written separately to Mr. McOmber concerning the decision of the EEOC on or about July 18, 2013 that there was insufficient evidence to issue a Complaint that had been initiated by Ms. Martin. There would not normally be any need to formally withdraw Ms. Martin's EEOC charge at this time if Ms. Martin received from the EEOC a "right to sue letter" that

required the filing of a lawsuit within 90 days of the receipt of that "right to sue letter"; litigation that was not filed.

Respectfully submitted,

Stephen B. Hunter

SBH/vjb
Enclosures
cc: Richard McOmber, Esq. (via email)
Lorraine Tesauro, NJEA (via email)
Robin Martin (via email)

A PROFESSIONAL CORPORATION

McOmber & McOmber

COUNSELLORS AT LAW

RICHARD D. McOMBER
ADRIENNE HAROUTUNIAN McOMBER
THOMAS J. WARREN
R. ARMEN McOMBER*
CHRISTIAN V. McOMBER*
MATTHEW A. LUBER◊
EDMUND F. FITTERER, JR.
ELIZABETH A. MATECKI△
KAITLYN R. GRAJEK

* RULE 1:40 QUALIFIED MEDIATOR
◊ ADMITTED IN NJ & PA
△ ADMITTED IN NJ & NY
▪ ADMITTED IN NY

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30 S. MAPLE AVENUE, SUITE 201
MARLTON, NEW JERSEY 08053
(856) 985-9800
FAX: (732) 530-8545

OF COUNSEL
J. PETER SOKOL
ROBERT J. MALLOY◊
ALAN SERRINS▪

November 30, 2017

VIA TELEFAX and REGULAR MAIL

Stephen B. Hunter, Esquire
Detzky, Hunter & DeFillippo, LLC
33 North Bridge Street
Somerville, NJ 08876

RE: Long Branch Board of Education
Robin Martin
Agency Docket No. 161-7/13
Our File No. 10365

Dear Mr. Hunter:

Receipt is acknowledged of your telefax dated November 22, 2017 attaching the Settlement Agreement signed by your client Robin Martin ("Ms. Martin"). The Board of Education approved the Settlement Agreement on November 29, 2017.

I am enclosing a fully executed Settlement Agreement, together with the letter signed by Peter E. Genovese III, RSBO, QPA, School Business Administrator/Board Secretary, employed by the Board of Education, ***which is attached to the Settlement Agreement as Exhibit A.*** Hold same in escrow pending my receipt of evidence that the Petition of Appeal filed with the Department of Education of the State of New Jersey and the Charge filed with the New Jersey Division of Civil Rights have both been withdrawn, as well as all other filed claims, petitions, etc.

Your courtesy and cooperation in this matter are greatly appreciated.

Very truly yours,

RICHARD D. McOMBER

RDM/dp
Enclosures
cc: Long Branch Board of Education
Attn: Peter E. Genovese III, Board Secretary, RSBO, QPA
(w/o enclosures; via e-mail only)

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (hereinafter referred to as "Settlement Agreement") is made and entered into as of the 29th day of November 2017, by and between:

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, IN THE COUNTY OF MONMOUTH, ("Board of Education") having its principal place of business located at 540 Broadway, Long Branch, New Jersey 07740; and

ROBIN MARTIN, c/o Detzky, Hunter & DeFillippo, LLC, 33 North Bridge Street, Somerville, New Jersey 08876 ("Ms. Martin").

RECITALS

A. Ms. Martin was employed as a special education teacher by the Board of Education from on or about January 3, 2011 through June 30, 2013;

B. The Board of Education determined not to renew the employment of Ms. Martin in April of 2013, and Ms. Martin thereafter received notice of her employment's non-renewal.

C. Ms. Martin grieved her non-renewal before the Board of Education (hereinafter "Grievance").

D. On or about July 23, 2013, Ms. Martin through her legal counsel, Detzky, Hunter & DeFillippo, LLC filed a Petition of Appeal with the Department of Education of the State of New Jersey challenging her non-renewal by the Board of Education (hereinafter "Petition").

E. On or about June 27, 2013, Ms. Martin requested review by the United States Equal Employment Opportunity Commission ("EEOC") and by the New Jersey Division of Civil Rights ("DCR") to review the circumstances of her non-renewal (hereinafter "Charge").

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F. The Grievance was denied and on July 18, 2013 as the EEOC found insufficient evidence to issue a complaint, but the Petition and DCR investigation remain unresolved as of this date.

G. Both parties have agreed to settle the above referenced claims through this Agreement.

H. Because all parties have been professionally represented throughout, this Agreement is the product of negotiation and compromise between the parties.

IT IS, THEREFORE, AGREED BY THE PARTIES AS FOLLOWS:

1. The Recitals set forth above are incorporated into and made a part of this Agreement.

2. The Board of Education shall execute the letter which is attached as Exhibit "A", which letter shall be confidentially maintained by the parties ("Letter"). Neither party shall release, publish, summarize, characterize or describe the Letter to any other person or persons without the written authorization from the other party.

3. In exchange for the execution of the Letter, Ms. Martin shall dismiss her Petition with prejudice, withdraw her Charge with prejudice and shall not further challenge, grieve, seek arbitration, sue, file a complaint(s) or authorize any other individual, attorney, agency, private or governmental entity to file on her behalf, any state or federal lawsuits, grievances, administrative proceedings, charges or complaints against the Board of Education based on any claim, whether or not presently known to Ms. Martin, which Ms. Martin may have at this time and which may arise out of her loss of employment as described in the above Recitals. This covenant not to sue is intended to

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include, but not be limited to, any and all claims arising out of Ms. Martin's loss of employment as described herein and any resulting claims, rights, and causes of action based on any federal, state or local law, statute, ordinance, administrative regulation, public policy or Executive Order, such as the Fair Labor Standards Acts of 1938, as amended, 29 *U.S.C.* §201, *et seq.*; the Civil Rights Act of 1964, as amended, 42 *U.S.C.* §20002e-2000e-17; the Civil Rights Act of 1871, as amended, 42 *U.S.C.* §§1983, 1985; Executive Order 11246; the Rehabilitation Act of 1973, as amended, 29 *U.S.C.* §701, *et seq.*; the National Labor Relations Act, as amended, 29 *U.S.C.* §141, *et seq.*; the Florida Human Rights Acts, as amended, §760.01, *et seq.*, Fla. Stat., the Americans with Disabilities Act of 1990, as amended, 42 *U.S.C.* §12101, *et seq.*; the Civil Rights Act of 1991, Public Law 102-106; the Equal Pay Act of 1963; the Family and Medical Leave Act, 29 *U.S.C.* §2601, *et seq.* This covenant not to sue is also intended to include, but not be limited to, any other state, federal or administrative claim or cause of action founded in tort, contract or other common law cause of action including, without limitation, actions based on misrepresentation, defamation, wrongful termination, negligent or intentional infliction of emotional distress, invasion of privacy, interference with prospective economic advantage, interference with contractual relations, or negligence.

4. In exchange for the execution of the Letter, Ms. Martin, individually and on behalf of her heirs, executors, administrators, representatives, attorneys, fiduciaries, successors and/or assigns, together with the Long Branch School Employees Association, knowingly and voluntarily release and forever discharge the Board of Education to the full extent permitted by law, of and from any and all claims, known and

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unknown, asserted and unasserted, which Ms. Martin and LBSEA have or may have against the Board of Education as of the date of the execution of this Settlement Agreement and as of the date of the loss of employment, which release shall include, but not be limited to, any alleged violation of:

- The National Labor Relations Act;
- Title VII of the Civil Rights Act;
- Civil Rights Act of 1991;
- Sections 1981 through 1988 of Title 42 of the United States Code;
- The Employee Retirement Income Security Act;
- The Fair Credit Reporting Act;
- The Family and Medical Leave Act;
- The Equal Pay Act;
- The Immigration Reform Control Act;
- The Rehabilitation Act;
- The Age Discrimination in Employment Act;
- The Occupational Safety and Health Act;
- Employee Polygraph Protection Act;
- The employee (whistleblower) civil protection provisions of the Corporate and Criminal Fraud Accountability Act (Sarbanes-Oxley Act)
- The New Jersey Law Against Discrimination;
- The New Jersey Civil Rights Act;
- The New Jersey Family Leave Act;
- The New Jersey State Wage and Hour Law;
- The Millville Dallas Airmotive Plant Job Loss Notification Act;
- The New Jersey Equal Pay Law;
- The New Jersey Occupational Safety and Health Law;
- The New Jersey Smokers' Rights Law;
- The New Jersey Genetic Privacy Act;
- The New Jersey Fair Credit Reporting Act;
- The New Jersey Statutory Provision Regarding Retaliation/Discrimination for Filing A Workers' Compensation Claim;
- The New Jersey Public Employees' Occupational Safety and Health Act;
- New Jersey laws regarding Political Activities of Employees, Lie Detector Tests, Jury Duty, Employment Protection, and Discrimination;
- any other federal, state or local civil rights law, whistle-blower law

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or any other local, state or federal law, regulation or ordinance;

- any public policy, contract (oral, written or implied), tort, or common law;
- any claims for vacation, sick or personal leave pay, short term or long term disability benefits, or payment pursuant to any practice, policy, handbook or manual of Employer; or
- any basis for costs, fees, or other expenses including attorney's fees.

Ms. Martin understands that this release includes all claims related in any manner to her application for and/or employment with and/or non-renewal by the Board of Education.

5. If Ms. Martin or another on her behalf in any way challenges Ms. Martin's loss of employment as described herein by an action against the Board of Education, Ms. Martin shall indemnify and save the Board of Education harmless from and against all liability, loss, damages, costs and expenses, including counsel fees, which the Board of Education may at any time sustain or incur by reason of such an action. Ms. Martin shall cause payment to be made to the Board of Education on account of any such liability, loss, damages, costs or expenses before the Board of Education shall be compelled to make any payment on account thereof, and shall pay, upon demand by the Board of Education, the amount of any claim made upon the Board of Education pursuant to the action, if the Board of Education determines in its discretion to pay such claim, and shall satisfy and discharge any Judgment recovered against the Board of Education promptly after the entry thereof, unless an appeal is taken and bonds to stay the collection thereof are procured by Ms. Martin; and if a final Judgment is entered against the Board of Education after appeal, Ms. Martin shall satisfy and discharge such Judgment. The

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Board of Education may, in its discretion, make any payment sustained or incurred by reason of any of the foregoing and Ms. Martin shall immediately repay the Board of Education the amount of such payment, together with 18% interest thereon from the date of payment.

6. In exchange for the execution of this Settlement Agreement, the Board of Education, on behalf of itself, its successors and assigns, knowingly and voluntarily releases and forever discharges Ms. Martin individually, her heirs, executors, administrators, representatives, attorneys, fiduciaries, successors and/or assigns and forever discharges her to the full extent provided by law, of any and all claims, known and unknown, asserted and unasserted, which the Board of Education has or may have against Ms. Martin as of the date of the execution of the Settlement Agreement with respect to the employment by the Board of Education of Ms. Martin and any matter related thereto.

7. The Board of Education and Ms. Martin agree not to speak negatively concerning any of the parties to this Agreement and agree not to do or say anything which would adversely affect their reputation, image, business relationships or goodwill currently enjoyed by Ms. Martin or the Board of Education in their markets and in the community at large, unless compelled to do so by law. The Board of Education and Ms. Martin agree that they will not, unless compelled by law to do so and then only to the extent required by law, assist or participate in any charge, claim, suit, complaint or grievance brought or which has been brought by any other person against the Board of Education or Ms. Martin.

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8. This Agreement sets forth the entire Agreement between Ms. Martin and the Board of Education, and fully supersedes any prior agreements or understandings, including any applicable collectively negotiated agreement between the Board and LBSEA.

9. Ms. Martin acknowledges that she has not relied on any representations, promises, or agreements of any kind made in connection with the decision to sign this Agreement, except for those set forth in this Agreement.

10. This Agreement shall be governed and conformed in accordance with the laws of the State of New Jersey.

11. This Agreement may not be modified except upon express written consent of all parties wherein specific reference shall be made to this Agreement.

12. This Agreement may be executed in counterparts and by facsimile or scanned signatures, and when each party has signed and delivered at least one such counterpart, each counterpart, including facsimile or PDF version, shall be deemed an original and when taken together with other signed counterparts, shall constitute an Agreement binding upon and effective as to all parties.

13. Ms. Martin represents that she has consulted with an attorney prior to her signing of this Agreement.

14. Ms. Martin freely and knowingly, and after due consideration, enters into this Agreement.

IN WITNESS WHEREOF, Ms. Martin and the Board of Education hereto knowingly and voluntarily executed this Agreement as of the dates set forth below.

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Witness:

Peter E. Genovese III, RSBO, QPA
Board Secretary

Witness:

BOARD OF EDUCATION OF THE
CITY OF LONG BRANCH, IN THE
COUNTY OF MONMOUTH

By: Michele Critelli
Michele Critelli, Ed.D., President

By: Robin Martin
ROBIN MARTIN

Signed and acknowledged before
me this 21 day of November 2017.

Sandra L Cronce

SANDRA L. CRONCE
Notary Public - State of New Jersey
Commission # 2292851
My Comm. Expires Oct. 10, 2022

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OFFICE OF THE SUPERINTENDENT
LONG BRANCH PUBLIC SCHOOLS
540 Broadway, Long Branch, New Jersey 07740

MICHAEL SALVATORE, Ph.D.
Superintendent of Schools

"WHERE CHILDREN MATTER MOST"

PETER E. GENOVESE, III, RSBO, QPA
School Business Administrator
Board Secretary
(732) 571-2868, Ext. 40100
Facsimile: (732) 229-0797

November 29, 2017

Certified Mail, Return Receipt Requested –and- Ordinary Mail
Ms. Robin Martin
119 Lippincott Ave.
Long Branch, NJ 07740

Dear Ms. Martin:

This letter will acknowledge that your employment as a non-tenured teacher by the Long Branch Board of Education (hereinafter the "Board") was terminated on June 30, 2013.

In reviewing your employment records, District Administrators determined that the District Administrator for Personnel did not strictly conform to certain provisions of the New Jersey Administrative Code that governed mentoring programs during the course of your employment. District Administrators agreed that more attention should have been given to the peer monitoring of you as staff turnover caused inconsistency in the mentoring process.

Actions have now been taken by the Board to insure strict compliance, in the future, with (1) the relevant Administrative Code provisions regarding mentoring programs and (2) the District's own mentoring policies.

We wish you the best in the future.

Sincerely,

Peter E. Genovese, III, RSBO, QPA,
School Business Administrator/Board Secretary

cc: Dr. Michael Salvatore, Superintendent of Schools

EXHIBIT A

20-18

GARY T. KENDELLEN
55 UNION PLACE #300
SUMMIT NJ 07901-2563
PH: 908 219 4851
FX: 908 219 4852
CL: 908 285 0884
GTKENDELLEN@COMCAST.NET

Kathy Duncan, Esq.
Director
Office of TEACHNJ Arbitration
New Jersey Department of Education
P.O. Box 500
Trenton, NJ 08625-0500

Re: Settlement Agreement/In the Matter of the Tenure Hearing of Merita Muja, State Operated School District of the City of Newark, Essex County 230-9/17

Ms. Duncan,

Please be advised that I have reviewed the attached Settlement Agreement entered into by the parties in the above-captioned matter and have concluded that it is in compliance with the requirements of N.J.A.C. 6A:3-5,6. Accordingly, I hereby approve the Settlement Agreement.

Gary T. Kendellen

Gary T. Kendellen
January 25, 2018

RIKER DANZIG SCHERER HYLAND
& PERRETTI LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
Attorneys for State-operated School District of the City of Newark

In the Matter of	:	
	:	
MERITA MUJA,	:	**Agency Docket Number 230-9/17**
	:	
	:	**SETTLEMENT AGREEMENT**
	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, IN THE COUNTY OF ESSEX	:	

This Settlement Agreement ("Agreement") is made by and between, on the one hand, the State-operated School District of the City of Newark ("School District"), with an address at 765 Broad Street, Newark, New Jersey 07102, and its successors, assigns, officers, employees, agents and representatives ("School District"), and, on the other hand, Merita Muja, residing at 6050 Boulevard East, Apartment #17G, West New York, New Jersey 07093 ("Muja") (collectively, the "Parties").

WHEREAS Muja is a tenured teaching staff member employed by the School District; and

WHEREAS, on or about September 27, 2017, the School District certified a tenure charge of inefficiency against Muja, those charges were assigned Docket No. 230-9/17 by the Commissioner of Education and assigned to Arbitrator Gary Kendellen for a hearing; and a copy of the Notice of Tenure Charge of Inefficiency is attached to this Agreement as Exhibit A; and

WHEREAS the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with litigation; and

WHEREAS the settlement set forth herein is in the best interest of the Parties and the public because it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, the Parties hereby agree as follows:

1. Muja hereby agrees to resign from her tenured position, effective January 8, 2018 ("Effective Date"). Attached as Exhibit B is a copy of Muja's signed letter of resignation. Muja's separation from employment will be deemed a voluntary resignation in good standing. Upon inquiry from any third parties, the School District will only confirm Muja's employment, position, title, salary and dates of employment. If applied for, the School District will not oppose Muja's application for unemployment.

2. This Settlement is intended to be the final resolution of all outstanding matters between the School District and Muja. The School District agrees to withdraw the tenure charge of inefficiency against Muja, and Muja agrees to withdraw with prejudice any and all claims or suits that she may have previously filed against the School District that are still pending in any and all courts and/or before any and all agencies with the exception of workers compensation claims. Should Muja fail to submit letters of withdrawal and/or stipulations of dismissal for any such pending claims or suits, this Settlement Agreement will serve as Muja's formal written notice of withdrawal of those pending claims or suits, except for workers compensation claims.

3. The School District also agrees not to pursue any action against Muja so long as this Settlement Agreement remains in effect and is not voided by any court or administrative agency of competent jurisdiction. However, if the Settlement Agreement is voided, the School District retains the right to pursue any and all appropriate action

against Muja, including reinstatement of the tenure charge of inefficiency and termination of her employment.

4. As of the Effective Date, all of Muja's employment rights, including but not limited to salary, benefits, tenure and seniority, will permanently end, except for any benefits to which she may lawfully be entitled under the Workers' Compensation Act or the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"). Muja will have no right to any additional compensation from the School District under this Agreement or on any other ground.

5. Muja agrees that she will not apply for reemployment with the School District at any time. Specifically, Muja will be considered to have permanently resigned from her tenured position as a result of this Settlement Agreement. If Muja does apply for reemployment with the School District and is approved for employment, the terms of this Settlement Agreement shall control and be grounds for immediate termination of Muja's employment.

6. This Settlement shall not constitute a precedent in any matters involving other employees.

7. Except as noted above, Muja waives all claims of any nature against the School District with regard to her employment with and/or her separation from the School District including fees or other monetary relief, with the exception of workers' compensation claims.

8. By entering into this Settlement Agreement, and in exchange for good consideration as set forth in Paragraph 2 and 3 above, the sufficiency of which is hereby acknowledged, Muja hereby releases and discharges the School District, its Board of Education and its members, the State District Superintendent, and any and all other

School District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") with respect to all claims or rights that she has or may have against the Board of Education of the School District regarding her employment with the School District. This includes without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Muja's employment with the School District and separation from the School District. It specifically includes, without limitation, all claims which Muja may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the Federal False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey

Wages and Hours Law, unemployment compensations laws, disability benefits laws, the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other alleged violation of any federal, state or local law, regulation or ordinance, common law and/or contract or implied contract or collective bargaining/ contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on her employment by and the termination of her employment with the School District, including, but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys fees, costs, and/or future wage loss, except for workers compensation claims and for health insurance continuation coverage under and pursuant to ("COBRA"). Muja agrees to save, hold harmless and indemnify the Released Parties for any legal costs and attorneys fees associated with the enforcement of the terms of this Settlement Agreement should enforcement become necessary.

9. Notwithstanding Paragraph 8 of this Settlement Agreement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the Released Parties, or any of them, based upon any of the above-released claims in Paragraph 8, Muja agrees not to seek or accept any resulting relief whatsoever.

10. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Muja of the legal requirements of that Act, and fully

incorporates the legal requirements by reference into this Settlement Agreement. Accordingly, by executing this Settlement Agreement, Muja acknowledges that she: (i) fully understands the terms and conditions of this Settlement Agreement; (ii) has consulted with an attorney to review the Settlement Agreement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given twenty-one (21) days within which to consider this Settlement Agreement; and (v) has seven (7) days from the date of the execution of this Settlement Agreement to revoke it. Muja understands that she may rescind this Settlement Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the School District either by hand or by certified mail within the seven-day period.

11. The parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, without duress, coercion or pressure from the other party.

12. This Settlement Agreement constitutes the full agreement between the parties, and shall be construed and enforced in accordance with New Jersey law.

13. If any provision or portion of a provision of this Settlement Agreement is held by a court of competent jurisdiction, or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions or remaining portions of a provision will continue and remain in full force and effect.

14. This Settlement Agreement is subject to final approval by the State District Superintendent and will become effective only upon approval of the Superintendent. After February 1, 2018, if not fully executed before that date, this Settlement Agreement shall be subject to final approval by the Newark Board of

Education and will become effective only upon approval by the Board of Education. Any disapproval by the Superintendent or the Board of Education, as applicable, shall not interfere with the rights of either party to pursue the matter further.

WHEREFORE, the Parties and their representatives have set their hand thereto on the dates set forth below.

Dated: 1/11/2018

MERITA MUJA

Dated: 1/11/2018

KATHLEEN NAPRSTEK CERISANO,ESQ.
Attorney for Merita Muja

Dated: 1/17/2018

~~ROBERT GREGORY~~ CHRISTOPHER CERF
~~Interim~~ State District Superintendent

Dated: 1/11/18

BRENDA C. LISS, ESQ.
Attorney for State-operated School District
of the City of Newark

CERTIFICATION

I, MERITA MUJA, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that I have been advised of the Commissioner of Education's duty to refer tenure determinations resulting in a loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: 1/11/2018

Merita Muja
MERITA MUJA

EXHIBIT A

EXHIBIT B

Robert Gregory
Acting Superintendent
Newark Public Schools
765 Broad Street, 3rd Floor
Newark, New Jersey 07102

RE: MERITA MUJA
NOTICE OF RESIGNATION- JANUARY 8, 2018

Dear Acting Superintendent Gregory:

I hereby unconditionally resign from my employment with the Newark Public Schools, effective January 8, 2018.

Dated: 1/11/2018

Merita Muja
MERITA MUJA

21-18

DANIEL F. BRENT
ARBITRATOR
239 SHADY BROOK LANE
PRINCETON, NEW JERSEY 08540

(609) 683-0033
FAX (609) 924-6171
dfbrentarbitrator@gmail.com

January 24, 2018

Kathleen Duncan, Director
Bureau of Controversies and Disputes
State of New Jersey Department of Education
PO Box 500
Trenton, NJ 08625-0500

Re: The Matter of the Tenure Hearing of Dawn Karpinski,
School District of the City of Pleasantville -- Docket No. 288-12/17

Dear Ms. Duncan:

After several discussions with counsel for the parties, including a Preliminary Conference on January 8, 2018, the District formally withdrew its tenure charges against Ms. Karpinski. Mr. Gallagher's letter is attached. The District reserved its prerogative to resubmit amended charges at a later date. The District also agreed that Ms. Karpinski will be paid her full salary and benefits from the date of her suspension until such time as amended charges may be filed.

I have been advised that Ms. Karpinski continued to receive direct salary deposits following her suspension from teaching, and will continue to receive salary and benefits going forward until such time as amended charges may be filed.

Based on these representations, I am declaring the instant proceedings completed. I will return the original file to you. Also attached, please find a bill for my services rendered in connection with this matter.

Both parties expressed a preference that I preside over any amended charges, and advised that they communicated their preference to you. I am willing to serve if appointed.

Thank you for your assistance in this matter.

Cordially,

Daniel F. Brent

cc: Steven Cohen, Esq.
Daniel Gallagher, Esq.

THE CARROLL LAW FIRM PLC

1 N. New York Rd., Suite 39
Galloway, NJ 08205
Phone: (609) 404-3440
Fax: (609)404-3441

James J. Carroll, III (AZ and NJ Bar) CasinoAtty@aol.com
Benjamin B. Brenner (NJ Bar) Ben@CarrollLawFirm.com
Daniel J. Gallagher (NJ Bar) *Of Counsel*
Darryl Rhone (NJ Bar) *Of Counsel*

January 11, 2018

Via Email dfbrentarbitrator@gmail.com

Daniel Brent, Arbitrator
239 Shady Brook Lane
Princeton, New Jersey 08540

Re: In the matter of Dawn Karpinski and the School District for the City of Pleasantville, Atlantic County
Agency Docket No. 288-12/17

Dear Mr. Brent:

We are counsel for the Pleasantville School District (hereinafter "Petitioner"). By letter dated January 8, 2018, the parties in the above referenced matter were notified that the Commissioner's Office had received and certified the tenure charges submitted by Petitioner against Dawn Karpinski (hereinafter "Respondent").

By letter dated December 27, 2017, we received Respondent's Motion to Dismiss the Tenure Charges.

Upon review of Respondent's Motion and Certification attached thereto, Petitioner became aware that, because of revised procedures, certain critical evidence was not included with the statement of evidence and would not be considered in deciding the Motion.

Based upon this serious procedural defect, Petitioner is requesting, pursuant to N.J.A.C. 6A:3-5.6, that the tenure charges against Respondent be withdrawn and the above procedural defect be found sufficient cause under *In re Cardonick*, State Board Decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846).

If Petitioner's request for withdrawal of the charges is granted, it is Petitioner's intention that Respondent's suspension (with pay) from her employment will continue, and Petitioner will resubmit the Tenure Charges to the PBOE and will provide Respondent with proper notice of the date and time of the Board meeting and a chance to provide the Board with a response to the charges.

For the foregoing reasons, it is respectfully requested that the certified Tenure charges against Respondent be withdrawn immediately.

Respectfully submitted,

DANIEL GALLAGHER, ESQ.

DJG:ch
cc: Mr. Steven Cohen, Esquire
James J. Carroll, III
Dr. Clarence Alston
Elisha Thompkins

25-18

AGENCY DKT. NO. 299-12/17

IN THE MATTER OF LEROY MACK,	:	
THE GRAY CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission, finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner on December 28, 2017, pursuant to *N.J.S.A.* 18A:12-29, for the Commissioner's final determination on the recommended penalty. The Commission recommended that the respondent receive a suspension of 30 days for violating the School Ethics Act. If the respondent fails to complete the online training program by the end of the 30 day period, the Commission recommends that the respondent be removed from his position. Respondent did not file exceptions, nor has he submitted proof that he completed the online training program. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

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

this decision, the respondent shall be removed from his position as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/12/18

Date of Mailing: 2/12/18

* 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 LEROY MACK	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
THE GRAY CHARTER SCHOOL, **ESSEX COUNTY**	:	
	:	**DOCKET NO.: T06-17**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on October 31, 2017, and mailed on November 2, 2017, via regular and electronic mail directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on November 2, 2017, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of N.J.S.A.18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of a charter school located in the City of Newark, County of Essex. As a result of his position as a charter school trustee, Respondent is required, pursuant to N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by June 30, 2017.

On September 8, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2017, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More specifically, on August 3, 2017, Respondent was registered to take Governance 1, and an e-mail

with the link to complete the training was sent to Respondent's registered e-mail address. In addition, on September 8, 2017, September 14, 2017, September 21, 2017, September 29, 2017, October 5, 2017, October 12, 2017, and October 19, 2017, additional e-mail notices were sent through the Weekly Program Update to all charter school trustees who had not yet completed training, including Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on August 7, 2017. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in September 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2017. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated October 13, 2017, via regular and electronic mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on November 2, 2017.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2017, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2017, and also failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on November 28, 2017, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **suspension for thirty (30) days**, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education. If Respondent fails to complete training within the period of his thirty (30) day suspension, the Commission recommends that Respondent be **removed from office on the thirty-first (31st) day**.

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

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

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: December 20, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on December 19, 2017.

Kathryn A. Whalen, Director

IN THE MATTER OF LEROY MACK	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***THE GRAY CHARTER SCHOOL,* ESSEX COUNTY**	:	
	:	**DOCKET NO.: T06-17**

WHEREAS, pursuant to N.J.S.A. 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq.; and

WHEREAS, Leroy Mack, Respondent, is a charter school trustee of the Gray Charter School; and

WHEREAS, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete his Governance 1 training program by June 30, 2017; and

WHEREAS, at its meeting on October 31, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2017, as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2017, and also failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed recommending that the Commissioner of Education impose a penalty of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education; and

WHEREAS, if at the conclusion of the thirty (30) day suspension, Respondent still has not completed his mandatory training requirement, the Commission discussed recommending that he be removed from office on the thirty-first (31st) day; and

WHEREAS, at its meeting on December 19, 2017, the Commission voted to approve the within decision as accurately memorializing its findings and recommendations from the meeting on November 28, 2017; and

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

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on December 19, 2017.

Kathryn A. Whalen, Director

26-18SEC

AGENCY DKT. NO. 298-12/17

IN THE MATTER OF GLADWYN BAPTIST,	:	
COMPASSS ACADEMY CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
CUMBERLAND COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act (SEA) for failure to timely complete the Governance 1 training program by June 30, 2017 – in accordance with *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a). The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that as of the date of its decision, respondent had not completed the training as directed. Respondent has neither filed exceptions to the recommended penalty, nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

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

Accordingly, respondent is hereby suspended for 30 days as a school official found to have violated the SEA, effective from the date of this decision. If respondent fails to complete training during the 30-day suspension period, he shall be removed from office on the 31st day.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/12/18
Date of Mailing: 2/12/18

[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).

IN THE MATTER OF GLADWYN BAPTIST	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***COMPASS ACADEMY CHARTER SCHOOL,* CUMBERLAND COUNTY**	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	**DOCKET NO.: T03-17**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on October 31, 2017, and mailed on November 2, 2017, via regular and electronic mail directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on November 2, 2017, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of N.J.S.A.18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of a charter school located in the City of Vineland, County of Cumberland. As a result of his position as a charter school trustee, Respondent is required, pursuant to N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by June 30, 2017.

On September 8, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2017, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More specifically, on August 3, 2017, Respondent was registered to take Governance 1, and an e-mail

with the link to complete the training was sent to Respondent's registered e-mail address. In addition, on September 8, 2017, September 14, 2017, September 21, 2017, September 29, 2017, October 5, 2017, October 12, 2017, and October 19, 2017, additional e-mail notices were sent through the Weekly Program Update to all charter school trustees who had not yet completed training, including Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on August 7, 2017. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in September 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2017. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated October 13, 2017, via regular and electronic mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on November 2, 2017.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2017, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent responded to the Commission's OTSC, indicating that he had tried, on multiple occasions, to complete the training, but was unable to do so because of technical issues. Respondent further indicated that he would "complete [training] as soon" as possible. Ultimately, Respondent failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on November 28, 2017, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **suspension for thirty (30) days**, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education. If Respondent fails to complete training within the period of his thirty (30) day

suspension, the Commission recommends that Respondent be **removed from office on the thirty-first (31st) day**.

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

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

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: December 20, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on December 19, 2017.

Kathryn A. Whalen, Director

IN THE MATTER OF GLADWYN BAPTIST	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***COMPASS ACADEMY CHARTER SCHOOL,* CUMBERLAND COUNTY**	:	
	:	**DOCKET NO.: T03-17**

WHEREAS, pursuant to N.J.S.A. 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq.; and

WHEREAS, Gladwyn Baptist, Respondent, is a charter school trustee of the Compass Academy Charter School; and

WHEREAS, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete his Governance 1 training program by June 30, 2017; and

WHEREAS, at its meeting on October 31, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2017, as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent responded to the Commission's OTSC, and indicated that he would complete training as soon as possible; and

WHEREAS, ultimately, Respondent failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed recommending that the Commissioner of Education impose a penalty of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education; and

WHEREAS, if at the conclusion of the thirty (30) day suspension, Respondent still has not completed his mandatory training requirement, the Commission discussed recommending that he be removed from office on the thirty-first (31st) day; and

WHEREAS, at its meeting on December 19, 2017, the Commission voted to approve the within decision as accurately memorializing its findings and recommendations from the meeting on November 28, 2017; and

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

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on December 19, 2017.

Kathryn A. Whalen, Director

27-18

BOARD OF EDUCATION OF THE TOWNSHIP OF MINE HILL, MORRIS COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Mine Hill Board of Education sought a limited severance of its sending-receiving relationship with the respondent Dover Board of Education in order to educate petitioner's seventh and eighth grade students in the Mine Hill school district. Petitioner proposed a two-year phase out program, beginning with the seventh grade class in the 2017-2018 school year, followed by the eighth grade class in the 2018-2019 school year. The petitioning Board did not seek any change to the sending-receiving relationship for Mine Hill students in the ninth through twelfth grades. The matter was transmitted to the OAL as a contested case.

The ALJ found that: subsequent to the transmittal of the matter to the OAL, the parties proposed a settlement agreement in which the parties agreed that petitioner would educate its seventh and eighth grade students in Mine Hill beginning in the 2018-2019 school year; the parties voluntarily agreed to the settlement; the settlement fully disposed of all issues in the petition, and is consistent with the law. The ALJ concluded that the agreement met the requirements of *N.J.A.C.* 1:1-19.1, and should be approved. Accordingly, the ALJ ordered that the parties comply with the terms of the settlement.

Upon comprehensive review of the record, the Commissioner rejected the Initial Decision, finding that the statutory criteria for adjudicating the termination of sending-receiving relationships are set forth in *N.J.S.A.* 18A:38-13, and the procedural requirements for same are set forth in *N.J.A.C.* 6A:3-6.1. In that the procedural rules governing uncontested applications for severance apply in this case, the Commissioner declined to permit severance at this time, and instead ordered further proceedings in accordance with the procedural rules so that the parties' now-mutual application can be properly assessed under the standard prescribed by law.

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

February 9, 2018

27-18

OAL DKT. NO. EDU 05427-17
AGENCY DKT. NO. 60-3/17

BOARD OF EDUCATION OF THE TOWNSHIP OF MINE HILL, MORRIS COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY,	:	
RESPONDENT.	:	

Petitioner Mine Hill Board of Education filed a petition seeking a limited severance of the sending-receiving relationship with respondent Dover Board of Education so that petitioner's seventh and eighth grade students would be educated in Mine Hill. Petitioner proposed a two-year phase out program beginning with the seventh grade class in the 2017-18 school year, followed by the eighth grade class in the 2018-19 school year. Petitioner did not seek to terminate the parties' sending-receiving relationship for Mine Hill's ninth through twelfth grade classes which would continue to attend school in Dover. After the matter was transmitted to the Office of Administrative Law (OAL) as a contested case, the parties proposed a settlement agreement in which the parties agreed that petitioner would educate its seventh and eighth grade students in Mine Hill beginning in the 2018-19 school year. The Administrative Law Judge (ALJ) recommended approval of the settlement.

The record, proposed settlement agreement, and Initial Decision issued by the OAL, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner notes that the statutory criteria for adjudicating the termination of sending-receiving relationships are enumerated in *N.J.S.A.* 18A:38-13. The party proposing the severance must provide the Commissioner with a thorough feasibility study which addresses the educational and financial implications, the impact on the quality of education, and the effect on the racial composition of the pupil population for each of the districts. *Ibid.* After consideration of the circumstances, the Commissioner must make an equitable determination. *Ibid.*

Also governing any application for severance of a sending-receiving relationship are the procedural requirements in *N.J.A.C.* 6A:3-6.1. Pursuant to *N.J.A.C.* 6A:3-6.1(f), when an application is initially contested, but – either prior to or after transmittal to the OAL – the parties settle and no longer oppose the application for severance, the process set forth for uncontested severance of sending-receiving relationship matters must be followed. Under *N.J.A.C.* 6A:3-6.1(b), the Commissioner must notify the petitioning and respondent boards of education, who – at their next public meetings – "shall announce that the record before the Commissioner shall remain open for a period of 20 days from the date of the announcement in order that interested persons or entities may submit written comments to the Commissioner."[1] *N.J.A.C.* 6A:3-6.1(b) and (c) contain further instructions about the information to be included in the announcements by the respective boards of education, and the nature and purpose of the comments. Certifications indicating the dates and contents of the boards' announcements are required to be filed with the Commissioner within ten days of the publishing of the announcements, pursuant to *N.J.A.C.* 6A:3-6.1(b)(1).

At the end of the 20-day comment period, the boards of education who are parties to the severance application have 20 days to serve responses upon the Commissioner and all other parties. *N.J.A.C.* 6A:3-6.1(d). Thereafter, it is within the Commissioner's discretion to direct further proceedings or make a determination. *N.J.A.C.* 6A:3-6.1(e).

In accordance with the foregoing, the Commissioner rejects the Initial Decision of the OAL. The parties are directed to make the announcements mandated by *N.J.A.C.* 6A:3-6.1(b), and to submit to the Commissioner the certifications required by same.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/9/18
Date of Mailing: 2/9/18

[1] The Commissioner has already received a packet of twelve comments from Mine Hill parents and students.

[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

SETTLEMENT

OAL DKT. NO. EDU 05427-17

AGENCY DKT. NO. 60-3/17

BOARD OF EDUCATION OF THE TOWNSHIP OF MINEHILL, MORRIS COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY,

Respondent.

Marc H. Zitomer, Esq., for petitioner

John E. Croot, Esq., for respondent (Adam, Gutierrez & Lattiboudere, attorneys)

Record Closed: December 21, 2017 Decided: December 26, 2017

BEFORE **JUDE-ANTHONY TISCORNIA,** ALJ:

On April 20, 2017, 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.

12/26/17
DATE

JUDE-ANTHONY TISCORNIA., ALJ

Date Received at Agency: December 27, 2017

Date Mailed to Parties: December 27, 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

SCHENCK PRICE SMITH & KING, LLP
ATTORNEYS AT LAW
~ Founded 1912 ~

Serving Our Clients and Community For Over 100 Years

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December 20, 2017

RECEIVED
2017 DEC 21 P 2:34
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Via Electronic and Federal Express
Hon. Jude-Anthony Tiscornia, ALJ
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: Mine Hill Board of Education v. Dover Board of Education
Agency Ref. No.: 60-3/17
OAL Dkt. No.: EDU 05427-17

Dear Judge Tiscornia:

As you know, this firm represents the Mine Hill Township Board of Education. I am pleased to enclose a fully executed Settlement Agreement in the above-referenced matter which has been approved by the Mine Hill and Dover Boards of Education. Also, attached are resolutions approving the Agreement. We look forward to Your Honor's approval of this settlement and transmittal of this matter to the Commissioner of Education for final approval.

If you have any questions, please do not hesitate to contact us.

Respectfully submitted,

SCHENCK, PRICE, SMITH & KING, LLP

MARC H. ZITOMER

c: Lee Nittel, Supt.
Carolina Rodriquez, Bus. Admin.
John Croot, Esq.

SETTLEMENT AGREEMENT

This Agreement is entered into this 20th day of December 2017 between the Mine Hill Township Board of Education, with administrative offices located at 42 Canfield Avenue, Mine Hill, New Jersey 07803 ("Mine Hill") and the Dover Board of Education, with administrative offices located at 100 Grace Street, Dover, New Jersey 07801 ("Dover").

WHEREAS, on or about March 28, 2017, Mine Hill filed a Petition of Appeal with the Commissioner of Education, captioned I/M/O Application for Approval of the Modification of the Sending/Receiving Relationship Between the Mine Hill and Dover Boards of Education; Morris County, Agency Ref. No. 60-3/17, seeking a limited severance of its send/receive relationship with Dover, such that Mine Hill's seventh and eighth grade pupils would return to Mine Hill to be educated; and

WHEREAS, on April 17, 2017, Dover filed an Answer to Mine Hill's Petition of Appeal, opposing Mine Hill's application; and

WHEREAS, Mine Hill and Dover desire to resolve and settle this matter pursuant to the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and conditions set forth in this Agreement, the Parties agree as follows:

1. Mine Hill will educate its seventh and eighth grade pupils in Mine Hill at the Canfield Avenue School commencing in the 2018-19 school year.

2. If Mine Hill cannot or chooses not to educate its seventh and eighth grade pupils in Mine Hill for any of the next five (5) school years commencing with the 2018-19 school year, Mine Hill and Dover agree that the students will be educated at Dover Middle School.

3. Mine Hill agrees that it will only accept choice students in grades K-6 for the 2018-19 and 2019-20 school years. However, any current choice students attending school in Mine Hill will be permitted to continue their education in Mine Hill through eighth grade.

4. Any current Mine Hill seventh grade students who participate in interscholastic sports at Dover Middle School will be permitted to participate in said sports for the eighth grade at Dover Middle School.

5. For the purposes of this settlement agreement only, both parties agree that the statutory criteria for limited severance of the send/receive relationship at the seventh and eighth grade levels are satisfied.

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6. A committee consisting of three (3) board members each from Mine Hill and Dover shall meet no less than two (2) times per year to evaluate the terms and conditions of the send/receive contract and compile an ongoing list of proposed modifications which will comprise the negotiations process one (1) year prior to the expiration of the send/receive contract.

7. This Agreement is subject to the approval of both Mine Hill and Dover and the signatories to this agreement agree to recommend approval of same to their respective Boards.

8. This Agreement is also subject to formal approval by the New Jersey Commissioner of Education.

9. Once approved by the Commissioner, Mine Hill agrees to withdraw its Petition of Appeal in this matter.

10. Upon approval of the limited severance by the Commissioner, the parties shall immediately commence negotiations for a successor send/receive contract.

By the Dover Board of Education

Robert Becker, Superintendent

Dated: 12/20/2017

By the Mine Hill Board of Education

Lee Nittel, Superintendent

Dated: 12/20/17

EXTRACT FROM THE MINUTES OF A MEETING OF
The Mine Hill Township Board of Education
Mine Hill, New Jersey
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Mine Hill Township School District in the County of Morris, New Jersey convened in Public Session on December 18, 2017, at the Canfield Avenue School, Mine Hill, New Jersey 07803.

The following members of the Board of Education present at the time of this action were:
Katie Bartnick, Karen Bruseo, Pete Bruseo, Jill Del Rio, Bridget Mauro, Dina Mikulka and Brianna O'Brien.

On a motion by Bridget Mauro and seconded by Jill Del Rio, the following resolution was adopted by the Board of Education:

13. FINANCE *Karen Bruseo, Jill Del Rio, Bridget Mauro*

b. This Agreement is entered into this 18th day of December, 2017 between the Mine Hill Township Board of Education, with administrative offices located at 42 Canfield Avenue, Mine Hill, New Jersey 07803 ("Mine Hill") and the Dover Board of Education, with administrative offices located at 100 Grace Street, Dover, New Jersey 07801 ("Dover").

WHEREAS, on or about March 28, 2017, Mine Hill filed a Petition of Appeal with the Commissioner of Education, captioned I/M/O Application for Approval of the Modification of the Sending/Receiving Relationship Between the Mine Hill and Dover Boards of Education; Morris County, Agency Ref. No. 60-3/17, seeking a limited severance of its send/receive relationship with Dover, such that Mine Hill's seventh and eighth grade pupils would return to Mine Hill to be educated; and

WHEREAS, on April 17, 2017, Dover filed an Answer to Mine Hill's Petition of Appeal, opposing Mine Hill's application; and

WHEREAS, Mine Hill and Dover desire to resolve and settle this matter pursuant to the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and conditions set forth in this Agreement, the Parties agree as follows:

1. Mine Hill will educate its seventh and eighth grade pupils in Mine Hill at the Canfield Avenue School commencing in the 2018-19 school year.

2. If Mine Hill cannot or chooses not to educate its seventh and eighth grade pupils in Mine Hill for any of the next five (5) school years commencing with the 2018-19 school year, Mine Hill and Dover agree that the students will be educated at Dover Middle School.

3. Mine Hill agrees that it will only accept choice students in grades K-6 for the 2018-19 and 2019-20 school years. However, any current choice students attending school in Mine Hill will be permitted to continue their education in Mine Hill through eighth grade.

4. Any current Mine Hill seventh grade students who participate in interscholastic sports at Dover Middle School will be permitted to participate in said sports for the eighth grade at Dover Middle School.

5. For the purposes of this settlement agreement only, both parties agree that the statutory criteria for limited severance of the send/receive relationship at the seventh and eighth grade levels are satisfied.

6. A committee consisting of three (3) board members each from Mine Hill and Dover shall meet no less than two (2) times per year to evaluate the terms and conditions of the send/receive contract and compile an ongoing list of proposed modifications which will comprise the negotiations process one (1) year prior to the expiration of the send/receive contract.

7. This Agreement is subject to the approval of both Mine Hill and Dover and the signatories to this agreement agree to recommend approval of same to their respective Boards.

8. This Agreement is also subject to formal approval by the New Jersey Commissioner of Education.

9. Once approved by the Commissioner, Mine Hill agrees to withdraw its Petition of Appeal in this matter.

10. Upon approval of the limited severance by the Commissioner, the parties shall immediately commence negotiations for a successor send/receive contract.

Roll Call Vote - All Present Voting Yes - Motion Carried

STATE OF NEW JERSEY}
COUNTY OF MORRIS}

I, Carolina Rodriguez, Secretary of the Board of Education for the Mine Hill Township School District, in the County of Morris, State of New Jersey, hereby certify that the attached extract from the minutes of the meeting of the Board of Education duly called and held on the date indicated has been compared by me with the original minutes as officially recorded in my office in the Minutes Book of said Mine Hill Township School District; 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 Mine Hill Township School District.

Date: 12/19/17
(Affix Seal)

Carolina Rodriguez, SBA
Board Secretary

DOVER BOARD OF EDUCATION
GRACE STREET
DOVER, NEW JERSEY 07801

CATHERINE M. JENISCH — **BUSINESS ADMINISTRATOR /SECRETARY TO THE BOARD**

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION, OF THE TOWN OF DOVER, COUNTY OF MORRIS NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Town of Dover in the County of Morris, New Jersey was convened in Regular Session, December 19, 2017 at 9:05 PM in the Media Center at Dover High School, Dover, New Jersey.

The following Board members were present:

Mrs. Shauer, Mrs. Laurie, Mr. Miller, Mr. Scarneo, Mrs. Mullin, Ms. Rosario, Ms. Dodd, Mrs. Philips, Ms. Ruiz and Mr. Bruseo

Absent:

None

D. ** On the motion of Mrs. Laurie, seconded by Ms. Dodd, the Board approved and/or adopted the following resolution:

**** Mine Hill representative ineligible to vote on this item**

WHEREAS, on or about March 28, 2017, the Mine Hill Board of Education ("Mine Hill") filed a Petition of Appeal with the Commissioner of Education, captioned I/M/O Application for Approval of the Modification of the Sending/Receiving Relationship Between the Mine Hill and Dover Boards of Education; Morris County, Agency Ref. No. 60-3/17, seeking a limited severance of its send/receive relationship with the Dover Board of Education ("Dover"), such that Mine Hill's seventh and eighth grade pupils would return to Mine Hill to be educated; and

WHEREAS, on April 17, 2017, Dover filed an Answer to Mine Hill's Petition of Appeal, opposing Mine Hill's application; and

WHEREAS, on December 6, 2017, the parties appeared in Court and reached a settlement of this matter subject to the terms of a settlement agreement which is incorporated by reference into the minutes of this meeting, as well as formal Board approval;

NOW, THEREFORE, BE IT RESOLVED, that the Board approves the settlement agreement in the matter captioned above in accordance with the terms and conditions therein; and

BE IT FURTHER RESOLVED, that the Superintendent is authorized to execute the agreement (please refer to pages 8 and 9 to view the settlement agreement) on behalf of the Board.

ROLL CALL VOTE

Yeas:	Mrs. Shauer, Mrs. Laurie, Mr. Miller, Mr. Scarneo, Mrs. Mullin, Ms. Rosario and Ms. Dodd
Nays:	Ms. Ruiz
Abstention:	Mrs. Philips and Mr. Bruseo
Absent:	None

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STATE OF NEW JERSEY)
) ss
COUNTY OF MORRIS)

I, Catherine M. Jenisch, Business Administrator/Secretary of Board of Education, of the Town of Dover, in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the Board of Education of said district has been compared by me with the original minutes as officially recorded in my office in the minute book of the Dover Board of Education and is a true and complete 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 I have hereunto set my hand and affixed the corporate seal of said Board of Education this 20th day of December, 2017.

Catherine M. Jenisch
Business Administrator
/Secretary to the Board of Education

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AGENCY DKT. NO. 303-12/17

IN THE MATTER OF KECIA TELLER,	:	
JOHN P. HOLLAND CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL, PASSAIC COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission), finding that respondent violated the School Ethics Act for failure to timely complete training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed the training after the issuance of the Commission's November 2, 2017 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

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

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

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/12/18

Date of Mailing: 12/12/18

[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)

IN THE MATTER OF KECIA TELLER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***JOHN P. HOLLAND CHARTER SCHOOL,* PASSAIC COUNTY**	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	**DOCKET NO.: T22-17**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on October 31, 2017, and mailed on November 2, 2017, via regular and electronic mail directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on November 2, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of N.J.S.A.18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of a charter school located in the City of Paterson, County of Passaic. As a result of her position as a charter school trustee, Respondent is required, pursuant to N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by June 30, 2017.

On September 8, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2017, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More specifically, on August 3, 2017, Respondent was registered to take Governance 2, and an e-mail

with the link to complete the training was sent to Respondent's registered e-mail address. In addition, on September 8, 2017, September 14, 2017, September 21, 2017, September 29, 2017, October 5, 2017, October 12, 2017, and October 19, 2017, additional e-mail notices were sent through the Weekly Program Update to all charter school trustees who had not yet completed training, including Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on August 7, 2017. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in September 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2017. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated October 13, 2017, via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on November 2, 2017.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2017, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement on November 8, 2017, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2017.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on November 28, 2017, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, 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 Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a

violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

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

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: December 20, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on December 19, 2017.

Kathryn A. Whalen, Director

IN THE MATTER OF KECIA TELLER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***JOHN P. HOLLAND CHARTER SCHOOL,* PASSAIC COUNTY**	:	
	:	**DOCKET NO.: T22-17**

WHEREAS, pursuant to N.J.S.A. 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq.; and

WHEREAS, Kecia Teller, Respondent, is a charter school trustee of the John P. Holland Charter School; and

WHEREAS, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 2 training program by June 30, 2017; and

WHEREAS, at its meeting on October 31, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2017, as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed her training requirement on November 8, 2017, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2017; and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed recommending that the Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on December 19, 2017, the Commission voted to approve the within decision as accurately memorializing its findings and recommendations from the meeting on November 28, 2017; and

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

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on December 19, 2017.

Kathryn A. Whalen, Director

AGENCY DKT. NO. 307-12/17

IN THE MATTER OF SANDY RUBIN,	:	
M.E.T.S. CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
HUDSON COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission), finding that respondent violated the School Ethics Act for failure to timely complete training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed the training after the issuance of the Commission's November 2, 2017 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

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

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

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/12/18

Date of Mailing: 2/12/18

[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)

IN THE MATTER OF SANDY RUBIN	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***M.E.T.S. CHARTER SCHOOL,* HUDSON COUNTY**	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	**DOCKET NO.: T14-17**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on October 31, 2017, and mailed on November 2, 2017, via regular and electronic mail directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on November 2, 2017, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of N.J.S.A.18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of a charter school located in the City of Jersey City, County of Hudson. As a result of his position as a charter school trustee, Respondent is required, pursuant to N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by June 30, 2017.

On September 8, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2017, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More specifically, on August 3, 2017, Respondent was registered to take Governance 2 and an e-mail

with the link to complete the training was sent to Respondent's registered e-mail address. In addition, on September 8, 2017, September 14, 2017, September 21, 2017, September 29, 2017, October 5, 2017, October 12, 2017, and October 19, 2017, additional e-mail notices were sent through the Weekly Program Update to all charter school trustees who had not yet completed training, including Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on August 7, 2017. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in September 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2017. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated October 13, 2017, via regular and electronic mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on November 2, 2017.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2017, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement on November 15, 2017, and also filed a response to the Commission's OTSC, indicating that completion of training was delayed due to "personal family and business related crises." Importantly, Respondent did not deny that he did not complete training in a timely fashion.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on November 28, 2017, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, 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 Commission's recommended penalty. Respondent may either: 1) file

exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

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

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: December 20, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on December 19, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

IN THE MATTER OF SANDY RUBIN	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***M.E.T.S. CHARTER SCHOOL,* HUDSON COUNTY**	:	
	:	**DOCKET NO.: T14-17**

WHEREAS, pursuant to N.J.S.A. 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq.; and

WHEREAS, Sandy Rubin, Respondent, is a charter school trustee of the M.E.T.S. Charter School; and

WHEREAS, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete his Governance 2 training program by June 30, 2017; and

WHEREAS, at its meeting on October 31, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2017, as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed his training requirement on November 15, 2017, and also filed a response to the Commission's OTSC that did not dispute that he did not complete training in a timely fashion; and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed recommending that the Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on December 19, 2017, the Commission voted to approve the within decision as accurately memorializing its findings and recommendations from the meeting on November 28, 2017; and

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

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on December 19, 2017.

Kathryn A. Whalen, Director

30-18
OAL DKT. NO. EDU 05067-17
AGENCY DKT. NO. 52-3/17

SHARON FAGUNDO,	:	
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 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: 2/9/18

Date of Mailing: 2/12/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05067-17
AGY REF NO. 52-3/17

SHARON FAGUNDO,
Petitioners,
vs.
CITY OF ELIZABETH BOARD OF EDUCATION,
UNION COUNTY,
Respondent.

Nicholas Poberezhsky, Esq., for Petitioner (Caruso, Smith, Picini, P.C., attorneys)

Heather Savage-Ford, Esq., for Respondents

Record Closed: December 15, 2017 Decided: December 21, 2017

BEFORE **JOHN P. SCOLLO**, ALJ:

Petitioner seeks reimbursement for sick time improperly charged by the Board.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on April 13, 2017.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached settlement agreement.

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

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

ORDER

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

It is further **ORDERED** that petitioner's appeal is withdrawn with prejudice.

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

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

December 21, 2017

DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: December 27, 2017

Date Mailed to Parties: December 27, 2017

Db

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

HEATHER SAVAGE-FORD, ESQ.
ELIZABETH BOARD OF EDUCATION
LEGAL DEPARTMENT
31 Parker Road
Elizabeth, New Jersey 07208
(908) 436-5000
Attorneys for Respondent, Elizabeth Board of Education.

SHARON FAGUNDO, **Petitioner,** **v.** **BOARD OF EDUCATION OF THE CITY OF ELIZABETH,** **Respondent.**	**STATE OF NEW JERSEY** **COMMISSIONER OF EDUCATION** **Agency Docket No. 52-3/17** **OAL Docket No. EDU 05067-17 N** **SETTLEMENT AGREEMENT**

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

WHEREAS, Petitioner has commenced an administrative proceeding captioned Sharon Fagundo v. Elizabeth Board of Education, which is presently pending before the Office of Administrative Law and docketed as Agency Reference No. 52-3/17, the allegations of which are detailed fully in the Petition of Appeal; 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 promised contained herein, the parties agree as follows:

1. The parties mutually agree that Petitioner is entitled to payment of five (5) sick days

in the total amount of $125.00 ($25.00 per day), for the period from August 27, 2012 through August 31, 2012.

2. 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 workers' compensation accident of July 28, 2012.

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. This release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to Workers' Compensation Claim #2012-25973.

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

9. This settlement is subject to the approval of the Office of Administrative Law and shall not be binding until said approval is received. Upon approval of this Settlement and Release, 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 set forth below.

Date: 12/13/17

NICHOLAS POBEREZHSKY, ESQ.
For the Petitioner, Sharon Fagundo

Date: 12/13/17

HEATHER SAVAGE-FORD, ESQ.
For the Respondent, Elizabeth Board of Education

HEATHER SAVAGE-FORD, ESQ.
ELIZABETH BOARD OF EDUCATION
LEGAL DEPARTMENT
31 Parker Road
Elizabeth, New Jersey 07208
(908) 436-5000
Attorneys for Respondent, Elizabeth Board of Education.

SHARON FAGUNDO, **Petitioner,** **v.** **BOARD OF EDUCATION OF THE CITY OF ELIZABETH,** **Respondent.**	**STATE OF NEW JERSEY** **COMMISSIONER OF EDUCATION** **Agency Docket No. 52-3/17** **OAL Docket No. EDU 05067-17 N** **SETTLEMENT AGREEMENT**

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

WHEREAS, Petitioner has commenced an administrative proceeding captioned Sharon Fagundo v. Elizabeth Board of Education, which is presently pending before the Office of Administrative Law and docketed as Agency Reference No. 52-3/17, the allegations of which are detailed fully in the Petition of Appeal; 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 promised contained herein, the parties agree as follows:

1. The parties mutually agree that Petitioner is entitled to payment of five (5) sick days

in the total amount of $125.00 ($25.00 per day), for the period from August 27, 2012 through August 31, 2012.

2. 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 workers' compensation accident of July 28, 2012.

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. This release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to Workers' Compensation Claim #2012-25973.

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

9. This settlement is subject to the approval of the Office of Administrative Law and shall not be binding until said approval is received. Upon approval of this Settlement and Release, 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 set forth below.

Date: 12/13/17

NICHOLAS POBEREZHSKY, ESQ.
For the Petitioner, Sharon Fagundo

Date: 12/13/17

HEATHER SAVAGE-FORD, ESQ.
For the Respondent, Elizabeth Board of Education

31-18

AGENCY DKT. NO. 306-12/17

IN THE MATTER OF TERRON SIMONS,	:	
INTERNATIONAL ACADEMY OF	:	COMMISSIONER OF EDUCATION
TRENTON CHARTER SCHOOL,	:	DECISION
MERCER COUNTY.	:	
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission), finding that respondent violated the School Ethics Act for failure to timely complete training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed the training after the issuance of the Commission's November 2, 2017 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

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

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

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/12/18
Date of Mailing: 2/12/18

[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)

IN THE MATTER OF TERRON SIMONS	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	
	:	**DECISION FOR FAILURE TO**
INTERNATIONAL ACADEMY OF TRENTON CHARTER SCHOOL, **MERCER COUNTY**	:	**COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	
	:	**DOCKET NO.: T15-17**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on October 31, 2017, and mailed on November 2, 2017, via regular and electronic mail directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on November 2, 2017, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of N.J.S.A.18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of a charter school located in the City of Trenton, County of Mercer. As a result of his position as a charter school trustee, Respondent is required, pursuant to N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by June 30, 2017.

On September 8, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2017, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More specifically, on August 3, 2017, Respondent was registered to take Governance 1, and an e-mail

with the link to complete the training was sent to Respondent's registered e-mail address. In addition, on September 8, 2017, September 14, 2017, September 21, 2017, September 29, 2017, October 5, 2017, October 12, 2017, and October 19, 2017, additional e-mail notices were sent through the Weekly Program Update to all charter school trustees who had not yet completed training, including Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on August 7, 2017. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in September 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2017. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated October 13, 2017, via regular and electronic mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on November 2, 2017.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2017, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement on November 12, 2017, and also filed a response to the Commission's OTSC, indicating that he believed he had already completed training because he attended trainings provided by NJSBA.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on November 28, 2017, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, 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 Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a

violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

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

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: December 20, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on December 19, 2017.

Kathryn A. Whalen, Director

IN THE MATTER OF TERRON SIMONS	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***INTERNATIONAL ACADEMY OF TRENTON CHARTER SCHOOL,* MERCER COUNTY**	:	
	:	**DOCKET NO.: T15-17**

WHEREAS, pursuant to N.J.S.A. 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq.; and

WHEREAS, Terron Simons, Respondent, is a charter school trustee of the International Academy of Trenton Charter School; and

WHEREAS, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete his Governance 1 training program by June 30, 2017; and

WHEREAS, at its meeting on October 31, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2017, as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed his training requirement on November 12, 2017, and also filed a response to the Commission's OTSC; and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed recommending that the Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on December 19, 2017, the Commission voted to approve the within decision as accurately memorializing its findings and recommendations from the meeting on November 28, 2017; and

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

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on December 19, 2017.

Kathryn A. Whalen, Director

72-18

AGENCY DKT. NO. 305-12/17

IN THE MATTER OF AIESHA BETTY,	:	
JOHN P. HOLLAND CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL, PASSAIC COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission), finding that respondent violated the School Ethics Act for failure to timely complete training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed the training after the issuance of the Commission's November 2, 2017 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

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

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

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/12/18

Date of Mailing: 2/12/18

[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)

IN THE MATTER OF AIESHA BETTY	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***JOHN P. HOLLAND CHARTER SCHOOL,* PASSAIC COUNTY**	:	
	:	**DOCKET NO.: T18-17**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on October 31, 2017, and mailed on November 2, 2017, via regular and electronic mail directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on November 2, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of N.J.S.A.18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of a charter school located in the City of Paterson, County of Passaic. As a result of her position as a charter school trustee, Respondent is required, pursuant to N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by June 30, 2017.

On September 8, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2017, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More specifically, on August 3, 2017, Respondent was registered to take Governance 2, and an e-mail

with the link to complete the training was sent to Respondent's registered e-mail address. In addition, on September 8, 2017, September 14, 2017, September 21, 2017, September 29, 2017, October 5, 2017, October 12, 2017, and October 19, 2017, additional e-mail notices were sent through the Weekly Program Update to all charter school trustees who had not yet completed training, including Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on August 7, 2017. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in September 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2017. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated October 13, 2017, via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on November 2, 2017.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2017, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement on November 8, 2017, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2017.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on November 28, 2017, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, 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 Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a

violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

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

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: December 20, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on December 19, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

IN THE MATTER OF AIESHA BETTY	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***JOHN P. HOLLAND CHARTER SCHOOL,* PASSAIC COUNTY**	:	
	:	**DOCKET NO.: T18-17**

WHEREAS, pursuant to N.J.S.A. 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq.; and

WHEREAS, Aiesha Betty, Respondent, is a charter school trustee of the John P. Holland Charter School; and

WHEREAS, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 2 training program by June 30, 2017; and

WHEREAS, at its meeting on October 31, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2017, as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed her training requirement on November 8, 2017, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2017; and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed recommending that the Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on December 19, 2017, the Commission voted to approve the within decision as accurately memorializing its findings and recommendations from the meeting on November 28, 2017; and

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

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on December 19, 2017.

Kathryn A. Whalen, Director

33-18

AGENCY DKT. NO. 297-12/17

IN THE MATTER OF KHAATIM SHERRE EL, :
MARION P. THOMAS CHARTER SCHOOL, : COMMISSIONER OF EDUCATION
ESSEX COUNTY. : DECISION
:

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act (SEA) for failure to timely complete the Governance 1 training program by June 30, 201 – in accordance with *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a). The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that as of the date of its decision, respondent had not completed the training as directed. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

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

Accordingly, respondent is hereby suspended for 30 days as a school official found to have violated the SEA, effective from the date of this decision. If respondent fails to complete training during the 30-day suspension period, he shall be removed from office on the 31st day.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/12/18
Date of Mailing: 2/12/18

[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).

IN THE MATTER OF KHAATIM SHERRE EL	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***MARION P. THOMAS CHARTER SCHOOL,* ESSEX COUNTY**	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	**DOCKET NO.: T12-17**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on October 31, 2017, and mailed on November 2, 2017, via regular and electronic mail directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on November 2, 2017, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of N.J.S.A.18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of a charter school located in the City of Newark, County of Essex. As a result of his position as a charter school trustee, Respondent is required, pursuant to N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by June 30, 2017.

On September 8, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2017, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More specifically, on August 3, 2017, Respondent was registered to take Governance 1, and an e-mail

with the link to complete the training was sent to Respondent's registered e-mail address. In addition, on September 8, 2017, September 14, 2017, September 21, 2017, September 29, 2017, October 5, 2017, October 12, 2017, and October 19, 2017, additional e-mail notices were sent through the Weekly Program Update to all charter school trustees who had not yet completed training, including Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on August 7, 2017. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in September 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2017. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated October 13, 2017, via regular and electronic mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on November 2, 2017.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2017, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2017, and also failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on November 28, 2017, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **suspension for thirty (30) days**, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education. If Respondent fails to complete training within the period of his thirty (30) day suspension, the Commission recommends that Respondent be **removed from office on the thirty-first (31st) day**.

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

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

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: December 20, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on December 19, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

IN THE MATTER OF KHAATIM SHERRE EL	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
MARION P. THOMAS CHARTER SCHOOL, **ESSEX COUNTY**	:	
	:	**DOCKET NO.: T12-17**

WHEREAS, pursuant to N.J.S.A. 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq.; and

WHEREAS, Khaatim Sherre El, Respondent, is a charter school trustee of the Marion P. Thomas Charter School; and

WHEREAS, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete his Governance 1 training program by June 30, 2017; and

WHEREAS, at its meeting on October 31, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2017, as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2017, and also failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed recommending that the Commissioner of Education impose a penalty of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education; and

WHEREAS, if at the conclusion of the thirty (30) day suspension, Respondent still has not completed his mandatory training requirement, the Commission discussed recommending that he be removed from office on the thirty-first (31st) day; and

WHEREAS, at its meeting on December 19, 2017, the Commission voted to approve the within decision as accurately memorializing its findings and recommendations from the meeting on November 28, 2017; and

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

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted
by the School Ethics Commission at its public meeting
on December 19, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

34-18L

74-18

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Acting Commissioner

February 9, 2018

C[redacted] F[redacted]
[redacted]
Colts Neck, New Jersey 07722

Marc H. Zitomer, Esq.
Schenck, Price, Smith & King, LLP
220 Park Avenue
PO Box 991
Florham Park, New Jersey 07932

Re: *Board of Education of the Township of Marlboro, Monmouth County v. C.F., on behalf of minor children, I.F. and S.F., Agency Dkt. No. 246-10/17.*

Dear Parties:

Upon review of the Petition of Appeal (Petition) 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 petitioner.

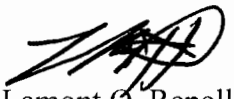
On October 23, 2017, petitioner filed a Petition pursuant to *N.J.A.C.* 6A:3-8.1 claiming that minor children I.F. and S.F. were not entitled to attend school in the District for the 2016-17 school year in accordance with *N.J.S.A.* 18A:38-1. A copy of the Petition was served upon C.F. on October 20, 2017. On October 24, 2017, an acknowledgment of filing was sent to the respondent that included a notice stating that an Answer to the Petition was due within 20 days. *N.J.A.C.* 6A:3-1.5.

C.F. failed to respond to the initial notice; therefore, on November 17, 2017, a second notice was sent to C.F. – via certified and regular mail – clearly indicating that, absent receipt of an Answer to the Petition 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 certified mail return receipt card indicates that the November 17, 2017 notice was delivered. C.F. again failed to respond, and on December 4, 2017 a third notice was sent to C.F. – via certified and regular mail – clearly indicating that, absent receipt of an Answer to the Petition 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 certified mail return receipt card indicates that the December 4, 2017 notice was delivered.

To date, no Answer has been filed on behalf of C.F. Accordingly, petitioner's claim that I.F. and S.F. were not entitled to attend school in the District in accordance with *N.J.S.A.* 18A:38-1 is deemed admitted. It is hereby ordered that C.F. reimburse the petitioner $26,916.00 in tuition costs for I.F. and S.F.'s ineligible attendance in the District during the 2016-2017 school year.[1]

Sincerely,



Lamont O. Repollet, Ed.D
Acting Commissioner

c: County Superintendent
State Law Library

EOR/SLP/JKH

[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).

35-18

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

SYNOPSIS

Petitioner alleged that he was suspended without pay from his tenured position as a custodian with respondent's school district, in violation of his tenure rights, after the Board became aware that criminal charges had been filed against him. The criminal charges were unrelated to his employment, and petitioner was not afforded a hearing before the Board. The criminal charges against petitioner were subsequently dismissed with prejudice, and petitioner pled guilty to a petty disorderly persons offense, which is not considered a crime in the State of New Jersey, and is not one of the offenses enumerated as disqualifying in *N.J.S.A.* 18A:6-7.1. Petitioner was not indicted for a criminal offense, and no tenure charges were filed against him. Petitioner filed a motion for summary decision.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:17-3, a tenured custodial employee shall not be dismissed, suspended or reduced in compensation except as a result of the reduction in the number of janitors or for neglect, misbehavior or other offense, and only in accordance with proper statutory procedures; tenured custodial employees may be suspended without pay in only two situations: 1) upon the return of an indictment, *N.J.S.A.* 18A:6-8.3, or 2) upon certification of any charge to the Commissioner; in this case, the petitioner was not indicted and no tenure charges were filed against him; under these circumstances, petitioner should have been suspended with pay; further, petitioner should not have been suspended because he is a tenured employee, and none of the exceptions in *N.J.S.A.* 18A:17-3 apply here. Accordingly, the ALJ concluded that petitioner should be reinstated to respondent's payroll and reimbursed for all salary payments withheld from him for the period from January 17, 2017 to date.

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. Petitioner's motion for summary decision was granted, and respondent was directed to reinstate petitioner to the Board's payroll immediately and to reimburse him for back pay and benefits.

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 2/12/18

OAL DKT. NO. EDU 6936-17
AGENCY DKT. NO. 71-4/17

MARVIN PAGAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, 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 a comprehensive review of the record in this matter, the Commissioner concurs with the Administrative Law Judge – for the reasons thoroughly set forth in the Initial Decision – that the petitioner is entitled to summary decision. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner's motion for summary decision is hereby granted; respondent is directed to reinstate petitioner to respondent's payroll immediately and to reimburse petitioner for back pay and benefits.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/12/18
Date of Mailing: 2/12/18

[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 06936-17
AGENCY DKT. NO. 71-4/17

MARVIN PAGAN,

Petitioner,

v.

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

Respondent.

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

Heather Savage-Ford, Deputy Counsel, for respondent

Record Closed: January 2, 2018 Decided: January 2, 2018

BEFORE **RICHARD McGILL**, ALJ:

Marvin Pagan ("petitioner") filed a petition with the Commissioner of Education alleging that the Board of Education of the City of Elizabeth ("respondent") suspended him without pay in violation of his tenure rights. Petitioner now moves for summary decision.

PROCEDURAL HISTORY

Petitioner filed his petition on April 7, 2017, invoking the authority of the Commissioner of Education to hear and determine controversies under the school laws pursuant to N.J.S.A. 18A:6-9. After the matter was transmitted to the Office of Administrative Law on May 16, 2017, for determination as a contested case, respondent filed an answer on May 18, 2017.

On August 3, 2017, petitioner filed a motion for summary decision. Attached thereto was a certificate of service, which stated that a copy of the motion for summary decision was sent to respondent by facsimile and regular mail. No response to the motion was received from respondent.

MOTION FOR SUMMARY DECISION

A. Legal Standard

A motion for summary decision should be granted where there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). The same standard is applied in the courts of this State pursuant to R. 4:46-2. Summary judgment "is designed to provide a prompt, businesslike and inexpensive method" to dispose of actions which do not present any genuine issue of material fact. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). Although the pleadings may raise a factual issue, summary judgment procedure pierces the allegations in the pleadings, where the other papers show the absence of any genuine issue of material fact. Ibid. Excessive caution which would undercut the purposes of a motion for summary judgment should be avoided. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 65 (1980).

In determining whether there exists a genuine issue as to a material fact, the judge must "consider whether the competent evidential materials presented, when

viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of America, 142 N.J., 520, 523 (1995).

B. Facts

Petitioner relies on the factual allegations in the petition which includes a sworn statement that the facts are true. Respondent's answer denies some of the facts set forth in the petition, but there are no evidential materials challenging petitioner's factual assertions. Under the circumstances, there is no genuine issue as to any material fact set forth in the petition.

The facts in this matter are as follows. Petitioner has been employed by respondent as a custodian for approximately six years. Petitioner earned tenure as a custodian in accordance with the terms of the controlling Collective Bargaining Agreement ("CBA") between respondent and the Elizabeth Education Association. The applicable provision of the CBA states as follows: "Effective July 1, 1998, employees who achieve three (3) consecutive years of employment shall be appointed for a unfixed term and shall acquire tenure in accordance with N.J.S.A. 18A:17-3."

On or about January 19, 2017, petitioner was suspended without pay, after respondent became aware that criminal charges were filed against him. Those charges were unrelated to petitioner's employment. Respondent did not conduct an independent investigation into the alleged incident(s), and petitioner was not afforded a hearing before respondent.

On or about February 14, 2017, the criminal charges against appellant were dismissed with prejudice. Petitioner pled guilty to a petty disorderly persons offense, which is not considered a crime in the State of New Jersey and is not one of the

offenses enumerated in N.J.S.A. 18A:6-7.1. Petitioner was not indicted for a criminal offense, and no tenure charges were ever filed against him.

C. Law and Analysis

A tenured janitorial employee shall not be dismissed, suspended or reduced in compensation except as a result of the reduction in the number of janitors or for neglect, misbehavior or other offense and only in accordance with proper statutory procedures. N.J.S.A. 18A:17-3. An employee may be suspended without pay in only two situations. First, an employee may be suspended without pay upon the return of an indictment. N.J.S.A. 18A:6-8.3. Second, upon certification of any charge to the Commissioner, an employee may be suspended with or without pay; however, if the suspension is without pay and a determination is not made within 120 days, then full salary shall be paid beginning on the 121st day until a determination is made. N.J.S.A. 18:A:6-14. In all other circumstances, a suspension must be with pay. Slater v. Bd. of Educ. of Ramapo-Indian Hills Reg'l High Sch. Dist., 237 N.J. Super. 424, 426 (App. Div. 1989).

Here, petitioner was not indicted and no tenure charges were filed against him. Under the circumstances, any suspension should have been with pay. Further, petitioner should not have been suspended due to the fact that he is a tenured employee and none of the exceptions in N.J.S.A. 18A:17-3 are applicable to this case. Therefore, I **CONCLUDE** that petitioner should be reinstated to respondent's payroll and that petitioner should be reimbursed for all salary payments already withheld from him to date.

Accordingly, it is **ORDERED** that:

1. Petitioner's motion for summary decision be granted.
2. Petitioner be restored to respondent's payroll immediately.

3. Petitioner be reimbursed for all salary payments withheld from him from January 17, 2017, to date.

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

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

Jan. 2, 2018
DATE

Richard McGill
RICHARD McGILL, ALJ

Date Received at Agency: Jan. 2, 2018

Date Mailed to Parties: JAN 4 2018

ljb

Director and
Chief Administrative Law Judge

36-18SEC
AGENCY DKT. NO. 300-12/17

IN THE MATTER OF DANA MURRAY,	:	
ROSEVILLE COMMUNITY CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL, ESSEX COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission, finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner on December 28, 2017, pursuant to *N.J.S.A.* 18A:12-29, for the Commissioner's final determination on the recommended penalty. The Commission recommended that the respondent receive a suspension of 30 days for violating the School Ethics Act. If the respondent fails to complete the online training program by the end of the 30 day period, the Commission recommends that the respondent be removed from her position. Respondent did not file exceptions, nor has she submitted proof that she completed the online training program. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

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

this decision, the respondent shall be removed from her position as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/12/18

Date of Mailing: 2/12/18

* 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 DANA MURRAY	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***ROSEVILLE COMMUNITY CHARTER SCHOOL,* ESSEX COUNTY**	:	
	:	**DOCKET NO.: T08-17**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on October 31, 2017, and mailed on November 2, 2017, via regular and electronic mail directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on November 2, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of N.J.S.A.18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of a charter school located in the City of Newark, County of Essex. As a result of her position as a charter school trustee, Respondent is required, pursuant to N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by June 30, 2017.

On September 8, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2017, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More specifically, on August 3, 2017, Respondent was registered to take Governance 1, and an e-mail

with the link to complete the training was sent to Respondent's registered e-mail address. In addition, on September 8, 2017, September 14, 2017, September 21, 2017, September 29, 2017, October 5, 2017, October 12, 2017, and October 19, 2017, additional e-mail notices were sent through the Weekly Program Update to all charter school trustees who had not yet completed training, including Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on August 7, 2017. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in September 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2017. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated October 13, 2017, via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on November 2, 2017.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2017, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2017, and also failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on November 28, 2017, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **suspension for thirty (30) days**, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education. If Respondent fails to complete training within the period of her thirty (30) day suspension, the Commission recommends that Respondent be **removed from office on the thirty-first (31st) day**.

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

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

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: December 20, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on December 19, 2017.

Kathryn A. Whalen, Director

IN THE MATTER OF DANA MURRAY	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***ROSEVILLE COMMUNITY CHARTER SCHOOL,* ESSEX COUNTY**	:	
	:	**DOCKET NO.: T08-17**

WHEREAS, pursuant to N.J.S.A. 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq.; and

WHEREAS, Dana Murray, Respondent, is a charter school trustee of the Roseville Community Charter School; and

WHEREAS, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 1 training program by June 30, 2017; and

WHEREAS, at its meeting on October 31, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2017, as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2017, and also failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed recommending that the Commissioner of Education impose a penalty of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education; and

WHEREAS, if at the conclusion of the thirty (30) day suspension, Respondent still has not completed her mandatory training requirement, the Commission discussed recommending that she be removed from office on the thirty-first (31st) day; and

WHEREAS, at its meeting on December 19, 2017, the Commission voted to approve the within decision as accurately memorializing its findings and recommendations from the meeting on November 28, 2017; and

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

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on December 19, 2017.

Kathryn A. Whalen, Director

37-18

AGENCY DKT. NO. 304-12/17

IN THE MATTER OF PUNTA MEGHANI,	:	
CLASSIC ACADEMY CHARTER SCHOOL	:	COMMISSIONER OF EDUCATION
OF CLIFTON, PASSAIC COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission), finding that respondent violated the School Ethics Act for failure to timely complete training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed the training after the issuance of the Commission's November 2, 2017 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

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

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

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/12/18

Date of Mailing: 2/13/18

[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)

IN THE MATTER OF PUNITA MEGHANI	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***CLASSICAL ACADEMY CHARTER SCHOOL OF CLIFTON*, PASSAIC COUNTY**	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	**DOCKET NO.: T20-17**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on October 31, 2017, and mailed on November 2, 2017, via regular and electronic mail directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on November 2, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of N.J.S.A.18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of a charter school located in the City of Clifton, County of Passaic. As a result of her position as a charter school trustee, Respondent is required, pursuant to N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by June 30, 2017.

On September 8, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2017, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More specifically, on August 3, 2017, Respondent was registered to take Governance 1, and an e-mail

with the link to complete the training was sent to Respondent's registered e-mail address. In addition, on September 8, 2017, September 14, 2017, September 21, 2017, September 29, 2017, October 5, 2017, October 12, 2017, and October 19, 2017, additional e-mail notices were sent through the Weekly Program Update to all charter school trustees who had not yet completed training, including Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on August 7, 2017. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in September 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2017. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated October 13, 2017, via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on November 2, 2017.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2017, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement on November 20, 2017, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2017.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on November 28, 2017, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, 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 Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a

violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

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

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: December 20, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on December 19, 2017.

Kathryn A. Whalen, Director

IN THE MATTER OF PUNITA MEGHANI	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***CLASSICAL ACADEMY CHARTER SCHOOL OF CLIFTON*, PASSAIC COUNTY**	:	
	:	
	:	**DOCKET NO.: T20-17**

WHEREAS, pursuant to N.J.S.A. 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq.; and

WHEREAS, Punita Meghani, Respondent, is a charter school trustee of the Classical Academy Charter School of Clifton; and

WHEREAS, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 1 training program by June 30, 2017; and

WHEREAS, at its meeting on October 31, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2017, as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed her training requirement on November 20, 2017, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2017; and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed recommending that the Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on December 19, 2017, the Commission voted to approve the within decision as accurately memorializing its findings and recommendations from the meeting on November 28, 2017; and

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

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on December 19, 2017.

Kathryn A. Whalen, Director

41-18

AGENCY DKT. NO. 302-12/17

IN THE MATTER OF VINCENT ROUSE,	:	
MARION P. THOMAS CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission, finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner on December 28, 2017, pursuant to *N.J.S.A.* 18A:12-29, for the Commissioner's final determination on the recommended penalty. The Commission recommended that the respondent receive a suspension of 30 days for violating the School Ethics Act. If the respondent fails to complete the online training program by the end of the 30 day period, the Commission recommends that the respondent be removed from his position. Respondent did not file exceptions, nor has he submitted proof that he completed the online training program. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

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

this decision, the respondent shall be removed from his position as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/12/18

Date of Mailing: 2/13/18

* 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 VINCENT ROUSE	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	
	:	**DECISION FOR FAILURE TO**
MARION P. THOMAS CHARTER SCHOOL,	:	**COMPLETE MANDATORY**
ESSEX COUNTY	:	**TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	
	:	**DOCKET NO.: T11-17**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on October 31, 2017, and mailed on November 2, 2017, via regular and electronic mail directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on November 2, 2017, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of N.J.S.A.18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of a charter school located in the City of Newark, County of Essex. As a result of his position as a charter school trustee, Respondent is required, pursuant to N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by June 30, 2017.

On September 8, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2017, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More specifically, on August 3, 2017, Respondent was registered to take Governance 1, and an e-mail

with the link to complete the training was sent to Respondent's registered e-mail address. In addition, on September 8, 2017, September 14, 2017, September 21, 2017, September 29, 2017, October 5, 2017, October 12, 2017, and October 19, 2017, additional e-mail notices were sent through the Weekly Program Update to all charter school trustees who had not yet completed training, including Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on August 7, 2017. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in September 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2017. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated October 13, 2017, via regular and electronic mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on November 2, 2017.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2017, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2017, and also failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on November 28, 2017, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **suspension for thirty (30) days**, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education. If Respondent fails to complete training within the period of his thirty (30) day suspension, the Commission recommends that Respondent be **removed from office on the thirty-first (31st) day**.

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

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

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: December 20, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on December 19, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

IN THE MATTER OF VINCENT ROUSE	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***MARION P. THOMAS CHARTER SCHOOL,* ESSEX COUNTY**	:	
	:	**DOCKET NO.: T11-17**

WHEREAS, pursuant to N.J.S.A. 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq.; and

WHEREAS, Vincent Rouse, Respondent, is a charter school trustee of the Marion P. Thomas Charter School; and

WHEREAS, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete his Governance 1 training program by June 30, 2017; and

WHEREAS, at its meeting on October 31, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2017, as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2017, and also failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed recommending that the Commissioner of Education impose a penalty of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education; and

WHEREAS, if at the conclusion of the thirty (30) day suspension, Respondent still has not completed his mandatory training requirement, the Commission discussed recommending that he be removed from office on the thirty-first (31st) day; and

WHEREAS, at its meeting on December 19, 2017, the Commission voted to approve the within decision as accurately memorializing its findings and recommendations from the meeting on November 28, 2017; and

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

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted
by the School Ethics Commission at its public meeting
on December 19, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

42-18

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges

BERNARDS TOWNSHIP SCHOOL DISTRICT, BOARD OF EDUCATION, SOMERSET COUNTY

Petitioner,

-and-

BRENDA BRUNI,

Respondent.

AGENCY DOCKET NO.: 207-9/17

OPINION AND AWARD

BEFORE: RUTH MOSCOVITCH, Arbitrator

Appearances:

For the Petitioner:

John Croot, Esq.
Adams Gutierrez & Lattiboudere, LLC
1037 Raymond Blvd., Suite 900
Newark, NJ 07102

For the Respondent:

Edward A. Cridge, Esq.
Melik O'Neill
51 East Broad Street
Hopewell, New Jersey 08525

This matter comes before me on tenure charges brought under N.J.S.A. **18A:6-10, 6-11, 6-16, 6-17.1, 6-17.2 AND N.J.A.C. 6A:3-5.1** by Petitioner Bernards Township School District, Board of Education, Somerset County (the "District) against Respondent Brenda Bruni. The tenure charges at issue here were certified to the Bureau of Controversies and Disputes by the District on August 28, 2017. I was appointed the arbitrator to adjudicate this matter on October 2, 2017.

In this proceeding, I heard testimony from 5 witnesses over 2 days at the offices of the District in Basking Ridge, New Jersey. Both sides were represented by counsel

and were afforded the opportunity to call witnesses, present evidence and to cross-examine witnesses offered by the opposing party.

The District presented the testimony of Superintendent Nick Markarian and three Raritan Township police officers: Ismael Mendez, Anthony Moreno, and Ryan Garbolino. The District placed 19 exhibits into evidence, consisting of 18 documents and two video recordings. Respondent testified in her own behalf and placed 28 exhibits in evidence. All witnesses were sworn and their testimony was recorded by a court reporter.[1] The parties submitted post-hearing briefs on January 10, 2018. No objection has been made to the fairness of this proceeding.

TENURE CHARGES

FACTS COMMON TO ALL CHARGES

1. The charges stated herein are based upon my personal knowledge, on information and belief derived from personnel records and other records maintained by the District, including but not limited to those set forth in the accompanying Statement of Evidence, and other information imparted to me by and from other staff members.

2. At all times relevant, Bruni has been employed by the District as an Italian teacher at the William Annin Middle School and Ridge High School.

3. On March 22, 2017 at approximately 5:49 p.m., Bruni was operating a motor vehicle on Hillsborough Road in Raritan Township when she was stopped for speeding by the Raritan Township Police Department.

4. At the time of the stop, Bruni was unable to produce the vehicle registration or proof of insurance.

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[1] The transcripts will be referred to as T1 for the November 20, 2017 proceedings and T2 for the November 30, 2017 proceedings.

5. The police officer noted that Bruni was very agitated throughout the motor vehicle stop. He observed her moving about within the vehicle and "fumbling though [sic] something" within the vehicle.

6. Bruni told the officer that she needed to get home to check on her mother-in-law and that she had left meatballs in the oven and the timer was about to go off. She threatened to leave the scene.

7. The officer advised Bruni that she was not free to leave the scene. He also called for backup,

8. At about 6:02 p.m., shortly after the backup offer [sic] arrived, Bruni sped off in her vehicle in direct contradiction of the police officer's instructions.

9. The two police officers then began a pursuit of Bruni in their respective vehicles, activating their emergency lights and sirens.

10. Bruni did not stop her vehicle and proceeded down Hillsborough Road, which eventually became Three Bridge Road, for half a mile with the officers in pursuit, reaching speeds well in excess of the posted speed limit.

11. Eventually, one of the officers was able to maneuver his car to head her off and force her to stop.

12. Even after exiting the vehicle, Bruni was slow to respond to the commands of the officers who had their guns drawn.

13. Bruni was handcuffed and placed in the rear of a patrol car. In the meantime, one of the officers smelled an odor of marijuana emanating from the inside of her vehicle. A further search revealed a metal "one hitter" pipe that resembled a white cigarette. Bruni admitted taking the pipe and putting it in her purse, although she denied smoking in the vehicle.

14. The officers spoke with Bruni's mother in law and confirmed that she was not in need

of medical attention or experiencing a medical emergency that would require Bruni to need to rush home.

15. Bruni was arrested, fingerprinted and processed at police headquarters. She was charged with the following criminal offenses arising out of the incident: eluding -3rd degree crime, possession of marijuana under 50 grams - disorderly persons offense, possession of drug paraphernalia - disorderly persons offense. She was also charged with the following motor vehicle offenses: careless driving, CDS in motor vehicle, failure to maintain lane, failure to exhibit documents, failure to signal turns and maintenance of lamps.

16. Details of Bruni's arrest subsequently appeared online and in the press and the school community, including students, became aware of her conduct.

CHARGE ONE

1. The Board repeats the allegations set forth above and incorporates them herein by reference.

2. Bruni fled the scene and attempted to elude a police officer despite having been specifically instructed by the officer that she was not permitted to do so.

The foregoing conduct by Bruni constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal.

CHARGE TWO

3. The Board repeats the allegations set forth above and incorporates them herein by reference.

4. Bruni violated N.J.S.A. 2C:29-2b by knowingly fleeing and attempting to elude a police officer.

The foregoing conduct by Bruni constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal.

CHARGE THREE

1. The Board repeats the allegations set forth above and incorporates them herein by reference.

2. Bruni was knowingly in possession of drug paraphernalia, namely a metal "one hitter" pipe that resembled a white cigarette.

The foregoing conduct by Bruni constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal.

CHARGE FOUR

1. The Board repeats the allegations set forth above and incorporates them herein by reference.

2. Bruni violated N.J.S.A. 2C:36-2 by knowingly possessing drug paraphernalia.

The foregoing conduct by Bruni constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal.

CHARGE FIVE

1. The Board repeats the allegations set forth above and incorporates them herein by reference.

2. Bruni's inappropriate and unprofessional conduct violated Board Policy 3210 in that she failed to treat all others with dignity, courtesy and respect and/or failed to conduct and present herself in a manner that would create a positive impression of the school district.

The foregoing conduct by Bruni constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal.

CHARGE SIX

1. The Board repeats the allegations set forth above and incorporates them herein by reference.

2. Bruni's conduct violated Board Policy and Regulation 3230 in that she engaged in conduct that, if given publicly, would tend to have an adverse effect upon pupils or the school community.

The foregoing conduct by Bruni constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal.

CHARGE SEVEN

1. The Board repeats the allegations set forth above and incorporates them herein by reference.

2. Bruni's conduct violated Board Policy and Regulation 3281 in that she engaged in inappropriate conduct and conduct unbecoming a staff member.

The foregoing conduct by Bruni constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal.

CHARGE EIGHT

1. The Board repeats the allegations set forth above and incorporates them herein by reference.

2. Bruni failed to exercise the level of behavior which is required and mandated for a teaching staff member entrusted with the care and custody of children.

3. Bruni's actions put the police officers and members of the public at risk of

harm.

4. Bruni acted carelessly and recklessly.

5. Bruni violated the public trust

6. Bruni's actions demonstrate that she is no longer fit to serve as a teaching staff member or a role model for her pupils.

7. Bruni's actions were sufficiently flagrant and egregious to warrant the termination of her employment.

The foregoing conduct by Bruni constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal.

CHARGE NINE

1. The Board repeats the allegations set forth above and incorporates them herein by reference.

2. All of the foregoing Charges and the Facts Common to All Charges, jointly and severally, demonstrate a series of infractions on March 22, 2017 constituting unbecoming conduct and/or other just cause warranting her dismissal from employment.

The foregoing conduct by Bruni constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal.

CHARGE TEN

1. The Board repeats the allegations set forth above and incorporates them herein by reference.

The foregoing conduct by Bruni constitutes other just cause sufficient to warrant her dismissal from employment.

ISSUE PRESENTED

The Parties agreed upon the following statement of the issue:

> Whether the Board has demonstrated by a preponderance of the credible evidence that the Respondent has engaged in conduct unbecoming a teaching staff member. If so, what shall be the penalty? If not what be the remedy?

FACTUAL BACKGROUND

The Respondent. Respondent is a tenured teacher of Italian to both middle and high school students in the District. She has been so employed for the past 15 years. (T2 at 78) She holds a Masters degree in Italian and a teaching certificate for grades K-12. (T2 at 77) She has no disciplinary history. (T2 at 32)

The District's witness, Superintendent Markarian, testified that there is no issue about the quality of her teaching or any other aspect of her professional performance. (T2 at 31-2, 50) His testimony is supported by documentary evidence of commendations for her teaching ability over many years, including Annual Evaluations from April 2005 through August 2014, and classroom observations from October 2004 through October 13, 2011. (R. Ex. 1-21) The Evaluations contain such praise as:

- "demonstrated excellent rapport with her students" (R. 1);
- "inspires the students' interest and desire to learn" (R. 2);
- "Her lessons were consistently well planned and executed" (R. 3);
- "flexibility and collaboration with colleagues make her an asset to the program" (R. 4);
- "contributes to the school community" by participating in school-wide activities (R 7); and
- motivates "students with her upbeat personality and friendly nature" (R. 8).

Also in the record is a lengthy letter to the District from one of her students, urging that Respondent be retained and praising her as an "exceptional teacher" who has "changed my attitude toward learning tremendously." (R. 24) The student's mother wrote a separate letter to the District, urging it to consider Respondent's "long, stellar record" and retain a teacher who "is one of those 'once in a lifetime teachers.'" (R. 25)

The Incident. The incident giving rise to the present charges occurred on March 22, 2017. That day, Respondent was alone with her mother-in-law at their home after the end of the school day. Her husband had taken their boys to baseball practice.

Respondent lives with her husband and children in a home in Hillsborough, New Jersey. Her husband's mother moved in with them in the fall of 2016 after losing her husband. (T2 at 80-2) The mother-in-law suffers from Parkinson's (T2. at 81) and has exhibited symptoms of weakness, confusion, and some dementia (R. 22). She also has fallen down and had accidents. (T. 22, T2 at 91-2) Respondent's husband is a self-employed contractor in the landscaping business, who uses his truck to transport workers on jobs. At that time of the year, in March, he had few jobs and generally was home with his mother (T2 at 116), although he would leave her alone for short periods of time in the mornings to run errands while she napped. (T2 at 115)

On the afternoon of March 22, the mother-in-law had been disoriented after a nap, but when Respondent got home from work and played music for her and put on the television, she was "okay." (T2 at 97) Respondent used her own cell phone to play the music. (T2 at 98–99) Respondent was cooking meatballs for her mother-in-law, and had the dish in the oven with a timer on. (T2 at 97) Realizing that she needed to go to a store to buy canned tomatoes, Respondent got in her husband's truck and drove to a nearby supermarket. She felt it was safe to leave her mother-in-law alone for that brief

period of time: she did not expect to be gone more than 25 minutes, thinking she would return before the timer was due to go off. (T2 at 99-100) Respondent left her phone at home so that her mother-in-law could continue to listen to music. (T2 at 101)

On the way back from the supermarket, Respondent was observed speeding and was pulled over by officer Ismael Mendez of the Raritan Township police force. (T1 at 28) Officer Mendez approached the car to ask Respondent for her car registration, insurance and drivers' license; Respondent provided her drivers' license. Almost immediately, Respondent told the officer "My mother-in-law is home alone, she has Parkinson's and she has hallucinations." (T1 at 34, 105) Respondent was worried that the oven timer going off might disorient her mother-in-law or cause her to panic. (T2 at 100)

Officer Mendez returned to his squad car to write Respondent a ticket. (T1 at 32) While doing so, he observed Respondent moving from the drivers' side of her vehicle to the passenger side and returned to ask her if she was okay. (T1 at 34) Respondent asked if the officer could follow her home so that she could check on her mother-in-law, and issue the summons there. Officer Mendez denied that request and called for backup. (T1 at 34)

As Officer Mendez was in his car checking Respondent's record, he was joined by another Raritan Township police officer, Anthony Moreno, who drove up in a separate vehicle. Officer Moreno got out of his car, approached Officer Mendez's vehicle on the passenger side, and asked what was going on. As he did so, Respondent drove off in her vehicle. (T1 at 37-8, 118)

The two officers got into their respective vehicles and pursued her with their lights and sirens on. At times their driving exceeded 50 mph. (T1 at 38-40) Their

pursuit lasted no more than a mile and a half, perhaps 2-3 minutes (T1 at 38; 118-9); then Officer Moreno pulled in front of Respondent's vehicle and she stopped. At the time she stopped, she was across the street from her home. (T1 at 42) The officers drew their guns and ordered Respondent to get out of her car and kneel on the ground, with her hands up. She complied (T1 at 44-45, 121-22), but immediately started talking about her mother-in-law, wanting to check on her inside the house. (T1 at 122) The videos confirm that Respondent spoke to the officers several times about her concern for her mother-in-law, including while she was handcuffed in the back of the squad car, and repeatedly asked them to check on her well-being, explaining that the oven was on and a timer would go off. The officers did not tell Respondent they would check on her mother-in-law and made no effort to do so, having decided for themselves that the situation was not an emergency. (T1 at 59-60).

Meanwhile, the officers searched Respondent's vehicle. Officer Mendes testified that he had not observed any odor of marijuana when he initially stopped Respondent (T1 at 97) nor did he see any sign of impairment. (T1 at 100, 148) However, Officer Moreno testified that he smelled a faint odor of marijuana when he opened the vehicle door. (T1 at 126) That led the officers to search the vehicle carefully. The officers also searched Respondent's purse, where they found a small, white metal tube, 2.5 inches in length, smaller than, but shaped like a cigarette, which they identified as a "one-hit" pipe used for smoking marijuana. (T1 at 77, 80, 128, 130) Officer Moreno observed some burnt plant residue in the pipe, which he believed to be marijuana. (T1 at 129) There was also a dog in the vehicle.

Respondent testified that she had found the pipe in her husband's truck some time before March 22 – perhaps a week or two earlier. (T2 at 119) Her husband

transports workers in the truck, and Respondent did not know to whom the pipe belonged. (T2 at 105) She knew that the pipe could be used to smoke marijuana but also tobacco. (Tr. 120) She put the pipe in her purse intending to dispose of it, so that her husband would not get into trouble. (T2 at 105, 120) She then forgot about it. (T2 at 105)

Eventually, after more than twenty minutes had gone by, Officer Moreno returned the dog to Respondent's home and spoke with Respondent's mother-in-law, who appeared to him to be okay, not in any distress. (T1 at 133-4)

Two video cameras on the front of Officer Mendez's patrol car and another inside the car facing the passenger seat as well as a microphone on Officer Mendez's person recorded his initial stop of the respondent, his chase of her vehicle after she drove off, and her behavior while sitting in the back of the car after being placed under arrest. Those videos were entered into evidence as SD Ex. 19a and played for me during the hearing. Another camera on Officer Moreno's car similarly recorded the chase and stop. That recording was entered into evidence as SD Ex. 19b and played for me during the hearing. The recordings confirm Respondent's frequent requests to check on her mother-in-law and growing agitation as the stop went on.

Eventually, the officers transported Respondent to the police station for booking. She was charged with: 1. Possession of less than 50 grams of marijuana; (2) possession of drug paraphernalia; and (3) knowingly attempting to elude a patrolman." (D. 10)

Shortly after this incident, Respondent wrote to the Superintendent and District Board, expressing remorse for her conduct on March 22, saying in part:

> Out of fear for the safety of my mother-in-law I made a grave mistake and decided to drive the short distance home instead of waiting for the officers to complete their traffic stop. I can't take that decision back, but please know that it

was done out of concern and I never imagined it would escalate to the point it did. I made a mistake. I absolutely acknowledge it, but I can only ask that you consider the entire picture. I made this irrational decision based on the safety of my mother-in-law.

***

Although I cannot change what I did I can accept responsibility for my transgression and I am asking for a second chance.

(R. 23, T2 at 53)

Disposition of the Criminal Charges. In the Superior Court of New Jersey, Hunterdon County, on May 15, 2017, the controlled substance and paraphernalia charges were dismissed. (R. 27, p. 7 or 7) On the same day, Respondent, who had no prior criminal record, was admitted into one year of Pre-Trial Intervention (PTI) on the charge of "Eluding," with the following conditions:

- Respondent was required to submit to random urine screens for the duration of the PTI;
- She was required to perform 50 hours of community service;
- She was required to report to her probation officer as directed; and
- Pay $125 in court costs;

(R. 27, p. 1-4) During PTI, her drivers' license was not suspended. (R. 27, p. 3 of 7) At the successful conclusion of the one-year period, the remaining eluding charge will be dismissed as well.

Current Tenure Charges. Superintendent Markarian ordered Respondent to be suspended pending investigation, when he learned from Assistant Superintendent Sean Siet that she had been arrested after a traffic stop. (T2 at 34-5) Superintendent Markarian testified that Siet showed him a couple of online news reports about the arrest, which they reviewed together. (S.D. Ex. 17, 18; Tr. 11.30.17 p. 7-34-36)

According to Markarian, Siet also told him that news of the arrest "was out there among the staff." (T2 at 38)

Before making his recommendation to the District, Superintendent Markarian reviewed the police reports and videos when they were made available to him. (T2 at 39-40) He then recommended that tenure charges be brought against Respondent for Conduct Unbecoming. (T2 at. 42)

POSITIONS OF THE PARTIES

The District argues that it has met its burden to prove the tenure charges by a preponderance of the credible evidence in that (1) Respondent's actions on March 22, 2017 violated her position of public trust as a role model for her students, when she exhibited a blatant disregard for the law and a serious lack of judgment by eluding the police and possessing drug paraphernalia, actions that are anathema to the responsibilities of a teacher; (2) Respondent's excuse that she was concerned about her mother-in-law and needed to check on her does not survive close scrutiny, since she left her mother-in-law alone earlier in the day to work, and again to go to the store, and, in fact, when the police officer checked on her mother-in-law, she was fine; it is more probable that her conduct was motivated by her concern that the police would discover the marijuana pipe in her purse; (3) Respondent's testimony regarding the pipe was contradictory and illogical, as she testified that the pipe belonged to her husband, could be used for smoking tobacco, and that she was concerned her husband would get in trouble; yet if it was a tobacco pipe, there was no reason to fear that her husband would get into trouble; (4) Respondent's admission that she had carried the pipe in her purse for two or three weeks is an admission that she brought drug paraphernalia into the school with her every day; (5) the fact that Respondent was allowed to enter into Pre-

Trial Intervention and had the drug charges against her dismissed is of no relevance in this matter; as the Commissioner of Education has held, it is the fact of unbecoming conduct that is relevant, not the disposition of criminal charges; in this case, there is no dispute that Respondent engaged in the conduct charged and that such conduct is unbecoming a teacher; (6) termination is appropriate here because of the egregious nature of Respondent's misconduct; her decision to disobey a police officer and leave the scene constituted a serious disrespect for law enforcement; further, requiring the officers to chase her for some miles on country roads exposed the officers, herself and the public to danger; (7) the fact that Respondent has no prior disciplinary record and is a satisfactory teacher does not negate the egregious conduct she engaged in on March 22, 2017; a single incident, even outside the school setting, can justify termination when the incident involves egregious conduct, as took place here. For all these reasons, the Arbitrator should uphold the charges and sustain the decision of the District to terminate Respondent from her tenured teaching position.

On the other hand, the Respondent argues that the circumstances of March 22, 2017 do not warrant Respondent's termination from her tenured teaching position in that (1) while there is no issue of fact that Respondent did drive away from the police on March 22, 2017, and was found to be in possession of what appeared to be a "one-hit" metal pipe with a trace residue of plant substance inside, these facts alone do not justify the termination of her position as a tenured teacher; indeed, there is no competent evidence from any laboratory to prove that the plant substance was in fact marijuana; and while a single, sufficiently flagrant violation, even outside of school, may be grounds for termination, generally progressive discipline is applied to findings of unbecoming conduct, particularly where the misconduct does not involve cruel, premeditated or

vicious actions and where, as here, the employee has a long, discipline-free record; (2) as the Superintendent freely acknowledged, the District had no concerns regarding her teaching performance; further, Respondent has received very positive feedback in annual performance reviews, and one of her students and that student's mother, wrote to the District to express their strong support for her positive impact in the classroom; (3) the court proceedings arising out of the misconduct, while not binding upon the District, are nonetheless relevant here: Respondent was admitted into a one-year Pretrial Intervention program which will soon terminate, leaving her without any criminal record; the drug charges were all dismissed at the same time; Respondent has not pled guilty to any offense, that not being required for Pretrial Intervention; (4) the circumstances surrounding Respondent's arrest on March 22, 2017 were all captured on video; the videos and the testimony of the arresting officers confirm Respondent's testimony that she was agitated and worried about her mother-in-law as the stop was prolonged by the officers; further, when Respondent drove away from the officers, she drove directly to her home, and was across the street from her home when the officers stopped her again; while her actions were unwise, there is absolutely no grounds for concluding that she was motivated by anything other than concern for her mother-in-law; (5) Respondent wrote to the District after her arrest promptly and sincerely acknowledging that she had made a mistake – an irrational decision based on concern for the safety of her mother-in-law – and pledging to work tirelessly to accept responsibility for that mistake and set a positive example for her students in the future; (6) The District has failed to prove that it notified its employees, including Respondent, of its disciplinary policies or applied discipline uniformly against its arrested employees.

For all of these reasons, termination is not warranted, and the Arbitrator should exercise her discretion to issue a penalty less than discharge.

DISCUSSION

There is no dispute about what happened on March 22, 2017: Respondent admits, and the arresting officers' testimony and videos confirm, that she drove away from police during a traffic stop after being ordered not to do so, and that a metal pipe – of a type the officers identified as used for smoking marijuana – was found in her purse. There is also no dispute that this conduct showed very bad judgment on her part. This was conduct unbecoming a teacher. The issue before me then is whether the District has sustained each and every part of the ten charges brought against Respondent, and whether the proven misconduct warrants the ultimate penalty of loss of Respondent's tenure as a teaching professional. I find that it does not.

There is no doubt that Respondent displayed very poor judgment on March 22, 2017 when she drove away from patrol officers who had stopped her for speeding. But Respondent explained why she did so – that she was very concerned about having left her ailing mother-in-law alone in the house with the oven on and a timer about to go off. This was the same explanation she gave to the officers at the time of the stop, and her testimony is supported by theirs and also by the video and audio recordings of the arrest. Her reasons do mitigate her misconduct on that day.

The District urges me to find that her real reason for leaving the scene was something else, perhaps her fear that the officers would find the pipe in her purse. But there is absolutely no basis for the District to speculate on such a motive, nor for me to accept that speculation. The respondent stated her concern for her mother-in-law repeatedly at the beginning and throughout the stop; the officers agree that she

explained the situation to them; and the videos and audio completely support her story. Indeed, that she became more agitated as time went on and the officers continued to ignore her requests to check on her mother-in-law is also substantiated by the officers' testimony and the videos. The officers plainly did not think the situation was as urgent as she did, and they prolonged the stop, first waiting for backup, and then after the arrest, waiting more than 20 minutes before going to the house to check on her mother-in-law as Respondent requested. Her agitation was understandable in those circumstances; her conduct was not venal or corrupt – it was simply poor judgment.

The District has cited cases where a loss of tenure has been sustained for a single instance of misconduct outside of and unrelated to school. In particular, the District relies upon a 2005 Hearing Officer decision upholding termination of a tenured teacher for a single incident involving failure to stop his vehicle when pursued by an arresting patrolman. That decision was subsequently upheld by both the Commissioner of Education and the Superior Court of New Jersey, Appellate Division, in an unpublished opinion. *In the Matter of the Tenure of Thomas Wachendorf, 2007.* That case is not binding precedent. But in any event, it is worth noting that the case is factually distinct from the present one in several important respects. First, the tenured teacher there taught in a correctional facility and was an employee of that facility; adherence to the orders of law enforcement officials must be of prime importance for employees of such facilities. Second, he not only failed to stop, but was deemed to have resisted arrest when he finally did stop his car and was slow to get out in response to the patrolman's order. Finally, he failed to report his arrest in a timely fashion as required by the rules,

Here when the Respondent drove away from the officers, she wasn't fleeing – she was driving to her home, where her ailing mother-in-law had been left alone. Of course,

she was not justified in taking off, especially when she had asked and was denied permission to do so. However, she was not otherwise uncooperative and did not resist arrest once she stopped her vehicle at her home. Finally, she did report her arrest as required. Thus, Respondent's conduct was not in fact as egregious as the conduct in *Wachendorf.*

Nor is there evidence to support the District's claim that Respondent's behavior after a traffic stop demonstrates "a series of infractions on March 22, 2017." This was a single incident; one, moreover, that took place outside of school and had no connection whatsoever to the school environment or community. The District has represented that the arrest was injurious to the school community. However, the only evidence that the school community knew anything about the incident was testimony from the Superintendent that he was informed of two online news articles and was told that Respondent's arrest was "out there" among staff. He had no direct knowledge or specific information about impact on any particular students or students or other members of the school community.

The District has argued, in Charge Six, that Respondent engaged in public conduct that "would tend to have an adverse effect upon pupils or the school community." It bases the "tend to have an adverse effect" standard on several policies that were admitted into evidence:

3210 – Teaching Staff Members Code of Conduct: the teaching staff member "Shall conduct and present himself/herself in a manner that would create a positive impression of the school district." (D. 12);

3230 – Outside Activities: teaching staff members "are advised to refrain from conduct, associations, and offensive speech that, if given publicly, would tend to have an adverse or harmful effect upon pupils or the school community." (D. 13);

3281 – Inappropriate Staff Conduct: the District "holds all school staff to the highest level of professional responsibility in their conduct with all pupils. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district." (D. 15)

While these policies appear to set forth self-evident standards of conduct, the Respondent correctly points out that there is no evidence in this record that Respondent was trained on or notified about these standards, which, according to Superintendent Markarian, are only maintained online. (T2 at 67) The Superintendent himself admitted that he did not review the District's Discipline Policy before recommend the charges against Respondent. (T2 at 71) That policy, among other things, calls for the Superintendent to "deal with disciplinary matters on a case by case basis;" "provide, wherever possible, for progressive penalties for repeated violations;" and give notice "to the teaching staff member in ordinary and concise language of the "text of the statute, policy, or rule that the member is alleged to have violated." (R. 28) The Superintendent testified that he felt no need to review the policies in relation to Respondent's conduct because:

> "I just felt that this was egregious and I couldn't think of a better example of conduct unbecoming, honestly."

(T2 at 71)

Before applying the ultimate penalty for violation of District policies, the District has an obligation to make certain that its policies are well known. It has not met its burden to prove that it did so in this case. Further, while a single instance of egregious conduct can trump the need for notice and progressive discipline, I find that Respondent's conduct here was not so outrageous, motivated as it was by Respondent's concern for her ailing mother-in-law and the officers' failure to act on her repeated pleas to check on her mother-in-law's well being. Finally, immediate termination is

inappropriate in light of the Respondent's lengthy history as an excellent teacher, with no prior discipline.

I am also unpersuaded by the District's argument that Respondent should be held accountable for having carried the marijuana pipe in her purse for two weeks, including into school. This argument is based upon her testimony that she found the pipe in her husband's car, placed it in her purse intending to dispose of it, but then forgot about it. We have only Respondent's guess as to when she put the pipe in her purse. There is no evidence that anyone in the school knew about the pipe or that Respondent ever took it out of her purse. Significantly, the district has not charged her with possession of the pipe at school.

The Respondent has cited other cases where conduct was arguably more egregious and/or directly involved students, yet the teacher was not terminated. In each case, it is the totally of the circumstances that must be considered.

Here, we have conduct that did not touch any students or other members of the school community. The conduct was a single instance of poor judgment – motivated by concern for an ailing family member – that will not result in any criminal conviction. The teacher is a long-term employee with a stellar record of positive interaction with her students and her peers and no history of discipline of any kind. Given all of those circumstances, termination is simply too harsh a penalty.

In light of the foregoing, I make the following judgments regarding the Charges:

Charges One and Two – the allegations contained therein regarding fleeing the scene and attempting to elude a police officer are sustained. This conduct constitutes conduct unbecoming a teaching staff member, but does not constitute just cause for dismissal;

Charges Three and Four– the record evidence supports that Respondent was in possession of drug paraphernalia. However, the evidence further does not support that Respondent was "knowingly" in possession of drug paraphernalia" at the time of her arrest, in that her testimony was that she had placed the pipe in her purse at an earlier time and forgotten about it, and there is no evidence in this record that the pipe in fact contained a controlled substance. Accordingly these charges are only sustained to the extent that Respondent was in possession of a metal pipe of a type used for smoking marijuana; the remaining allegations are not sustained and are dismissed.

Charge Five – the allegation that Respondent's conduct violated Board Policy 3210 in that she failed to treat all others with dignity, courtesy and respect and/or failed to conduct and present herself in a manner that would create a positive impression of the school district is not sustained in that the District failed to prove that Respondent was made aware of that policy or that her conduct created a negative impression of the school. Accordingly, this charge is dismissed.

Charge Six – the allegation that Respondent's conduct violated Board Policy 3320 in that she "engaged in conduct that, if given publicly, would tend to have an adverse effect upon pupils or the school community" is not sustained in that the District failed to prove that Respondent was made aware of that policy or that the conduct became public or had any adverse effect upon pupils or the school community. Accordingly, this charge is dismissed.

Charge Seven – the allegation that Respondent's conduct violated Board Policy 3281 in that "she engaged in inappropriate conduct and conduct unbecoming a staff member" is not sustained in that that the District failed to prove that Respondent was

made aware of that policy or that the conduct created a negative impression of the school. Accordingly, this charge is dismissed.

Charge Eight – the allegations in subparts (3) that Respondent 's actions "put the police officers and members of the public at risk of harm;" and (4) that she "acted carelessly and recklessly" are sustained. The remaining allegations of this charge in subparts (2) that she "failed to exercise the level of behavior which is required and mandated for a teaching staff member entrusted with the care and custody of children;" (5) "violated the public trust;" (6) "demonstrate[d] that she is no longer fit to serve as a teaching staff member or a role model for her pupils; and (7) her actions "were sufficiently flagrant and egregious to warrant the termination of her employment are not sustained. Those parts are dismissed.

Charges Nine and Ten incorporate by reference the earlier charges. As set forth above, the sustained allegations in Charges One, Two, and portions of Three, Four and Eight do constitute conduct unbecoming a teaching staff member, but do not constitute "just cause" or "other just cause" for dismissal.

For the sustained charges, the appropriate penalty is for Respondent to serve a disciplinary suspension without pay for two months. In that Respondent has already been suspended with pay for many months, she may reimburse the District in lieu of serving the actual suspension.

AWARD

The District has established the allegations in Charges One, Two and portions of Three, Four, Eight, Nine, and Ten. The District has failed to establish that the proven allegations constitute cause sufficient to warrant Respondent's dismissal from employment. Instead, the appropriate penalty for the proven conduct is a two-month suspension without pay.

Ruth Moscovitch, Arbitrator

KRISTIN E. WOOD
Notary Public, State of New York
No. 01WO5342711
Qualified in Nassau County
Commission Expires May 23, 20 20

Date: February 9, 2018

ACKNOWLEDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On February 9, 2018, RUTH MOSCOVITCH, whom I know, came before me and acknowledged that she executed the foregoing as and for her Opinion and Award in the above-captioned matter.

Notary Public
My Commission expires

45-18

AGENCY DKT. NO. 90-5/17

S.F., ON BEHALF OF MINOR CHILD, A.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	ORDER
RESPONDENT.	:	

On November 6, 2017, a final agency decision was rendered in this matter, wherein the Commissioner approved a settlement in which S.F. agreed to pay Six Thousand Five Hundred Fifteen Dollars ($6,515.00) – by an initial payment of $500.00, followed by monthly installments of $300.00 – representing tuition for a period of 84 days of ineligible attendance by her daughter, A.M., in the Board's school district. The Board subsequently notified the Commissioner that S.F. had failed to comply with the terms of the settlement, and it requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. S.F. 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 Freeman is now subject to entry of a judgment by the court in the amount of $6,515.00, which represents the payment agreed upon by the parties in a settlement agreement that was approved by the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/14/18

Date of Mailing: 2/15/18

46-18

OAL DKT. NO. EDU 4735-17
AGENCY DKT. NO. 65-3/17

M.C., on behalf of minor child, S.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	ORDER
RESPONDENT.	:	

On September 29, 2017, a final agency decision was rendered in this matter, wherein the Commissioner found M.C. liable for tuition in the amount of Fifteen Thousand-Five Hundred and Eighty Three Dollars and Fifty Six Cents ($15,583.56), representing tuition for a period of ineligible attendance by her child, S.L., in the Board's school district during the 2015-2016 and 2016-2017 school years. The Board subsequently notified the Commissioner that M.C. had failed to comply with the decision and it requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. M.C. in response to the Board's request offered no reasons that have not been fully and fairly adjudicated as to why the judgment against her should not be so docketed.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Maria Cancel is now subject to entry of a judgment by the court in the amount of $15,583.56, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/14/18
Date of Mailing: 2/15/18

47-18

AGENCY DKT. NO. 49-3/17

R.V., ON BEHALF OF MINOR CHILDREN, D.V. AND S.T.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	ORDER
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	
RESPONDENT.	:	

On August 31, 2017, a final agency decision was rendered in this matter, wherein the Commissioner found R.V. liable for tuition in the amount of Twenty One Thousand Two Hundred Thirty Two Dollars and Thirty Cents ($21,232.30), representing tuition for a period of ineligible attendance by his children, D.V. and S.T., in the Board's school district between September 6, 2016 and June 19, 2017. The Board subsequently notified the Commissioner that R.V. had failed to comply with the decision, and requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. R.V. offered no reasons why the judgment against him should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Roder Valladares is now subject to entry of a judgment by the court in the amount of $21,232.30, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/14/18

Date of Mailing: 2/15/18

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, Ed.D.
Acting Commissioner

February 15, 2018

Roder Valladares, *Pro Se*
449 Greylock Parkway
Belleville, NJ 07109

Bradley D. Tishman, Esq.
Cleary Giacobbe Alfieri Jaccobs, LLC
169 Ramapo Valley Road
Upper Level 105
Oakland, NJ 07436

Dear Parties:

R.V., on behalf of minor children, D.V. & S.T. V. BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY, AGENCY DKT. NO. 49-3/17, COMMISSIONER DECISION NO. 47-18.

We are enclosing a copy of the decision of the Commissioner of Education dated February 14, 2018 in the above-captioned matter. Appeals of Commissioner decisions may be filed with the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36* and applicable Appellate Division rules.

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

Very truly yours,

Samantha L. Price, MKD

Samantha L. Price, Director
Bureau of Controversies and Disputes

SLP/BCM/kk:o/dec ltr/RVandDV
Enclosure
c: State Law Library

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, Ed.D.
Acting Commissioner

February 15, 2018

Michelle M. Smith, Clerk
Superior Court of New Jersey
Hughes Justice Complex
25 Market Street, 6th Floor
P.O. Box 971
Trenton, NJ 08625

Re: Request for Docketing of Judgment

Dear Ms. Smith:

In accordance with *N.J.S.A.* 2A:58-10, I am enclosing the February 14, 2018 Order of the Commissioner of Education finding that Roder Valladares is subject to entry of a judgment on the docket of the court due to his failure to pay the tuition assessment agreed upon in the matter of *R.V., on behalf of minor children, D.V. and S.T. v. Board of Education of the Township of Union, Union County.*[1] By copy of this letter, I am advising Mr. Valladares, as well as counsel for the Union Township Board of Education, of the Commissioner's issuance of the enclosed Order.

If you require anything more, please contact this office at (609) 376-9079.

Very truly yours,

Samantha L. Price, MKD

Samantha L. Price, Director
Bureau of Controversies and Disputes

Enclosure
c: Roder Valladares (with copy of Order)
Bradley D. Tishman, Esq. (with copy of Order)
State Law Library (with copy of Order)

[1] Please note that, although the case caption reflects only Mr. Valladares' initials, his full name is included within the body of the Commissioner's Order.

47-18+

AGENCY DKT. NO. 49-3/17

R.V., ON BEHALF OF MINOR CHILDREN, D.V. AND S.T.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	CORRECTED ORDER
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
RESPONDENT.	:	

On August 31, 2017, a final agency decision was rendered in this matter, wherein the Commissioner found R.V. liable for tuition in the amount of Twenty One Thousand Two Hundred Thirty Two Dollars and Thirty Cents ($21,232.30), representing tuition for a period of ineligible attendance by his children, D.V. and S.T., in the Board's school district between September 6, 2016 and June 19, 2017. The Board subsequently notified the Commissioner that R.V. had failed to comply with the decision, and requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. R.V. offered no reasons why the judgment against him should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Roder Valladares is now subject to entry of a judgment by the court in the amount of $21,232.30, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/28/18

Date of Mailing: 2/28/18

48-18L+

48-18

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

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

LAMONT O. REPOLLET, ED.D.
Acting Commissioner

AMENDED DECISION

March 16, 2018

K[redacted] McK[redacted], *pro se*
[redacted] Albert [redacted]
Princeton, New Jersey 08540

Board Secretary
Princeton Board of Education
25 Valley Road
Princeton, New Jersey 08540

Re: *K.M-L., on behalf of minor children, D.K. and D.K. v. Board of Education of the Township of Princeton, Mercer County, Agency Dkt. No. 267-11/17.*

Dear Parties:

On February 14, 2018, I issued a decision in the above-captioned matter finding that D.K. and D.K. were entitled to attended school in the Princeton School District pursuant to *N.J.S.A.* 18A:38-1, as long as there was no change in circumstances that would alter that entitlement.[1] After my decision was issued, the Princeton School District submitted information indicating that D.K. and D.K. are residing with their mother in Trenton and that they have been enrolled in the Trenton School District. Based on this change in circumstance, D.K. and D.K. are no longer entitled to attend school in the Princeton School District.

Accordingly, the Princeton Board of Education is no longer ordered to continue to admit D.K. and D.K. into its public school system. The February 14, 2018 decision that was issued in this matter is hereby vacated.[2]

Sincerely,

Dr. Lamont O. Repollet, Ed.D.
Acting Commissioner

c: County Superintendent
State Law Library

LOR/SLP/JKH

[1] The February 14, 2018 decision was a decided on a summary basis, based on the fact that the Princeton Board of Education did not file an Answer to the Petition of Appeal.

[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).

48-18

48-18L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Acting Commissioner

February 14, 2018

K[redacted], *pro se*
[redacted]
Princeton, New Jersey 08540

Board Secretary
Princeton Board of Education
25 Valley Road
Princeton, New Jersey 08540

Re: *K.M-L., on behalf of minor children, D.K. and D.K. v. Board of Education of the Township of Princeton, Mercer County, Agency Dkt. No. 267-11/17.*

Dear Parties:

Upon review of the Petition of Appeal (Petition) 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 November 17, 2017, petitioner filed a Petition pursuant to *N.J.A.C.* 6A:3-8.1, claiming that D.K. and D.K. were entitled to attend school in the District in accordance with *N.J.S.A.* 18A:38-1. A copy of the Petition was served upon the Board Secretary via facsimile on November 17, 2017, 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.

The Board failed to respond to the initial notice; therefore, on December 14, 2017, 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 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 January 3, 2018, 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 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 both notices were delivered to the Board.

Despite receipt of several notices stating that an Answer must be filed by the Board, no Answer has been filed. Accordingly, petitioner's claim that D.K. and D.K. are entitled to attend school in the District pursuant to *N.J.S.A.* 18A:38-1 is deemed admitted by the Board. The Board is hereby ordered to continue to admit D.K. and D.K. into its public school system, free of charge, so long as there is no change in circumstances that would alter that entitlement.[1]

Sincerely,

Dr. Lamont O. Repollet, Ed.D.
Acting Commissioner

c: County Superintendent
State Law Library

LOR/SLP/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).

48-18

49-18L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Acting Commissioner

February 14, 2018

Elizabeth Farley Murphy, Esq.
Busch Law Group, LLC
450 Main Street
Metuchen, New Jersey 08840

Geoffrey N. Stark, DAG
Division of Law
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625

Re: *Board of Education of the Township of Woodbridge, Middlesex County v. New Jersey School Ethics Commission, Agency Docket No. 255-10/17*

Dear Counsel:

I have reviewed the Petition for Declaratory Ruling in the above-captioned matter, together with the respondent School Ethics Commission's (Commission) 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).

In rendering this decision, I note that this petition does not meet the requirements of *N.J.A.C.* 6A:3-2.1(a) because the Commissioner only has authority to issue a declaratory ruling from matters "arising from any statute or rule within the jurisdiction of the Commissioner." The Commissioner's jurisdiction extends to controversies and disputes arising under New Jersey school law. *N.J.S.A.* 18A:6-9.

This matter – which involves the issue of whether a local school board is properly invoking the doctrine of necessity or whether additional specifications are required in order to properly identify the nature of the conflict of interest – does not involve an issue of New Jersey school law. Indeed, the doctrine of necessity is grounded in the common law, not school law. While the Commissioner could have incidental jurisdiction to decide an issue involving common law conflict of interest claims if there were an underlying school law controversy, no such school law controversy exists here. *See Clarissa Gilliam Gardner v. Board of Education of the City of Hackensack, Bergen County*, EDU 09421-12, Initial Decision (May 3, 2013), adopted, Commissioner Decision No. 209-13, decided June 7, 2013 (finding that the Commissioner was

without jurisdiction to decide a Board member's challenge to the Board's invocation of the doctrine of necessity for a vote on contract renewals as the matter did not arise out of school law).

Accordingly, petitioner's request for declaratory ruling is declined. The petition of appeal is dismissed for lack of jurisdiction.

Sincerely,



Lamont O. Repollet, Ed.D.
Commissioner

c: State Law Library

LR/MKD/BCM

50-18A

STATE BOARD OF EXAMINERS DKT. NO. 1516-189
AGENCY DKT NO. 4-8/17A

IN THE MATTER OF THE	:	
REVOCATION OF THE CERTIFICATES	:	COMMISSIONER OF EDUCATION
OF ELOISE STEWART,	:	DECISION
STATE BOARD OF EXAMINERS.	:	

Order of Revocation by the State Board of Examiners, July 27, 2017

For the Respondent-Appellant, Carol R. Smeltzer, Esq.

For the Petitioner-Respondent State Board of Examiners, James M. Esposito, Deputy Attorney General (Christopher S. Porrino, Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Eloise Stewart's appeal of the State Board of Examiners' (Board) Order of July 27, 2017, revoking her Teacher of the Handicapped Certificate and her Principal Certificate of Eligibility. This matter was referred to the Board by the Department of Education, Office of Certification and Induction, after it was determined that the course descriptions submitted by the appellant with her application for a Supervisor Certification may have been altered. Following a hearing at the Office of Administrative Law (OAL), the Administrative Law Judge (ALJ) found that the appellant engaged in conduct unbecoming a teacher by submitting a fraudulent course catalogue description in support of her certification application and recommended that the appellant's certificates be revoked. Thereafter, the Board adopted the Initial Decision of the ALJ and revoked the appellant's teaching certificates.

On appeal, the appellant contends that the decision of the Board finding that the appellant engaged in fraud by submitting a falsified course description to further her application

certificates based on the fact that the ALJ found that the appellant knowingly committed fraud in support of her application for a Supervisor Certificate. In so doing, the ALJ rejected the appellant's "position that she received an incorrect copy of the Hampton University course catalogue with errors therein by pure happenstance, coincidentally supporting the requirements she needed for her Supervisor [C]ertificate." The ALJ further found that the appellant's "position is not credible and is not supported by the clear testimony of [the Board's witnesses], to which I give much weight." (Initial Decision at 10) In adopting the decision of the ALJ, the Board deferred to the ALJ's credibility determinations, noting that he was in the best position to access witness credibility. The Commissioner likewise finds no basis in the record to reject the ALJ's determinations of witness credibility as he had the opportunity to assess the credibility of the various witnesses who appeared before him and make findings based upon their testimony.

There is also nothing in the record to suggest that the Board's decision to revoke the appellant's certificates – based on the nature and extent of the unbecoming conduct proven during the hearing at the OAL – was arbitrary, capricious or unreasonable. Accordingly the decision of the State Board of Examiners is affirmed for the reasons expressed therein.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/14/18

Date of Mailing: 2/15/18

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

51-18

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

IN THE MATTER OF THE TENURE HEARING OF KATHLEEN MCMAHON

GLOUCESTER COUNTY SPECIAL SERVICES : Agency DKT No. 161-7/17
SCHOOL DISTRICT, GLOUCESTER COUNTY :
Petitioner :

and :

KATHLEEN MCMAHON :
Respondent

AWARD APPROVING SETTLEMENT AND DISMISSING CHARGES AS MOOT PURSUANT TO N.J.A.C. 6A:3-5.6

For the Petitioner:
Michael J. DiPiero, Esquire
Brown & Connery, LLP

For the Respondent:
Jeremiah Atkins, Esquire
Hoffman DiMunzio

On July 21, 2017, the Gloucester County Special Services District Board of Education ("District" or "Petitioner") served certified tenure charges against Kathleen V. McMahon, Secretary to the Superintendent. After review, the Department of Education appointed the undersigned, pursuant to *P.L. 2012, c.26,* to hear and evaluate the tenure charges of unbecoming conduct, neglect of duty and insubordination.

The hearing was scheduled to be conducted on September 27, 2017. Three days prior thereto, the Parties informed the undersigned of their intention to settle. As a settlement was not effectuated, this matter was rescheduled for hearing to

commence on November 8, 2017. Unfortunately, Respondent Kathleen V. McMahon passed away on October 27, 2017, during the pendency of the charges. Under the circumstances, the District determined not to further pursue the charges. Instead, it graciously negotiated with the Estate of McMahon, entering into the executed Settlement Agreement regarding Kathleen V. McMahon's tenure charges. (Exhibit 1, attached)

The New Jersey Administrative Code contains procedures for filing Controversies and Disputes with the Commissioner of Education, *N.J.A.C 6A:3-1.1 et seq.* The new Subchapter 5, applies to Charges Under the Tenure Employee's Hearing Act. *N.J.A.C. 6A:3-5.6* addresses *withdrawal, settlement, or mooting of tenure charges*. Section (a), identifies the criteria a panel arbitrator must review prior to approving any settlement, as follows:

> *6A:3-5.6* **Withdrawal, settlement or mooting of tenure charges**
>
> (a) Once tenure charges are certified to the Commissioner, they may be withdrawn or settled only with approval. Any proposed withdrawal or settlement, whether submitted to the Commissioner or to the arbitrator, shall address the following standards established by the State Board of Education in the matter entitled *In re Cardonick*, State Board decision of April 6, 1983 (1990 *School Law Decisions* (S.L.D.) 842, 846):
>
> 1. Accompaniment by documentation as to the nature of the charges;
>
> 2. Explication of the circumstances justifying settlement or withdrawal;
>
> 3. Consent of both the charged and charging parties;

4. Indication the charged party entered into the agreement with a full understanding of his or her rights;

5. A showing the agreement is in the public interest; and

6. If the charged party is a teaching staff member, a showing the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

Upon review, I ***find*** the Settlement Agreement regarding Kathleen V. McMahon's tenure charges is consistent with the Administrative Code, *N.J.A.C. 6A:3-5.6.* Accordingly, the executed Settlement Agreement is, hereby **approved.** Moreover, as the result of Respondent's untimely passing, I, hereby, **ORDER** the tenure charges against Respondent be dismissed, as **moot.**

DATED: February 7, 2018

CAROL F. LASKIN, ESQUIRE

STATE OF NEW JERSEY :

COUNTY OF CAMDEN :

I CERTIFY that on February 7, 2018 CAROL F. LASKIN, personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as his or her act and deed.

DATED: 2-7-18 Lynda A Green

NOTARY PUBLIC

LYNDA A GREEN
ID # 2316329
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires June 28, 2019

SETTLEMENT AGREEMENT
REGARDING KATHLEEN MCMAHON
TENURE CHARGES

This SETTLEMENT AGREEMENT is entered into between the Gloucester County Special Services School District Board of Education (hereafter "Board" or "District") and the Estate of Kathleen McMahon (hereafter "McMahon" or "Respondent").

WHEREAS, McMahon has been employed continuously by the Gloucester County Special Services School District since September 4, 1994 and currently holds the title of Secretary for the Superintendent;

WHEREAS, McMahon was accused of (1) conduct unbecoming a board employee; (2) neglect of duty; and (3) insubordination by the District.

WHEREAS, McMahon was suspended on March 30, 2010;

WHEREAS, the Board directed the Board Secretary to certify tenure charges related to the allegations of misconduct on July 21, 2017;

WHEREAS, McMahon, passed away on October 27, 2017, during the pendency of the charges;

WHEREAS, the District has decided not to further pursue the charges under the circumstances; and

WHEREAS, the Estate of McMahon is interested in a prompt disposition of this matter in order to have McMahon's affairs settled.

EXHIBIT 1

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

1. The above recitals are repeated and made part of this settlement by reference.

2. The District will move to withdraw the pending tenure charges against McMahon, subject to the review and approval of the Commissioner of Education.

3. The District will record McMahon's service as if she died as an active employee without any interruption in service related to this matter.

4. The District will pay to the Estate all wages that would have been paid to McMahon through October 27, 2017.

5. In exchange, the Estate of McMahon and its representatives will agree to enter into a separate agreement to waive any potential claims it may have on behalf of McMahon related to her employment with the District.

6. The Estate and its representatives further agree in consideration of this Settlement Agreement that it will not assert, pursue, or assist in any judicial or administrative proceeding concerning a reason that this agreement is not enforceable and/or consistent with the public's interest.

7. The Parties agree that in the event any provision or condition of this Settlement Agreement be finally determined to be in violation of any law, then such provision or condition, only to the extent that any may be so in violation, shall be deemed of no force and effect and unenforceable without impairing the validity and enforceability of the rest of the Agreement.

WITNESS:

1/22/18
Dated:

Michael C. Dicken, Superintendent
Gloucester County Special Services
School District and Gloucester
County Vocational Technical School
District

Administrator of the Estate of Kathleen McMahon

Sworn and subscribed before
me by Steven Scally, the
Declarer this 22 day of
January, 2018

Notary

CHRISTINA M. MOYS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires August 22, 2022

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE	:	COMMISSIONER OF EDUCATION
OF BRUCE WILSON, SCHOOL DISTRICT	:	DECISION
OF THE TOWNSHIP OF FRANKLIN,	:	
SOMERSET COUNTY.	:	

SYNOPSIS

In October 2017, 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 for resigning his position without giving the notice required by his contract with the petitioner. 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 Assistant Commissioner – to whom this matter was delegated pursuant to *N.J.S.A.* 18A:4-34 – 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 2/15/18

September 8, 2017, respondent submitted his resignation; and on September 10, 2017, respondent clarified that his resignation was effective immediately. The respondent has not denied these allegations; therefore, the Commissioner deems such allegations to be admitted pursuant to *N.J.A.C.* 6A:3-1.5(e) and further deems them sufficient to justify suspension of respondent's teaching certification pursuant to *N.J.S.A.* 18A:26-10.

Accordingly, summary decision is hereby granted to petitioner, and respondent's teaching certification is suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[1]

Robert L. Burgess

ASSISTANT COMMISSIONER OF EDUCATION[2]

Date of Decision: 2/15/18

Date of Mailing: 2/16/18

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

[2] This matter has been delegated to the undersigned Assistant Commissioner, pursuant to *N.J.S.A.* 18A:4-34.

53-18

OAL DKT. NO. EDU 9409-17
AGENCY DKT. NO. 112-6/17

KIMBERLY BESECKER-WASHKO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ANDOVER REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release, 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.

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: 2/16/18
Date of Mailing: 2/16/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09409-17

AGENCY DKT. NO. 112-6/17

KIMBERLY BESECKER-WASHKO,

Petitioner,

v.

BOARD OF EDUCATION OF THE ANDOVER REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,

Respondent.

Randi Doner April, Esq., for petitioner (Oxfeld Cohen, attorneys)

Stephen M. Bacigalupo, II, Esq., for respondent (Schwartz, Simon, Edelstein & Celso, attorneys)

Record Closed: December 15, 2017 Decided: January 2, 2018

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

On or about June 8, 2017, petitioner Kimberly A. Besecker-Washko filed a Petition of Appeal with the Commissioner of Education against respondent Board of

Education of the Andover Regional School District (District) alleging her tenure and seniority rights were violated. The Department of Education, Bureau of Controversies and Disputes transmitted the matter to the Office of Administrative Law, where it was filed on July 5, 2017, for hearing as a contested case. A telephone prehearing conference was scheduled for August 9, 2017.

By letter dated August 7, 2017, counsel for petitioner advised that the matter had been settled and requested that the telephone conference be adjourned. Under cover letter dated December 12, 2017, counsel for the District submitted the attached Employment Separation Agreement, along with the Board Resolution, indicating the terms of agreement between the parties.

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

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

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

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

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

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

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

1/2/18

DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: 1-5-18

Date Mailed to Parties: JAN 5 2018

jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

EMPLOYMENT SEPARATION AGREEMENT AND RELEASE

This Employment Separation Agreement and Release ("Agreement") is entered into and effective as of the 29th day of August, 2017 (the "Effective Date"), by and between the Andover Regional Board of Education ("Board") and Kimberly Besecker-Washko ("Ms. Besecker-Washko" or "Employee").

WHEREAS, the Board is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:13-1 et seq., which is entrusted with maintaining and conducting the public schools of the Andover Regional School District ("District"); and

WHEREAS, the Board has its administrative offices located at 707 Limecrest Road, Newton, New Jersey 07860; and

WHEREAS, Ms. Besecker-Washko, a tenured guidance counselor employed by the Board, has her current address located at 5153 Laurel Loop, Swiftwater, Pennsylvania 18370; and

WHEREAS, Ms. Besecker-Washko has submitted an irrevocable letter of resignation in furtherance of retirement; and

WHEREAS, the parties, now wishing to resolve the within matter amicably without the need for litigation, while achieving the goals of both parties, hereby stipulate to settle same, subject to the terms and conditions set forth herein; and

NOW, THEREFORE, the parties hereby agree, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged, as follows:

1. IRREVOCABLE RESIGNATION

Ms. Besecker-Washko has tendered her irrevocable resignation, in furtherance of retirement, from all employment with the Board effective May 1, 2018. See Attachment A. Following Ms. Besecker-Washko's retirement, she will become eligible to receive any benefits to which she may be lawfully entitled under the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA").

Ms. Besecker-Washko agrees that she will not seek any future employment or consultant relationship with the Board in perpetuity and that the Board has no obligation, contractual or otherwise, to re-hire or re-employ her.

RECEIVED
2017 DEC 18 A 9:11
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

2. 2017-2018 ASSIGNMENT

During the 2017-2018 school year until the retirement date as set forth in the preceding paragraph, Ms. Besecker-Washko shall be employed by the Board, in a full-time capacity, with pay minus customary deductions, and medical benefits. Ms. Besecker-Washko shall serve as both a guidance counselor and BSI teacher, with her schedule and caseload to be determined by District Administration. Ms. Besecker-Washko acknowledges that she has neither previously served as a BSI teacher, nor does she have any tenure entitlement to said position.

3. COMPENSATION/BENEFITS

As stated above, Ms. Besecker-Washko shall be employed by the Board, in a full-time capacity, with pay, minus customary deductions, and medical benefits until May 1, 2018 (i.e., effective date of retirement). Thereafter, Ms. Besecker-Washko will become eligible to receive any benefits to which she may be lawfully entitled under the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"). Ms. Besecker-Washko shall have the same COBRA rights as any other former employee and shall be solely responsible for any and all costs associated with said COBRA coverage. Ms. Besecker-Washko shall also be entitled to any benefits to which she may be lawfully entitled under the Workers' Compensation Act. Ms. Besecker-Washko shall also receive One Thousand Nine Hundred Fifty-One Dollars and Fifty-Six Cents ($1951.56), which represents payment Ms. Besecker-Washko made for her health insurance for the months of July 2017 and August 2017.

Moreover, at the time of Ms. Besecker-Washko's retirement, she shall be entitled to receive any emolument of employment or fringe benefit of any kind from the Board that otherwise may have been due to her as a result of any collective bargaining agreement, contract or Board Policy; for example, payment for accumulated sick days.

4. NO ADMISSIONS

This Agreement is entered into solely for the purpose of resolving certain issues related to Ms. Besecker-Washko's employment, and that neither the execution, delivery, nor performance of this Agreement, nor Ms. Besecker-Washko's resignation, shall constitute or be construed at any time or for any purpose to be an admission of liability or wrongdoing by any of the parties; and the parties further agree that neither this Agreement and Release nor Ms. Besecker-Washko's resignation shall be used as evidence in any judicial, administrative, or quasi-judicial proceeding, except to enforce the terms of said Agreement.

5. RELEASE

In exchange for the above consideration, Ms. Besecker-Washko, her heirs and assigns, and the Board and its successors in interest, mutually irrevocably and unconditionally waive, release and forever discharge any and all claims or rights, whether known or unknown, which they have or may have against each other, personally and officially, individually and collectively, its past and present Board members, all officers and administrators, its attorneys, agents and employees, personally and officially, as well as their successors, and assigns, including, but not

limited to any and all claims for attorneys' fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability stemming from this Agreement, and any and all claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions; Title VII of the Civil Rights Acts of 1871 and 1991; the Americans with Disabilities Act; the Age Discrimination in Employment Act; the Older Workers Benefit Protection Act of 1990; the 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; any collective negotiations agreement; any common law claim and any and all other claims, that could be initiated in any venue, for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim.

Specifically exempted from this release are any claims arising under the Workers' Compensation Act, N.J.S.A. 34:15-1 et seq., and for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (referred to hereinabove as "COBRA"). Ms. Besecker-Washko represents that as of the date of this Agreement she has not filed and does not intend to file a Workers' Compensation claim.

It is expressly understood that the arrangement herein is predicated exclusively upon the special circumstances of this matter and shall not be construed to represent any policy or procedure of the Board.

Ms. Besecker-Washko agrees that upon the Board approving the subject Agreement, she will withdraw with prejudice the matter entitled Kimberly Besecker-Washko v. Andover Regional Board of Education School District, OAL Docket No. EDU 09409-2017 N; Agency Reference No. 112-6/17.

6. INQUIRIES

The Board agrees to limit remarks regarding Ms. Besecker-Washko in response to any future employment inquiries, either orally or in writing, to confirming the dates of Ms. Besecker-Washko's employment within the District, the amount of Ms. Besecker-Washko's salary in the final year of her employment, the position(s) that Ms. Besecker-Washko held within the District, and the fact that Ms. Besecker-Washko resigned in furtherance of her retirement. However, nothing herein shall be deemed to limit the Board's actions in compliance with the Open Public Records Act, or its obligation to respond fully and accurately to any and all inquiries from State agencies such as, without limitation, the Public Employees Retirement System ("PERS"); TPAF; for example.

7. NON-DISPARAGEMENT

The parties and their agents shall refrain from public negative comments regarding each other, and each other's employees and/or agents. However, nothing in this Agreement shall be construed to limit Ms. Besecker-Washko or the Board and its agents' obligation to provide accurate information in response to legitimate requests for public information, nor to provide information requested by various State Agencies and/or their agents.

8. NO RETALIATION

Ms. Besecker-Washko shall take no retaliatory action of any kind against any student, parent, staff member, Board member or agent of the Board. The Board and its agents shall take no retaliatory action of any kind against Ms. Besecker-Washko.

9. ENTRY ONTO BOARD PROPERTY

Subsequent to her resignation, Ms. Besecker-Washko may enter onto Board property in order to attend an event open to the public. In all other instances, Ms. Besecker-Washko shall first schedule her visit with the Superintendent of Schools, and must follow all other procedures (e.g., sign in as an outside visitor, etc.) as would apply to any other person/visitor.

10. SURRENDER OF BOARD PROPERTY

A. At the time of Ms. Besecker-Washko's resignation, she shall surrender all school keys and property in her possession to the Superintendent of Schools or his designee.

B. At the time of Ms. Besecker-Washko's resignation, the Superintendent of Schools shall arrange an appointment for her to retrieve her personal property, if necessary.

11. BOARD APPROVAL

This Agreement is subject to Board approval. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

12. ASSENT TO TERMS

A. Ms. Besecker-Washko hereby acknowledges that she entered into this Agreement with a full understanding of her rights and that she does so without duress and of her own free will and volition, and that she has consulted with independent legal counsel prior to executing same.

B. Ms. Besecker-Washko further acknowledges that she was given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and was given seven (7) days from the execution of this document to revoke this Agreement, by delivering written notification to Stephen M. Bacigalupo, II, Esq., Schwartz Simon Edelstein & Celso, LLC, 100

South Jefferson Road, Whippany, New Jersey 07981. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Ms. Besecker-Washko will not be entitled to the consideration described herein.

13. SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

14. PUBLIC INTEREST

This proposed settlement will serve the public interest because, as a result of Ms. Besecker-Washko having tendered her irrevocable letter of resignation, the Board will not have to engage in litigation related to her employment.

15. 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. This Agreement shall not be amended, changed or modified except in a writing signed by all parties. 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.

16. SEVERABILITY

If any non-material portion of this Agreement shall be determined by any court agency of competent jurisdiction to be contrary to law, then it shall be deemed to be severed from the remainder of this Agreement which shall continue in full force and effect. Should any material provision be stricken by a court or agency of competent jurisdiction, then the entire Agreement shall be null and void, *ab initio*.

17. COUNTERPARTS

This Agreement may be executed simultaneously in two (2) or more counterparts, each of which shall be deemed an original and all of which, when taken together, constitute one and the same document. The signature of any party to any counterpart shall be deemed a signature to, and may be appended to, any other counterpart.

18. GOVERNING LAW

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

Witness:

KIMBERLY BESECKER-WASHKO

Dated:

Dated:

For the Andover Regional Board of Education:

Witness:

MICHAEL FANCHER
Board President

DONNA MOSNER
School Business Administrator/Bd. Sec.

Dated:

Dated:

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

KABesecker-Washko
KIMBERLY BESECKER-WASHKO

Dated: 8/2/2017

Witness:

See below

Dated:

For the Andover Regional Board of Education:

MICHAEL FANCHER
Board President

Dated:

Witness:

DONNA MOSNER
School Business Administrator/Bd. Sec.

Dated:

State of Pennsylvania County of Chester
Subscribed and sworn to (or affirmed) before me
on this 7th day of August, 2017
by Kimberly Ann Besecker-Washko
proved to me on the basis of satisfactory evidence to be
the person(s) who appeared before me.

Cassandra R Reeser
Notary Public Signature

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
CASSANDRA R. REESER, Notary Public
Honey Brook Twp., Chester County
My Commission Expires July 27, 2020

Attachment A

Irrevocable Letter of Resignation

Andover Regional Board of Education
c/o Donna Mosner, School Business Administrator/Bd. Sec.
707 Limecrest Road
Newton, New Jersey 07860

Re: Irrevocable Letter of Resignation

Dear Ladies and Gentlemen:

Subject to the terms and conditions of our Employment Separation Agreement and Release ("Agreement"), and approval of same by the Andover Regional Board of Education ("Board"), I hereby tender my irrevocable resignation, in furtherance of retirement, effective May 1, 2018 from all employment with the Board.

Very truly yours,

KIMBERLY BESECKER-WASHKO

ANDOVER REGIONAL SCHOOL DISTRICT

707 Limecrest Road
Newton, NJ 07860

EXTRACT FROM THE MINUTES OF A REGULAR MEETING OF THE BOARD OF EDUCATION OF ANDOVER REGIONAL, COUNTY OF SUSSEX, STATE OF NEW JERSEY AS RECORDED IN THE OFFICIAL SET OF MINUTES

The Board of Education of Andover Regional School District, located in the County of Sussex, New Jersey, convened a Regular Meeting on Tuesday, August 29, 2017 at 7:30 p.m. in the Long Pond School, 707 Limecrest Road, Andover Township, New Jersey.

Attendance: Mrs. Teri Ashworth, Mrs. June Bliss, Mr. David Brothman, Mr. Eric Danielson, Mr. Michael Fancher, Mr. Robert Koroski, Mr. Steven Minnick, and Mr. Morel. Also present: Mr. Matthew Beck, Superintendent, Mrs. Donna Mosner, School Business Administrator/Board Secretary, and two (2) members of the public.

Members Absent: Mr. Nicholas Sabatino.

The following action was taken by the Board of Education:

C.12. Employment Separation Agreement: Mr. Morel moved to approve the following, as recommended by the Superintendent of Schools, seconded by Mr. Danielson and unanimously CARRIED in a roll call vote.

BE IT RESOLVED that the Andover Regional Board of Education ("Board") hereby approves the attached Employment Separation Agreement and Release with Employee 0097; and

BE IT FURTHER RESOLVED that the Board hereby accepts Employee 0097's irrevocable resignation effective May 1, 2018; and

BE IT FURTHER RESOLVED that the Board authorizes the Board President and the Business Administrator/Board Secretary to execute the Employment Separation Agreement and Release on behalf of the Board; and to take such further steps as may be necessary to effectuate the within Employment Separation Agreement and Release and carry out this action of the Board.

I, Donna Mosner, Secretary of the Board of Education of the Andover Regional School District in the County of Sussex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on August 29, 2017, and has been compared by me with the original minutes as officially recorded in my office in the minute book of said Andover Regional 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 14th day of November, 2017.

Donna Mosner

State of New Jersey
County of Sussex

Donna Mosner
Business Administrator/Board Secretary

54-18

OAL DKT. NO. EDU 16738-16
AGENCY DKT. NO. 259-9/16

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
N.D., on behalf of minor children, J.D. and D.D.,	:	
RESPONDENT.	:	

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

Under the terms of the Agreement, respondent was to commence payment of the settlement amount to petitioner within sixty days following execution of the Agreement. The Agreement was fully executed on November 1, 2017, which date has preceded the consideration of the Agreement 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 light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms, or have agreed upon mutually satisfactory alternate dates for the effectuation of the settlement payment. Assuming same, 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: 2/16/18
Date of Mailing: 2/16/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 16783-16
AGENCY DKT. NO. 259-9/16

BOARD OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

Petitioner,

v.

N.D., ON BEHALF OF MINOR CHILDREN, J.D. AND D.D.,

Respondent.

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

N.D., respondent, pro se

Record Closed: January 2, 2018 Decided: January 3, 2018

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

On November 3, 2016, the Department of Education transmitted this case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

Before the hearing, the parties settled the case. A copy of their agreement is attached to this decision. Having reviewed the terms of the stipulation of settlement, I **FIND** that the parties have entered into their settlement voluntarily, as evidenced by their signatures, the signatures of their representatives, or both.

Moreover, I **CONCLUDE** that the stipulation of settlement is consistent with the law, is fully dispositive of all issues in controversy between the parties, and is otherwise consistent with the requirements of N.J.A.C. 1:1-19.1.

Therefore, given my findings of fact and conclusions of law, I **ORDER** that the parties comply with the terms of their settlement and that these proceedings are now closed.

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

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

1/3/17
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 1-5-18

Date Mailed to Parties: JAN 5 2018

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

CLEARY | GIACOBBE | ALFIERI | JACOBS LLC

FRANCES L. FEBRES, Counsel
ffebres@cgajlaw.com

Reply to: Oakland Office

January 2, 2018

VIA FAX AND REGULAR MAIL
Hon. Barry E. Moscowitz, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: West Orange Board of Education v. Nadine Dorceus
OAL DKT EDU 16783-2016 N
Agency Reference No. 259-9/16

Dear Judge Moscowitz:

This firm represents Petitioner, the West Orange Board of Education, regarding the above-referenced matter. By letter dated November 1, 2017, we provided Your Honor with a copy of the parties' Settlement Agreement and advised that we would be forwarding the Board Resolution approving same upon receipt. Accordingly, enclosed please find a copy of the Board's December 4, 2017 Resolution approving the Settlement Agreement.

Thank you for your attention and courtesies with this matter. Should you have any questions, do not hesitate to contact this office.

Respectfully,

Frances L Febres

Frances L. Febres
Enclosure

C: Nadine Dorceus (by regular mail and email)
Jeffrey Rutzky, Superintendent of Schools

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

The Board of Education of the West Orange School District, West Orange, in the County of Essex, New Jersey, convened in Regular/Work session on December 4, 2017 at 6:50 P.M., at West Orange High School, 51 Conforti Avenue, West Orange, NJ.

The following members of the Board of Education were present:
President Mordecai, Mr. Schwarzbaum, Mrs. Lab, Mr. Charles, Mr. Robertson

The following motions were offered by Mrs. Lab and seconded by Mr. Schwarzbaum and adopted by the Board of Education by the following roll call vote:

Recommend approval of Settlement Agreement between the West Orange Board of Education and the Parent of former Students #1002025 and #1004095.

ROLL CALL: Ayes: Mrs. Mordecai, Mr. Schwarzbaum, Mrs. Lab, Mr. Charles, Mr. Robertson

Abstain: None

CERTIFICATE

I, John Calavano, Secretary of the Board of Education, of the West Orange Public Schools, West Orange, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on December 4, 2017, has been compared by me with the original minutes as officially recorded in my office in the minute book of said West Orange Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 7th day of December 2017.

John Calavano/Board Secretary

CLEARY GIACOBBE ALFIERI JACOBS LLC

Attorneys at Law
169 Ramapo Valley Rd.
Oakland, NJ 07436
973-845-6700
Facsimile 201-644-7601

Fax Cover Sheet

To: Hon. Barry E. Moscowitz, A.L.J.

Fax: 973-648-2358

From: Frances L. Febres, Esq.

Date: January 2, 2018

Re: **West Orange Board of Education v. Nadine Dorceus**
OAL DKT EDU 16783-2016 N

Notes:

Please see attached. Thank you.

Please call 973-845-6700 immediately if you did not receive all 3 pages (includes fax cover page)

CLEARY GIACOBBE ALFIERI & JACOBS, LLC
169 Ramapo Valley Road
Upper Level, Suite 105
Oakland, New Jersey 07436
Telephone: 973-845-6700
Facsimile: 201-644-7601
Attorneys for Petitioner, West Orange Board of Education

RECEIVED
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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

WEST ORANGE BOARD OF EDUCATION, Petitioner, vs. NADINE DORCEUS Respondent.	STATE OF NEW JERSE OFFICE OF ADMINISTRATIVE LAW OAL DOCKET EDU 16783-2016 M **STIPULATION OF SETTLEMENT**

The matter and things in controversy having been discussed by and between the parties, and a settlement having been agreed upon:

It is on this _____ day of _____, 2017, STIPULATED by and between the parties as follows:

1. Nadine Dorceus, Respondent in the above-captioned matter and mother of former students Donte and Justin Dorceus, personally guarantees and agrees to pay the Petitioner, the West Orange Board of Education ("Board"), Nine Thousand Dollars ($9,000.00), which sum the Board agrees to accept in full settlement of the entire tuition assessed and owing for the 2015-2016 school year, inclusive of interest. Payment is to be made by personal or certified checks.

2. The sum aforesaid shall be paid by Nadine Dorceus to the Board in the following manner:

   a. Nadine Dorceus is to pay the Board a minimum amount of ~~$250.00~~ 125.00 within ~~thirty~~ sixty (~~30~~ 60) days of the execution of this Agreement;

b. By the ~~1st~~ 15th of each month thereafter, Nadine Dorceus is to pay the Board a minimum amount of ~~$250.00~~ 125.00 until the full amount of $9,000.00 has been paid, except that:

i. In the event Nadine Dorceus has not paid the Board the entire $9,000.00 by ~~June 1~~ December 15, 2023, then Nadine Dorceus must pay the Board the existing balance by or before ~~June 1, 2020.~~ December 15, 2023

c. All payments shall be made to the Board by personal or certified check, payable to the West Orange Board of Education.

3. In the event Nadine Dorceus fails to pay in accordance with the terms set forth in this Stipulation of Settlement ("Stipulation"):

a. Nadine Dorceus shall be given ~~thirty~~ ninety (~~30~~ 90) days from Notice of Default to cure same;

b. Thereafter, the Board may submit an ex parte certification to the Superior Court of New Jersey with notice to Nadine Dorceus, setting forth her failure to pay in accordance with the terms set forth herein with a consent judgment in Plaintiff's favor, in the form annexed hereto, for entry by the court (the "Consent Judgment"). The Consent Judgment shall be for the full assessed tuition amount of ~~$13,534.93~~ 13,350.12 (representing tuition for both Donte Dorceus and Justin Dorceus for the 2015-2016 school year), less any payments made by Nadine Dorceus to the Board pursuant to paragraph 2 (above);

c. Nadine Dorceus waives all rights to contest entry of the Consent Judgment, an unexecuted copy of which is attached as Exhibit "A" to this Agreement. The Consent Judgment may be docketed with the Clerk of the Superior Court of New

Jersey;

d. Nadine Dorceus shall pay all of the Board's reasonable attorney's fees and legal costs associated with enforcing the Board's rights under this Stipulation; and,

e. Any payments made above the minimum monthly payments shall be a credit towards the Board's future monthly payments; and,

4. No delay or omission on the part of the Board in exercising any right under this Stipulation will operate as a waiver of that right or of any other right under this Stipulation.

5. **Binding Effect.** All parties to this Stipulation, as well as their heirs, successors, and assigns, are bound by it. The other party and/or parties may rely upon his/her actual authority in connection with the signing of this Stipulation. Additionally, each party to this Stipulation is an intended beneficiary hereof.

6. **Integration Clause.** This Stipulation shall constitute the entire agreement among the parties and supersedes all prior or contemporaneous agreements, oral or written. This Stipulation cannot be altered, amended, modified, terminated, or discharged except in a writing signed by the party against whom enforcement of such alteration, amendment, modification, termination or discharge is sought.

7. **Governing Law.** This Stipulation shall be construed in accordance with the substantive laws of the State of New Jersey, without regard to its conflicts of laws rules.

8. **Severability.** If all or any portion of any provision of this Stipulation shall be held to be invalid, illegal, or unenforceable in any respect, then such invalidity, illegality, or unenforceability shall not affect any other provision hereof, and such provision shall be limited and construed as if such invalid, illegal, or unenforceable provision, or portion

9. The parties, by written agreement, may modify the terms of this Agreement, upon approval by the West Orange Board of Education.

thereof, were not contained herein.

We hereby consent to the form and entry of the within Stipulation.

NADINE DORCEUS (pro se)
Respondent

Date: 9/20/2017

FRANCES L. FEBRES, ESQ.
Cleary Giacobbe Alfieri Jacobs, LLC
Attorney for the Petitioner,
West Orange Board of Education

Date: 11/1/2017

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

CLEARY GIACOBBE ALFIERI & JACOBS, LLC
169 Ramapo Valley Road
Upper Level, Suite 105
Oakland, New Jersey 07436
Telephone: 973-845-6700
Facsimile: 201-644-7601
Attorneys for Plaintiff, West Orange Board of Education

WEST ORANGE BOARD OF EDUCATION, Plaintiff, vs. NADINE DORCEUS Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION :: ESSEX COUNTY **CONSENT JUDGMENT**

THIS MATTER having been opened to the Court by Cleary Giacobbe Alfieri Jacobs LLC, attorneys for the Plaintiff, West Orange Board of Education ("Plaintiff"), with the consent of the defendant, Nadine Dorceus ("Defendant"), and it appearing that the parties entered into a Stipulation of Settlement on _____, 2017 to resolve a dispute before the New Jersey Office of Administrative Law and, as part of the Stipulation of Settlement, the Plaintiff and the Defendant willingly executed this Consent Judgment, the entry of which is governed by the terms and conditions of the Stipulation of Settlement and good cause appearing;

IT IS on this _____ day of _____, 2017, ORDERED AND ADJUDGED:

Judgment is entered in favor of Plaintiff and against Defendant, Nadine Dorceus, in the amount of $13,350.12, in addition to interest, attorneys' fees, and legal costs, as of _____, 20____, as follows:

a. Within _____ days of the execution of this Order, Nadine Dorceus shall pay the West Orange Board of Education $13,350.12 less any monies already paid to the Plaintiff under the Stipulation of Settlement; and

b. Nadine Dorceus shall pay Plaintiff's attorneys fees and legal costs incurred in enforcing this Consent Order.

_____
J.S.C.

We hereby consent to the form and entry of this Consent Judgment:

NADINE DORCEUS
Respondent

Date: 10/26/2017

FRANCES L. FEBRES, ESQ.
Cleary Giacobbe Alfieri Jacobs, LLC
Attorney for the Petitioner,
West Orange Board of Education

Date: 11/1/2017

55-18

D.H., on behalf of minor child, D.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY, AND MICHAEL GASKELL,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Pro se petitioner challenged the respondent Board's imposition of discipline upon her child, and sought rescission of the one-day in-school suspension as well as expungement of the discipline from D.H.'s educational records. Petitioner contended that the District violated D.H.'s procedural due process rights and imposed discipline that was "too harsh, not justified, and induced by improper motive." A settlement conference failed to resolve the controversy, and the matter proceeded to a hearing at the OAL in May 2017.

The ALJ found, *inter alia*, that: the issue to be determined was whether the respondent Board disciplinary decision was arbitrary, capricious or unreasonable; local school boards have broad discretion in matters involving pupil discipline, and actions taken by local school boards that are within the board's authority carry a presumption of validity and will generally not be disturbed unless there is an affirmative showing that the action taken was arbitrary, capricious or unreasonable; the scope of the Commissioner's review is not to substitute his judgment for that of the Board, but to determine whether there was a reasonable basis for the Board's decision and actions; in the instant case, there is no dispute that D.H. hit a male student as least twice after he attempted to frighten her in a school corridor; the male student never struck D.H.; and there is no dispute that D.H. deserved to be disciplined for her conduct. The ALJ concluded that the Board's disciplinary action was not arbitrary, capricious or unreasonable as there was a reasonable basis for making the decision, based on evidence and testimony presented. Additionally, the ALJ found no merit in petitioner's allegations that D.H.'s due process rights were violated, and further dismissed petitioner's claims against respondent Gaskell.

Upon review and consideration, the Commissioner concurred with the ALJ's determinations for the reasons thoroughly set forth in the Initial Decision. 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 2/16/18

merit in petitioner's allegations that D.H.'s due process rights were violated, and further dismissed petitioner's claims against respondent Gaskell.

Petitioner's exceptions substantially recast and reiterate the arguments made below. Petitioner asserts "arbitrary, capricious, intentional misconduct, and bad faith" as bases for her exceptions to Initial Decision. Petitioner argues that "Fight or Flight instinctive reaction" and "prima facie retaliation, with an open complaint against Gaskell" were not taken into account in considering this matter. Petitioner further argues that evidence, *i.e.*, the video, was "altered," and that necessary witnesses were not presented for the hearing. In reply, the Board argues that there is no legal basis for petitioner's assertion that the video was altered, and respondent acted within its discretion in presenting witnesses at the hearing.

Upon consideration and review, the Commissioner is in accord with the ALJ's determination – for the reasons thoroughly set forth in the Initial Decision. The Commissioner finds that the Board did not act in an arbitrary, capricious or unreasonable manner in imposing the subject disciplinary action on D.H., as the undisputed findings of fact reflect that D.H. struck another student and was disciplined in accordance with the Board's policies pertaining to Pupil Discipline and the Student Code of Conduct. Furthermore, the Commissioner finds that the record does not reflect that D.H.'s procedural due process rights were violated. The Commissioner also finds that petitioner's accusations of retaliation are without merit; therefore, the claims against respondent Gaskell were properly dismissed. With regard to the remainder of the arguments reiterated in petitioner's exceptions, the Commissioner finds that her claims that the video was altered are unsubstantiated, and there is no evidence in the record transmitted to the Commissioner by the OAL that respondent was directed to present specific witnesses at the hearing and failed to do so.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 16679-16
AGENCY DKT. NO. 268-10/16

D.H. O/B/O MINOR CHILD D.H.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, AND MICHAEL GASKELL, PRINCIPAL,
Respondents.

D.H., appearing pro se

Jodi S. Howlett, Esq., for respondents (Cleary Giacobbe Alfieri Jacobs, attorneys)

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

Record Closed: August 25, 2017 Decided: January 12, 2018

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about October 5, 2016, Petitioner D.H., pro se, filed the instant Petition of Appeal (hereinafter referred to as Petition) with the Commissioner of Education against Respondents, Board of Education of the Township of East Brunswick and Michael

student. John Doe reported to the nurse that he was punched in the arm and kicked in the groin by another student.

Assistant Principal Russell Petronko (Petronko) reviewed security video of the hallway where the incident occurred and positively identified the alleged offending student as minor D.H. Mr. Petronko and Ms. Baker interviewed minor D.H. at which time, she admitted to physically striking the other student as an instinct to him startling her.

Mr. Petronko contacted Petitioner via telephone to inform her of the incident involving minor D.H. and advising that she would be subjected to a one-day in-school suspension. Petitioner requested a counter-Harassment, Intimidation and Bullying (HIB) investigation be initiated on behalf of her daughter and submitted a Student/Parent Appeal Form to appeal the one-day in-school suspension.

The Anti-Bullying Specialist at Hammarskjold Middle School, Margaret Haas, conducted an investigation into the HIB complaints. At the direction of her mother, D.H. refused to be interviewed as a part of any investigation. Ms. Haas reviewed the security video, reviewed written witness statements, and interviewed staff members and students with personal knowledge of the altercation involving minor D.H. Ms. Haas completed her investigation on or about September 28, 2016, and she concluded that no finding of HIB was substantiated as to either student involved in the incident.

On or about September 28, 2016, Respondent Dr. Michael Gaskell, principal of Hammarskjold Middle School, reviewed the disciplinary determination against D.H. Dr. Gaskell upheld the one-day in-school suspension that was imposed.

Arguments of the Parties

Petitioner argues that John Doe intentionally "threw a quick punch" that did not make contact with D.H., but which was close enough to startle her and to evoke an "instinctive" retaliation. Petitioner acknowledges that D.H. struck John Doe and denies "repeatedly" striking him. She argues that D.H.'s conduct was justified because of the

the internal hearing, and not having the opportunity to observe the student witnesses and assess their credibility, I **FIND** the following further **FACTS** of this case:

On September 16, 2017, minor child D.H., a seventh-grade student, was walking down the hallway of a corridor identified as the sixth-grade hallway. It was the end of the school day and D.H. was walking quickly down the hallway. Suddenly, a sixth-grade-male student lunged in her direction in an attempt, by his own admission, to frighten her. The young man is taller and larger than D.H.; however, he does not make contact with D.H.

D.H. immediately reacted by punching and kicking the male student and she begins to walk away. There is some discrepancy as to what follows next. My observation of the video is that, as D.H. is walking away, the bag on her right shoulder came off—it could have been pulled off or it could have slipped off of her shoulder. The male student was still in close proximity to D.H. and she struck him again.

LEGAL DISCUSSION AND ANALYSIS

The issue to be determined is whether the respondent school board disciplinary decision was arbitrary, capricious or unreasonable. It is widely recognized that local school boards have been charged by the Legislature with the orderly conduct of public schools and are vested with broad discretion in matters involving pupil discipline. K.O.H. ex rel. R.H. v. Edison Twp. Bd. of Educ., 95 N.J.A.R.2d (EDU) 275, 276. When a local board has acted within its authority, its actions carry a presumption of validity and will not generally be disturbed absent an affirmative showing that its judgment was arbitrary, capricious or unreasonable. Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966). In matters involving the exercise of a local board of education's discretion, the scope of the Commissioner's review is not to substitute his/her judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for making the conclusions and decisions they made.

ORDER

It is hereby **ORDERED** that Petitioner's claims against Respondent Board of Education and Respondent Michael Gaskell, 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 12, 2018
DATE

LELAND S. MCGEE, ALJ

Date Received at Agency: January 12, 2018

Date Mailed to Parties: JAN 16 2018

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

R-4 D.H.'s Incident Report

R-5 Diagram of first floor of the school

R-6 Petronko's Case Note

R-7 School Code of Conduct

R-8 Parent/Student Acknowledgement Form

R-9 Pupil Discipline Code of Conduct

R-10 Student/Parent Appeal Form

R-11 Student Incident Report

R-12 Student HIB Statement

R-13 Statement by Victim

R-14 Attachment to R-10 dated September 19, 2016

R-15 Report of Suspensions for 2015-2016 school year

R-16 Letter to D.H., mother of minor child D.H.

56-18

C.P., ON BEHALF OF MINOR CHILD, L.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WARREN, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Pro se petitioner challenged the determination of the respondent Board that L.P. was not the victim of harassment, intimidation or bullying (HIB) under the provisions of the New Jersey Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 *et seq.* (the Act). C.P., the father of L.P. – an eighth grade student in respondent's school district – alleged that his daughter had been subjected to harassment, intimidation, or bullying by two District staff members in the spring of 2016. Petitioner sought reversal of the Board's decision finding no HIB, and a determination that L.P. was the victim of bullying behavior by staff members based on a distinguishing characteristic, specifically L.P.'s Individualized Education Program (IEP). The Board asserted that the required HIB investigation was timely conducted, and the results supported the conclusion that no HIB occurred in this case.

The ALJ found, *inter alia*, that: the Act applies to any gesture, or any written, verbal or physical act, or any electronic communication that is reasonably perceived as being motivated either by an actual or perceived characteristic, such as, *inter alia*: race, color, religion, national origin, gender, sexual orientation, or a mental, physical or sensory disability, or any other distinguishing characteristic; the District's HIB policy mirrors the New Jersey law, and sets forth a detailed process by which complaints are investigated to determine whether an action meets the definition of HIB as set forth in the policy and Act; in the instant case, petitioner alleged that the HIB investigation was flawed, and asserted that the Board failed to interview witnesses and properly investigate two incidents of harassment and demeaning conduct against L.P.; the Board contended, *inter alia*, that incidents of HIB must be motivated by a distinguishing characteristic and substantially disrupt or interfere with the orderly operation of the school or the rights of students; further, the Board asserted that its determination that no HIB occurred in the instant case was not arbitrary, capricious or unreasonable. The ALJ concluded that the petitioner presented no credible evidence that the actions of the District staff members constituted HIB, nor that the Board acted in an arbitrary manner. Accordingly, the ALJ ordered the petition dismissed.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, 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 2/16/18

OAL DKT. NO. EDU 13907-16
AGENCY DKT. NO. 210-8/16

C.P., ON BEHALF OF MINOR CHILD, L.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WARREN, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a comprehensive review of the record, the Commissioner agrées with the Administrative Law Judge (ALJ) that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its Harassment, Intimidation and Bullying (HIB) determinations, pursuant to the Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 *et seq*. The Commissioner is in accord with the ALJ that the Board investigated the two HIB complaints in a timely manner and in accordance with the statutory timelines. The HIB complaints were filed on April 11 and 15, 2016, and the investigations into these complaints were completed on April 25, 2016 – or within ten school days, as set forth in *N.J.S.A.* 18A:37-15(b)(6)(a). Petitioner has failed to demonstrate that any communications he had with the Board prior to April 11, 2016 constituted a HIB complaint.

[1] The Commissioner was not provided with a transcript of the September 25, 2017 hearing at the OAL.

This Commissioner also agrees with the ALJ that the alleged actions by the teacher and guidance counselor were not motivated by any actual or perceived distinguishing characteristic of L.P. Although petitioner alleges that L.P.'s distinguishing characteristic is that she has an Individualized Education Program (IEP), there is no evidence to suggest that the alleged actions were in any way *motivated* by that distinguishing characteristic, as required by *N.J.S.A.* 18A:37-14.

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: 2/16/18

Date of Mailing: 2/20/18

[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).

25, 2016. Petitioner claims that his daughter, L.P., currently an eighth-grade student in the District, was subjected to harassment, intimidation, or bullying by two District staff members, Language Arts Teacher, Christine Cirrotti (Cirrotti), and Guidance Counsellor, Helen Scully (Scully), in the spring of 2016. Petitioner seeks the reversal of the Board's decision finding no HIB, seeking a determination that both Scully and Cirrotti engaged in bullying behavior towards L.P. based on a distinguishing characteristic, specifically an IEP (Individualized Education Program).

On September 13, 2016, this matter was transferred to the Office of Administrative Law (OAL) from the New Jersey Department of Education for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to B-15 and N.J.S.A. 52:14F-1 to F-13. On March 21, 2017, respondent filed a motion for summary decision, and on April 5, 2017, petitioner submitted a brief in opposition to the motion for summary decision. Respondent submitted a reply in further support of respondent's motion for summary decision on April 10, 2017. On May 5, 2017, petitioner submitted a signed brief in opposition to the motion for summary decision. The motion was subsequently denied on May 8, 2017.

A hearing was held on September 25, 2017, and the record was kept open for each of the parties to submit closing summations by December 1, 2017. On that date, the record closed.

FACTUAL DISCUSSION AND TESTIMONY

For Respondent

Dr. Beatrice Schwarzkopf

Dr. Schwarzkopf has been employed by Warren Middle School as psychologist for the past four years. She was awarded her Ph.D from Pace University and has spent the last thirteen years in education.

She was involved in the development of L.P.'s IEP and considered her a hard worker in the classroom and on assignments. She recalled that C.P. wanted L.P. to be in a higher language arts class but the doctor did not think it was a good idea. She asked for a discussion with C.P. but they never met. The doctor did not think it was the best placement for L.P.

She worked with Cirrotti on implementation of L.P.'s IEP. She recalled that "Cirrotti really wanted to make sure what she was doing everything to make L.P. successful."

Terry Godfrey

Ms. Godfrey is the Learning Disabilities Consultant on the child study team at Warren Middle School. She recalled that on March 17, 2016, she met with L.P.'s parents about Cirrotti's treatment. Godfrey stated that she didn't inform anyone about the parents' concerns for two reasons: 1) the parents were going to inform Ms. Dicumba; and 2) L.P. was "happy in the class." She recalled that it was "my understanding" the parents were not alleging HIB.

Candida Hengemuhle

Ms. Hengemuhle is the Director of Special Services and Coordinator of Anti-Bullying at Warren Middle School. She is involved in annual HIB training and meetings regarding any complaints of HIB.

She first became aware of L.P.'s allegations of HIB when C.P. contacted her. She recalled a discussion with L.P.'s parents regarding the alleged HIB and counselor Scully. Thereafter, Scully was interviewed and the investigation concluded with a finding of no HIB.

Helen Scully

Ms. Scully has been a guidance counselor at the Warren Middle School for eight years. She spent the last fourteen years in the Warren Board of Education.

L.P. came to her complaining about Cirrotti's class and felt that Cirrotti talked to her about a grade she received in front of the class. They discussed options and Scully spoke to Cirrotti who said it never happened. Scully told Cirrotti never to discuss grades in front of the class in that fashion.

Scully recalled that L.P. was "upset" but it did not warrant any action because L.P. ultimately calmed down. She further recalled that L.P. was "composed and confident" throughout the interview. Scully was "confident" that L.P. was satisfied because she gave the instruction that if she was "not happy or satisfied, come back and see me." "She didn't."

Thereafter, L.P. circulated a petition about Cirrotti and the principal asked Scully to retrieve it. Scully called L.P. to the office and met with her behind closed doors without anyone else present. The purpose was to collect the survey but L.P. did not possess it. Her father, C.P., had it and was going to meet the principal the following day. Nevertheless, Scully met with L.P. for approximately fifteen minutes and L.P. called it was a survey not a petition. Scully indicated that she never said she was going to shred the survey nor was L.P. upset.

On redirect, Scully reiterated that at no time did she raise her voice, berate or intimidate L.P. She was not angry at her.

Christine Cirrotti

Mrs. Cirrotti has been teaching Language Arts for six years. She described that High Language Arts is faster and more challenging. It is reserved for students at a higher level. L.P. was not recommended for the program but wanted it as an elective.

Cirrotti knew L.P. had an IEP and the accommodations and implementation was made. "It was never a burden."

Early October, L.P. grades were low so she met with C.P. in an effort to prevent her from falling behind. Cirrotti recalled that she had concerns about whether L.P. would be successful but never discussed grades in front of other students. There were discussions about essays with each student during class. She thought the relationship was "good" with L.P. but she got "quieter" throughout the year and did not ask as many questions.

Cirrotti was told by another teacher about the survey and inquired of three students if they thought she was an unfair teacher. This was simply an effort by her to see if there was a problem with her teaching so she could correct it.

On redirect, Cirrotti did not speak to L.P. about her grades in front of other students. During silent reading, she asks students about the book. She also noted that some students got less than stellar grades. Cirrotti felt as if her hands were tied when dealing with L.P. and wanted all students to be successful.

Carol Brown

Ms. Brown is the Anti-Bullying specialist in Warren. She has a master's degree in Social Work and Clinical Social Work. Her duties are to investigate allegations and make findings of fact on the issue of HIB.

She recalled that the principal told her about a complaint from C.P. He wrote an explanation about an allegation of HIB. Brown's investigation included interviewing L.P., Cirrotti, and several students. At no time did anyone "counsel" L.P. The supposed intention was for her to stop circulating the survey. L.P. was not a student "at risk." In fact, she was composed and impressed at her advocacy on what "she believed occurred" during the interview. These were fact-finding exercises to determine if there was HIB. They accurately reflect the investigation which was thorough.

Robert Comba

His understanding was that L.P. was having difficulty in the Cirrotti classroom. He did not start an HIB investigation at the first complaint of Cirrotti because there were no "distinguishing characteristics" to put it in HIB. He recalled that a class change or level change may have been suggested, and that there was a sense of urgency in removing the petition from the school so as not to disrupt the educational process.

L.P. was pulled out of her Social Studies test because lunch was next period and a petition in the cafeteria could have been very disruptive. He also understood that L.P. was "upset" at the meeting with Scully and lost her composure.

For Petitioner

L.P.

L.P. is an eighth-grader at the Warren Middle School and is thirteen years old. She recalled that her PARC scores allowed her to be in High Language Arts Class. "It was challenging" but "she felt like she was not keeping up," "was not given extra time to complete assignments" and "it was frustrating."

The "directives were vague" and "Cirrotti was not approachable." She specifically remembered that Cirrotti repeated her grade in front of the class and her being "embarrassed." L.P. articulated that "the teacher should be encouraging" and she was scared of the embarrassment because the conversation was heard by other students.

L.P. indicated that she loves poems and hopes to have a book published one day. During school, she learned so much about moral integrity and that was the reason for the petition. L.P. went to Scully so many times and "felt that nobody had my back" so she did it for herself and started the petition.

She believes Cirrotti had "aggression towards her" but she sucked it up. After these incidents, she "dreaded school." Home was a safe haven.

Regarding the discussion in Scully's office L.P. was surprised to have the door closed. During the discussion, Scully escalated her tone. L.P. "couldn't handle it" and felt as if she was being interrogated. She remembered thinking "do I need a lawyer." After, she ran to the bathroom and cried because Scully was "mean" and L.P. was "intimidated." Scully had "hurt" her feelings. She did not feel as if she could trust anyone because of how "arrogant she came off."

On cross-examination, L.P indicated that Cirrotti spoke to her about grades on seven occasions. Cirrotti would say "I'd like to go over this grade with you" and repeated the grade in front of other students including T.R., C.C., L.S., and R.C. However, Cirrotti never repeated grades with any of the other kids. Cirrotti never resisted meeting after school but "did not have a kind approach." L.P. also noted that her parents were okay with the survey.

FINDINGS OF FACTS

Having carefully considered the relevant evidence, including the testimony, and observed the demeanor of the witnesses, I **FIND** the following **FACTS**:

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J.Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness' 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). Also, "'[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 trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

In total, the testimony of respondent's witnesses was credible and persuasive. Although the outward presentation by Cirrotti was priggish and her testimony "canned," all of respondent witnesses' testimony was clear and concise. It was obvious that their only concern was for the welfare and education of all students in the Warren Middle School including L.P.

Likewise, L.P.'s testimony was also credible. The feelings she experienced cannot and should not be dismissed. The undersigned was very impressed with the maturity in this thirteen-year-old. With her indicating that she "loved poems and hopes to have a book published one day," I have no doubt in my mind that it will become a reality sooner than later. The parents of L.P. should be very proud of their daughter. However, there is nothing in the evidence presented that establishes any indicia of HIB.

After hearing the testimony and reviewing the evidence, **I FIND,** by a preponderance of credible evidence, that L.P. is an eighth-grader at the Warren Middle School. **I FURTHER FIND,** that a complaint of HIB was proffered by C.P. against Cirrotti and Scully. The school investigated the allegation and made a finding that there was no HIB.

LEGAL ANALYSIS AND CONCLUSIONS

Petitioner challenges the determination of the Board that the conduct of several faculty members towards L.P. did not constitute harassment, intimidation or bullying (HIB).

New Jersey enacted the Anti-Bullying Bill of Rights Act (Act) to "strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying" occurring both on and off of school grounds. N.J.S.A. 18A:37-13.1(f). Definitions relative to adoption of harassment and bullying prevention policies are found in N.J.S.A. 18A:37-14, which states in part:

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> > (a) a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
> >
> > (b) has the effect of insulting or demeaning any student or group of students; or
> >
> > (c) creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

The District's HIB Policy, "Prohibiting Harassment, Intimidation and Bullying," essentially mirrors the New Jersey law. Additionally, the policy also sets forth a detailed process by which complaints are investigated to determine whether an action meets the definition of HIB as set forth in the policy and Act.

Petitioner alleges that the HIB investigation was conducted improperly and was incomplete. He asserts that the Board failed to interview witnesses and properly investigate two separate instances of harassment and demeaning contact with L.P. Petitioner urges this tribunal to conclude that: 1) there was HIB and that 2) the HIB investigation was conducted improperly and incomplete therefore the determination should be reversed. I completely disagree.

The Board argues that incidents of HIB must be based on a distinguishing characteristic and substantially disrupt or interfere with the orderly operation of the school or the rights of students. Further, the incident must have physically or emotionally harmed the student, insulted or demeaned the student, or created a hostile educational environment for the student. The Board asserts that petitioner has failed to show that L.P. was mistreated by the staff based on her race, gender or any other characteristic. Moreover, petitioner has not shown that L.P. was insulted or demeaned, or that she was physically or emotionally harmed.

The Board urges this tribunal to conclude that the Board was not arbitrary, capricious or unreasonable in its determination that the HIB investigation was conducted properly and that the conduct did not constitute HIB.

The Commissioner of Education will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008) (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)), adopted, Comm'r (April 7, 2008), <http://njlaw.rutgers.edu/collections/oal/>. Further, the Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). New Jersey courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200

(Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, in order to prevail, the petitioner must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M., EDU 2780-07, Initial Decision (February 6, 2008), <http://njlaw.rutgers.edu/collections/oal/>; See W.C.L. and A.L. ex rel L.L. v. Tenafly Bd. of Educ., OAL Dkt. No. EDU 3223-12 (2013) (The petitioner challenged the school board's decision that a student committed an act of HIB. The Administrative Law Judge (ALJ) found that the board's actions were consistent with the letter and spirit of the law and were not taken in bad faith or in disregard of the circumstances. The ALJ concluded that the petitioner failed to establish that the board's actions were arbitrary, capricious or unreasonable. The Commissioner affirmed the ALJ's decision to dismiss the petition of appeal.); J.M.C. ex rel A.C. v. E. Brunswick Bd. of Educ., OAL Dkt. No. EDU 4144-12 (2013) (The petitioner challenged the board's determination that the actions of the petitioner's son constituted HIB. The board found that the student called another student "gay" and said he "danced like a girl." The demeaning remarks constituted HIB.). In both cases, the petitioners failed to satisfy their burden to show that the board's actions were arbitrary, capricious or unreasonable.

Here, C.P. spoke about his concern and school personnel responded. Petitioner would like the undersigned to believe that his discussion was that the incident regarded an HIB complaint. I cannot find nor conclude that was the case. In fact, I find the opposite. C.P.'s complaint was that of an interaction involving a teacher and ultimately a guidance counselor. There is nothing in the record that intimates or can be construed as any comment or action that was based on "actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic." C.P. would like the undersigned to believe that the motivation for the comments was because of L.P.'s IEP. However, that is not founded in any lucid fact. In fact, the District investigated the HIB complaint in a timely manner in accordance with the statute, and once the investigation was conducted all timelines in the Anti-Bullying Bill of Rights were followed. Petitioner asserts that the initial investigation omitted interviews of key witnesses. He points to inconsistencies in the reports and testimony. However, those assertions are also unfounded.

Petitioner bears the burden of proof by a preponderance of the credible. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); DYFS v. M.R., 314 N.J. Super. 390, 414 (App. Div. 1998); In re Allegations of Sexual Abuse at E. Park High Sch., 314 N.J. Super. 149, 168 (App. Div. 1998). This tribunal has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E.&A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958).

I have carefully reviewed the record. Petitioner presented no credible evidence that the actions of the teacher or guidance counselor constituted HIB. Furthermore, petitioner presented no credible evidence that Board acted in an arbitrary manner. I am mindful of C.P.'s strong desire to protect his daughter from harm. Indeed, a parent's most basic instinct is to protect their children. However, petitioner provided no testimony from L.P. or any other witness to support their allegations. I am more persuaded by the evidence presented by the respondent than by that presented by petitioner. It has not been established that the alleged aggressors' actions were motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic.

Based on the whole of the credible evidence presented, I **CONCLUDE** that petitioner has not met his burden of proof that the Board acted in an arbitrary manner in concluding that the actions failed to constitute harassment, intimidation or bullying under the Act.

ORDER

Based on the foregoing, I **ORDER** that the petition be **DISMISSED**.

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

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

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

January 16, 2018
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 1/17/18

Date Mailed to Parties: 1/17/18

dw/mph

APPENDIX

WITNESSES

For petitioner:

L.P.

For respondent:

Dr. Beatrice Schwarzkopf
Terry Godfrey
Candida Hengemuhle
Helen Scully
Christine Cirrotti
Carol Brown
Robert Comba

EXHIBITS

Joint Exhibits:

J-1 Complaint
J-4 Anti-Bullying Report Form (Cirrotti)
J-7 Anti-Bullying Report Form (Scully)
J-14 Email
J-16 Email
J-22 Survey/Petition
J-25 Questions regarding survey

57-18

OAL DKT. NO. EDU 172-16
AGENCY DKT. NO. 363-12/15

M.K. AND M.K., on behalf of minor child, M.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	ORDER
RESPONDENT.	:	

On June 5, 2017, a final agency decision was rendered in this matter, wherein the Commissioner found M.K. and M.K. liable for tuition in the amount of Thirty Eight Thousand-Three Hundred and Twenty Nine Dollars and Twenty Cents ($38,329.20), representing tuition for a period of ineligible attendance by their child, M.K., in the Board's school district during the 2015-2016 school year. The Board subsequently notified the Commissioner that M.K. and M.K. have not complied with the decision and it requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. M.K. and M.K., in response to the Board's request, offered no reasons that have not been fully and fairly adjudicated as to why the judgment against them should not be so docketed.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Michael and Michelle Knight are now subject to entry of a judgment by the court in the amount of $38,329.20, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/14/18
Date of Mailing: 2/20/18

58-18

AWARD APPROVING SETTLEMENT AGREEMENT

In the Matter of the Tenure Hearing of Andrew Frazier and the Bergenfield Public School District	*	Department of Education Docket No. 293-12/17

Before: Joel M. Weisblatt, Arbitrator

Appearances: For the Employee
Springstead & Maurice
By: Harold N. Springstead, Esquire

For the District
Fogarty & Hara
By: Nicholas A. Soto, Esquire

AWARD

In advance of the arbitration proceeding to commence on February 12, 2018, the parties reached a resolution of the issues presented in the above-captioned matter. The Arbitrator finds that the terms of that settlement are clearly in the public interest. Therefore the Arbitrator issues this Award approving the terms of the parties' settlement.

Specifically, the Arbitrator has reviewed the record evidence, including: the charges, the answer, and documented materials in support of the charge. The settlement provides for the withdrawal of the charges and the resignation of the charged party. It was achieved with the consent of both the charged and charging parties. The Settlement reflects a full explanation to the charged party of his rights and the implications of the resolution. The Settlement represents a fair and equitable resolution of the parties' dispute and reflects a result serving the public interest as well as that of the parties.

Skillman, New Jersey
February 19, 2018

Joel M. Weisblatt, Arbitrator

On this 19th day of February 2018, before me personally came and appeared Joel M. Weisblatt, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Attorney-at-law

February

SEPARATION AGREEMENT

This SEPARATION AGREEMENT is made and entered into this 8th day of ~~January,~~ 2018, by and between the BERGENFIELD BOARD OF EDUCATION, with offices located at 225 W. Clinton Ave, Bergenfield, New Jersey ("Board") and ANDREW FRAZIER, whose address is 113 New York Avenue, Bergenfield, New Jersey 07621 ("Frazier").

WITNESSETH:

WHEREAS, Frazier has been employed in the Bergenfield Public School District since 2001, and is currently in the position of Head Custodian; and

WHEREAS, certain employment issues have arisen between the Board and Frazier; and

WHEREAS, on December 18, 2017, the Board certified the filing of Tenure Charges against Frazier with the Commissioner of Education ("Commissioner"); and

WHEREAS, the parties have determined it is in their mutual interests to conclude their employment relationship; and

WHEREAS, Frazier has indicated a willingness to resign from all employment with the Board effective at the close of business on June 30, 2018, upon satisfaction of certain terms and conditions to be stipulated in this Separation Agreement ("the Agreement"); and

WHEREAS, Frazier will be placed on a personal leave of absence without pay, but with the continuation of health insurance coverage, less his required employee contributions of One Thousand Eight Hundred Twenty One Dollars and Seventy-Two Cents ($1,821.72) toward the premium, for the period covering January 1, 2018 through June 30, 2018; and

WHEREAS, Frazier will be paid for twenty (20) vacation days in the amount of Five Thousand Seventy Dollars ($5,070.00), less his employee health insurance contributions of One Thousand Eight Hundred Twenty-One Dollars and Seventy-Two Cents ($1,821.72), for a total payment of Three Thousand Two Hundred Forty-Eight Dollars and Twenty-Eight Cents ($3,248.28).

NOW, THEREFORE, in consideration of the aforementioned mutual premises and promises, and in exchange for the consideration more particularly set forth below, it is hereby agreed:

1. In return for full compliance with this Agreement, and subject to formal Board approval and ratification of the Agreement, Frazier agrees to sign a letter of resignation from all employment with the Board, to be effective at the close of business on June 30, 2018. The Board shall, by separate Resolution, publically accept this resignation at its next scheduled Board meeting, and shall formally withdraw the Tenure Charges filed with the Commissioner. The form of said resignation is attached hereto as Exhibit A. Said resignation is effective only upon the full terms and conditions of the Agreement being publically accepted by Resolution of the Board, and is only then binding upon the parties and irrevocable and is not subject to modification or rescission.

2. Frazier hereby releases and waives any and all claims he has, or could have, against the Board, its individual members, officers, employees, administrators, agents, servants and representatives, including, but not limited to, claims for discrimination, contract, tort, constitutional violation and/or attorneys' fees. Frazier shall execute a General Release in favor of the Board, its individual members, officers, employees, administrators, agents, servants, and representatives, releasing them from any and all claims, liabilities or expenses to which they may be subject arising from any claims or rights of Frazier. The form of this General Release is attached hereto as Exhibit B. Nothing in this Agreement or the documents referenced herein shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

3. In consideration for Frazier's resignation as set forth in Paragraph 1 of this Agreement and his waiver and release as set forth in Paragraph 2 of this Agreement, the Board hereby approves a personal leave of absence without pay, but with the continuation of health insurance coverage, less Frazier's required employee contributions of One Thousand Eight Hundred Twenty-One Dollars and Seventy-Two Cents ($1,821.72) toward the premium, for the period covering January 1, 2018 through June 30, 2018.

4. In further consideration for Frazier's resignation as set forth in Paragraph 1 of this Agreement and his waiver and release as set forth in Paragraph 2 of this Agreement, the Board hereby agrees to pay Frazier for twenty (20) vacation days in the amount of Five Thousand Seventy Dollars ($5,070.00), less his employee health insurance contributions of One Thousand Eight Hundred Twenty-One Dollars and Seventy-Two Cents ($1,821.72), for a total payment of Three Thousand Two Hundred Forty-Eight Dollars and Twenty-Eight Cents ($3,248.28).

5. It is expressly understood that should Frazier acquire health insurance coverage through another employer or by any other means during the period of January 1, 2018 through June 30, 2018, Frazier shall immediately notify the School Business Administrator, at which time the Board will cease health insurance coverage for Frazier.

6. It is further expressly understood that, with the exception of Paragraph 4 of this Agreement, any personal leave, sick leave, and any other financial remuneration to which Frazier is otherwise entitled under the collective negotiations agreement between the Board and the Bergenfield Education Association covering the period of July 1, 2015 through June 30, 2018, shall not accrue, nor shall he be entitled to their cash equivalent.

7. The parties agree that neither will malign, disturb nor interfere with the other in any manner whatsoever. Each shall be free from interference, direct or indirect, by the other and neither shall discuss with, disclose to or communicate with anyone, the terms of this Agreement, except their attorneys or accountants who shall hold such communication as confidential, or as may be required by law. The Board shall be required to adopt a public resolution approving this Separation Agreement and each of the documents which are incorporated by reference in said Agreement.

8. Frazier agrees that, upon the execution of this Agreement, he shall forfeit all rights he has to any position with the Board. Frazier further agrees that he shall never return to any employment or service with the Board as an employee or an independent contractor. Additionally, Frazier shall never apply for any position with the Board at any time after the execution of this Agreement. With respect to any inquiries from the Department of Labor concerning Frazier's reason for separation, the Board will answer truthfully that his resignation was in settlement of an employment dispute, the details of which shall remain confidential to the extent permitted by law.

9. Both parties acknowledge that they have consulted with an attorney or a representative of their own choosing prior to signing this Agreement, and that they sign this Agreement as their own voluntary act and deed and fully understand the duties and obligations enumerated herein.

10. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

11. All terms of this Agreement are deemed to be material. This document may not be altered, amended, modified or revoked unless in writing executed by both parties with the same formalities as the original.

12. This Agreement and the resignation of Frazier shall only become effective upon the ratification and approval by the Board and in the event that the Board is prohibited from, unable or, unwilling to, fulfill the terms of this Agreement, for any reason, Frazier's resignation shall be rendered null and void and, of no force or effect, regardless of whether it has been accepted by Board resolution. In that event, the parties' rights shall return to the status existing prior to the execution of this Agreement.

13. If, during the term of this Agreement, it is found that a specific clause of the Agreement is illegal under federal or State law, the remainder of this Agreement not affected by such a ruling shall remain in force.

14. This Agreement shall be subject to the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties set their hands and seals to this agreement effective on the day and year first written above.

WITNESS:

DAVID DiPISA
School Business Administrator/
Board Secretary

DATED: 2-12-18

BERGENFIELD
BOARD OF EDUCATION

BY: _____
DR. JOSEPH AMARA
Board President

DATED: 2/12/18

WITNESS:

Diane Edwards

DATED: 2/12/18

ANDREW FRAZIER

DATED: 2/12/18

EXHIBIT B

RELEASE

This Release, dated JANUARY ___, 2018, is given

BY the Releasor(s)

ANDREW FRAZIER

referred to as "I", "Frazier", or "my",

TO BERGENFIELD BOARD OF EDUCATION and its members, officers, employees, administrators, agents and servants,

referred to as "You" or the "Board".

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. Release. Except as to claims that cannot be released under applicable law, I waive, release and give up any and all claims and rights which I may have against you through the date of this Release. This releases all claims, including those of which I am not aware and those not mentioned in this Release through the date of this Release. This Release applies to claims resulting from anything which has happened up to now. Except as to claims that cannot be released under applicable law, I waive and release the following claims:

More particularly, Frazier knowingly and voluntarily releases, waives, acquits, disclaims and forever discharges the Board from any and all claims which I have or might have against you from any and all lawsuits, charges, claims, complaints, demands, judgments, obligations, causes of action, controversies or any other proceedings with any administrative agency, or court or any other forum, under any federal, state or local laws or regulations, including, but not limited to, claims arising under the Americans with Disabilities Act, the Fair Labor Standards Act, the Employee Retirement Income Security Act of 1974, Title VII of the Civil Rights Act of 1964, the Vocational Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967, as amended, and including the Older Worker Benefit Protection Act, the Federal Family Medical Leave Act, the Consolidated Budgetary Reconciliation Act, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, New Jersey Wage and Hours law, New Jersey Statutes Title 18A, Education, and/or any other federal, state or local employment, human rights, civil rights, wage hour, tenure, pension or labor law, rule, statute, regulation, constitution or ordinance and/or public policy, contract or tort law, or any claim of retaliation under such law, or any claim of breach of any contract, employment agreement or promise (whether express, oral, written or implied from any source), or any claim of intentional or negligent infliction of emotional distress, tortious interference with contractual relations, wrongful or abusive discharge, constructive discharge, common law retaliation, defamation, prima facie tort, fraud, misrepresentation, negligence, estoppel, or any action similar thereto against the Board including any claim for attorneys' fees, that Frazier, his heirs, executors, administrators, successors, and assigns now have, ever had, or may hereafter have, whether known or unknown, suspected or unsuspected, based upon any conduct arising out of Frazier's employment with the Board. This paragraph is not intended and shall not preclude Frazier from instituting proceedings seeking to enforce the terms of this Release.

2. Consideration.

a. In consideration for my resignation as set forth in the Separation Agreement, the Board will approve a personal leave of absence without pay for the period covering January 1, 2018 through June 30, 2018.

b. I will continue to receive health insurance coverage through the Board, less my required employee contributions of One Thousand Eight Hundred Twenty-One Dollars and Seventy-Two Cents ($1,821.72) toward the premium, from January 1, 2018 through June 30, 2018.

c. I will be paid for twenty (20) vacation days in the amount of Five Thousand Seventy Dollars ($5,070.00), less my employee health insurance contributions of One Thousand Eight Hundred Twenty One Dollars and Seventy-Two Cents ($1,821.72), for a total payment of Three Thousand Two Hundred Forty-Eight Dollars and Twenty-Eight Cents ($3,248.28).

d. With the exception of receiving pay for twenty (20) vacation days, during the period of my leave of absence without pay, any personal leave, sick leave, and any other financial remuneration to which I am otherwise entitled under the terms of the collective negotiations agreement in effect between the Board and the Bergenfield Education Association covering the period of July 1, 2015 through June 30, 2018 shall not accrue, nor shall I be entitled to their cash equivalent.

3. Who is Bound. I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. Signatures. I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

Diane Edwards (Seal)
NOTARY PUBLIC

ANDREW FRAZIER

STATE OF NEW JERSEY :
SS:
COUNTY OF :

BE IT REMEMBERED that on this 7th day of ~~January~~ February, 2018, before me personally appeared , who I am satisfied is the person mentioned in and who executed the within Agreement and who knows the contents thereof and thereupon I acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

DIANE EDWARDS
ID # 2303519
~~NOTARY PUBLIC~~
STATE OF NEW JERSEY
My Commission Expires July 29, 2018

(Seal)
NOTARY PUBLIC

Prepared by:

/s/ Stephen R. Fogarty
Stephen R. Fogarty, Esq.

EXHIBIT A

ANDREW FRAZIER
113 New York Avenue
Bergenfield, New Jersey 07621

January ___, 2018

Dr. Christopher Tully
Superintendent of Schools
Bergenfield
Board of Education
225 West Clinton Ave
Bergenfield, New Jersey 07853

Re: Letter of Resignation

Dear Dr. Tully:

I hereby submit my irrevocable resignation, from all employment with the Bergenfield Board of Education, effective at the close of business on June 30, 2018, in accordance with the provisions of a Separation Agreement and General Release executed between the Parties. By this resignation, I hereby forfeit all employment rights in the Bergenfield School District upon my resignation. I understand that, once acted upon, my resignation may not be rescinded.

Very truly yours,

ANDREW FRAZIER

Board of Education
Bergenfield, New Jersey

David DiPisa
Business Administrator/Board Secretary

225 W. Clinton Avenue
Bergenfield, New Jersey 07621
201-385-8801

2. Motion to accept and approve the following resolution:

BE IT RESOLVED by the Bergenfield Board of Education (hereinafter referred to as the "Board") as follows:

1. An employee's name who is on file in the Superintendent's office shall be granted a personal leave of absence without pay, but with the continuation of health insurance coverage, less the employee's required health insurance contributions, for the period covering January 1, 2018 through June 30, 2018.

2. Said employee's resignation, effective June 30, 2018, is hereby approved and accepted.

3. The terms, stipulations and conditions of the Settlement Agreement, annexed to this Resolution, is hereby adopted and approved by the Board. The Board President and School Business Administrator/Board Secretary are hereby authorized and directed to execute the attached Settlement Agreement and any other documents necessary to effectuate same.

RESULT:	**APPROVED [UNANIMOUS]**
MOVER:	Ralph Messina, Trustee
SECONDER:	Eileen Ryder, Vice-President
AYES:	Joseph Amara, Eileen Ryder, Ralph Messina, William Jaeger
ABSENT:	Anthony J. Cortez

This is to certify that this is a copy of the minutes of the Bergenfield Board of Education meeting held 2/12/18.

Diane Edwards 2/13/18
Diane Edwards, Adm. Asst., Notary Public

David DiPisa, Business Admin/Board, Secretary

DIANE EDWARDS
ID # 2303519
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires July 29, 2018

59-18

STATE OF NEW JERSEY

COMMISSIONER OF EDUCATION

In the Matter of Tenure Charges Against Joanne Monroe, Freehold Township Board of Education, Monmouth County	)))))	Agency Docket 232-10/17 Settlement Agreement

Having examined the attached documents and having assurances from the parties that they understand and are willing to be bound by its provisions, I hereby declare this Settlement Agreement, dated February 6, 2018 to be the final and binding resolution of this matter and order its implementation this twelfth day of February, 2018.

Lewis R. Amis

Lewis R Amis

Arbitrator

Encl.

KENNEY, GROSS, KOVATS & PARTON
130 Maple Avenue, Building 8
Red Bank, New Jersey 07701
(732) 530-7500
Attorneys for Freehold Township Board of Education

IN THE MATTER OF TENURE CHARGES AGAINST JOANNE MONROE, FREEHOLD TOWNSHIP BOARD OF EDUCATION, MONMOUTH COUNTY.	**STATE OF NEW JERSEY COMMISSIONER OF EDUCATION** AGENCY DOCKET NO. 232-10/17 **SETTLEMENT AGREEMENT**

The above-captioned matter having been filed with the Commissioner of Education and transferred to Arbitrator Lewis Amis for a hearing on Tenure Charges filed by Petitioner, the Freehold Township Board of Education against Respondent, Joanne Monroe, and the parties to this matter having discussed the amicable resolution of this litigation without the allocation of further time and expense, the parties are hereby agreed as follows:

1. Respondent has been suspended without pay for 120 days pursuant to N.J.S.A. 18A:6-14, commencing on September 27, 2017.

2. Respondent will provide an irrevocable letter of resignation simultaneous with the execution of this agreement, effective on a date to be determined. In doing so, Respondent acknowledges and agrees that she shall not return to the Petitioner's employ at the end of her leave of absence;

3. In exchange for the letter of resignation referred to in paragraph 3 above, Petitioner shall pay to Respondent two month's pay. Neither Petitioner nor Respondent shall seek payment towards health benefits coverage for the period of July 2017 through November 2017.

4. Respondent shall be placed on unpaid leave of absence without benefits retroactive to September 27, 2017 for disability purposes. Petitioner agrees not to contest Respondent's usage of her privately funded disability insurance policy.

5. Respondent waives any claim for compensation for any remaining accrued sick, vacation, or any other days or emoluments she may have possessed as of September 27, 2017 pursuant to the terms of the collective negotiations agreement;

6. Petitioner and Respondent each waive any and all claims, in any forum, arising out of or related to this matter, including but not limited to Respondent's suspension, reinstatement, placement on leave, the certification of tenure charges against her, and any tenure related claims. This waiver includes any claims which either party has, had, or could have had against the other party, its employees, members, and agents.**This waiver expressly preserves any workers compensation claim(s) or action(s) which Respondent has or may file.**

7. Petitioner, via counsel, shall withdraw and dismiss with prejudice the Tenure Charges pending before the Commissioner of Education and the Arbitrator under Agency Docket Number 232-10/17 upon approval of this Agreement;

8. Petitioner and Respondent each agree that they will keep this Agreement confidential to the extent permitted by law. The parties further agree that neither party will disparage the other, whether orally or in writing, nor will either party encourage any other person to do so.

9. The terms set forth herein constitute the parties' entire agreement with regard to this matter. No other terms shall be implied or included. In the event that the Arbitrator does not approve this Agreement, it shall become null and void, and the parties shall resume the litigation of this matter;

10. The parties acknowledge that all terms of this Agreement are subject to the review and approval of the Arbitrator pursuant to N.J.A.C. 6A:3-5.6. As required by that regulation and in accordance with the standards established by the State Board of Education in In re Cardonick, the parties submit the following information in support of their mutual decision to resolve this matter:

    a. The Tenure Charges allege that during the course of her tenure Respondent abandoned her position and/or committed insubordinate acts or unbecoming actions by failing to respond to the district and failing to provide certain student grade information. Respondent has denied any abandonment of position, and submitted medical documentation in support of her claim that she was unable to return to work;

    b. The parties, through counsel and with the assistance of the Arbitrator Lewis Amis, have identified terms of settlement which will amicably resolve the matter to the benefit of both parties, and will allow both parties to move forward without allocation of further time or expense in involved in tenure litigation;

    c. Both parties, having had the opportunity to review this matter with their respective legal counsel, consent to this Agreement voluntarily and with the mutual interests of closure and moving forward;

d. Respondent, in entering this Agreement, represents that she does so with a full understanding of her rights and the effects and implications of all terms of this Agreement, and that she does so having thoroughly reviewed this matter with legal counsel, who has fully explained the terms and effects hereof to her satisfaction, and to which she agrees;

e. The parties represent that this Agreement is in the public interest, as it adequately resolves this matter, and allows both parties to move forward without any further expenditure of public monies for the discovery, hearing, review, and possible appellate components of the litigation of tenure charges or any additional or ancillary claims that could have been brought;

f. Respondent, in entering this Agreement, acknowledges that she has been advised of the Commissioner of Education's duty to refer tenure determinations to the State Board of Examiners in certain instances.

WHEREFORE, the parties to this matter are so agreed, and set their signatures on this 6th day of February, 2018.

JOANNE MONROE

FREEHOLD TOWNSHIP BOARD OF EDUCATION

Joanne Monroe

ROSS KASUN

SUPERINTENDENT OF SCHOOLS
WITNESS:

Ross Kasun

I, Joanne Monroe,

Acknowledge that I have settled my pending tenure matter Agency Docket No. 232-10/17. As a result of the settlement I will not be returning to the classroom. I hereby acknowledge that I understand my continued employment with the district will be unpaid and without benefits. I acknowledge I am still the district's employee until retirement. I also have an affirmative duty to submit a letter to the district regarding my official retirement date.

Dated: 2/6/18

Joanne Monroe
JOANNE MONROE

Subscribed, sworn to, and acknowledged before me this 6th day of February, 2018.

JAMES J. ULIANO
Attorney at Law
State of New Jersey

February 6, 2018

Dr. Ross Kasun
Superintendent of Freehold Township School District
384 West Main Street
Freehold Township, New Jersey 07728

Dear Dr. Kasun:

Please accept this irrevocable letter as notification that I am resigning from my position with the Freehold Township Board of Education. The date this resignation goes into effective is to be determined. I understand I will be on an unpaid leave of absence without benefits until my retirement date. It has been a pleasure to serve the District.

Thank you.

Sincerely,

Joanne Monroe

Joanne Monroe

61-18

BEFORE THE COMMISSION OF EDUCATION
OF NEW JERSEY DEPARTMENT
OF EDUCATION

In the Matter of **JOSEPH OWENS,** **Respondent** **v.** **STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, IN THE COUNTY OF ESSEX,** **School District** **Agency Docket No. 222-9/17**	**RE: SETTLEMENT AGREEMENT** **Dr. Andrée Y. McKissick** **Arbitrator**

APPEARANCES:

For the School District: Brenda C. Liss, Esquire
Riker Danzig Scherer Hyland & Perrett, LLP
Headquarters Plaza
1 Speedwell Avenue
Morristown, New Jersey 07962-1981

For the Respondent: Colin Lynch, Esquire
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
570 Broad Street, Suite 1402
Newark, New Jersey 07102

BACKGROUND

On November 1, 2017, Respondent sought an application to compel discovery for full and complete answers to questions in the interrogatories enumerated as Questions: 4, 15, 18, 19, 20 and 21. Case law was submitted to support the Parties' claims and short briefs were exchanged. On November 7, 2017, a conference call to respond to this order for discovery was established by this Arbitrator as time was of the essence.

FINDINGS OF THE ORDER

The findings of this Arbitrator were that the above-noted questions were relevant and viable to the Respondent's defense (see Mancini v. TWP of Teaneck, 179 NJ 425, 846 A2d 596 (2004)). Based on case law, the real question was: whether or not such information was "reasonably likely to lead to the discovery of admissible evidence"? (See In re Liquidation of Integrity Ins. Co., 165 NJ 72 (2000).) In addition, this Arbitrator found that New Jersey's discovery rules are construed liberally allowing broad pretrial discovery (Payton v. NJ TPK Authority 148 NJ 524 (1997); also see NJ Rule 4: 10-2 (a)). Moreover, this Arbitrator also found that personnel records are not public record nor subject to disclosure to the general public by way of the common law right of access (OPRA). That is, these personnel records are available through standard discovery provided such information is relevant to the issues of this arbitration proceeding. Specifically, confidentiality concerns are "less acute" and should be utilized in only "extreme cases" (see Payton v. NJ TPK Authority, 148 NJ 535 (1992)). The Arbitrator utilized NJSA: 18A: 6-17.2 (a) 3, citing the standard which an arbitrator "shall consider whether charges would not have been brought but for consideration of discrimination as prohibited by state or federal law." Additionally, NJ Superior Court Rule 4: 10-2 (a) 1 states: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim and defense of any party … or appears reasonably calculated to lead to the discovery of admissible evidence." In this case, the Arbitrator still further found that the Respondent offered to redact identifying information of third parties by utilizing one's initials to protect the confidentiality of these

parties. Based on the foregoing, this Arbitrator found that the School District must fully and completely answer the above-numbered questions presented in the interrogatories as noted. It was so ordered. Thus, this ruling precipitated this settlement. Therefore, the scheduled hearing days were cancelled.

6A: 3-5.6 WITHDRAWAL, SETTLEMENT, OR MOOTING OF TENURE CHARGES

Pursuant to this provision, settlement requires approval by an arbitrator. The standards established by the State Board of Education in In re Cardonick, April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846 are as follows:

1. **Accompaniment by documentation as to the nature of the charges;**
2. **Explication of the circumstances justifying settlement or withdrawal;**
3. **Consent of both the charged and charging parties;**
4. **Indication the charged party entered into the agreement with a full understanding of his or her rights;**
5. **A showing the agreement is in the public interest and**
6. **If the charged party is a teaching staff member, a showing the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.**

Approval was given to this settlement based upon documentation utilized in the request for full and complete answers to interrogatories as required by the Order's affirmance. Circumstances for the Settlement were encompassed in the order and the rationale set forth in the Background. Consent of both Parties was freely given, as evidence in the Settlement, itself. The public interest for this settlement, as evidenced by New Jersey's broad and liberal discovery requirements was made. Acknowledgement of the

Respondent's advisement of the Commissioner's duty to refer tenure determinations resulting in a loss of position to the State Board of Examiners for possible suppression or revocation was given on December 13, 2017 by the Respondent. As noted in Frank Cardonick v. Board of Education of the Borough of Brooklawn, Camden County and In the Matter of the Tenure Hearing of Frank Cardonick, School District of the Borough of Brooklawn, Camden County, EDU: 7093-81: 7094-81: 100-82, the New Jersey courts have looked with great favor upon voluntary resolution of litigation through settlement (see Judson v. Peoples Bank & Trust Co, 25 NJ 17 (1957); Honeywell v. Bubb, 130 NJ Super 130 (App. Div. 1974)). Thus, all of the substantive requirements of NJSA 6: A: 3-5-6 were satisfied.

THE SETTLEMENT

This Settlement Agreement ("Agreement") is made by and between, on the one hand, the State-operated School District of the City of Newark ("School District"), with an address at 2 Cedar Street, Newark, New Jersey 07102, and its successors, assigns, officers, employees, agents and representative ("School District"), and, on the other hand, Joseph Owens, residing at 11 Cutler Street, Newark, New Jersey ("Owens") (collectively, the "Parties").

WHEREAS Owens is a tenured teaching staff member employed by the School District;

WHEREAS, on or about September 21, 2017, the School District certified tenure charges of inefficiency and unbecoming conduct against Owens, and a copy of the Notice

of Tenure Charges of Unbecoming Conduct and Inefficiency is attached to this Settlement Agreement (the "Settlement Agreement") as Exhibit A;

WHEREAS, upon certification of such charges, Owens was suspended, without pay, from his employment with the School District for a period of 120 days;

WHEREAS Owens has filed a complaint with the School District's Office of Affirmative Action ("Affirmative Action Complaint"), alleging discrimination on the basis of race, and the Affirmative Action Complaint is currently pending unresolved;

WHEREAS, through counsel, Owens has served the School District with a notice of tort claim, asserting claims of intentional interference with contractual and/or economic relations, defamation, and intentional infliction of emotional distress; and, through counsel, Owens has informed the School District that he is contemplating litigation against the School District and certain School District employees, for discrimination on the basis of race and disability and violation of the Family Medical Leave Act;

WHEREAS the School District denies any discrimination against Owens, denies any violation of the Family Medical Leave Act, and denies any liability to Owens whatsoever;

WHEREAS the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with litigation;

WHEREAS the settlement set forth herein is in the best interest of the Parties and the public because it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, the Parties hereby agree as follows:

1. Owens hereby waives and releases any and all claims and defenses that exist or may exist as of the date he signs this Settlement Agreement, and agrees not to pursue or assert any such claims or defenses in this or any future proceeding. Owens also agrees to withdraw with prejudice any and all claims, complaints, charges, or suits that he may have previously filed against the School District that are still pending in any and all courts and/or before any and all agencies, with the exception of workers compensation claims. This settlement is intended to be the final resolution of all outstanding matters between the School District and Owens. Should Owens fail to submit letters of withdrawal and/or stipulations of dismissal for any such pending claims, charges, complaints, or suits, this Settlement Agreement will serve as Owens's formal written notice of withdrawal thereof.

2. Owens also hereby waives and releases any and all claims or defenses relating to the timing of implementation of a Corrective Action Plan for the 2017-2018 school year and any and all claims or defenses relating to the scheduling of observations in the first semester of the 2017-2018 school year.

3. In exchange for the waiver and release set forth in paragraphs 1 and 2 above, Owens will be reinstated to a teaching position with the School District, effective January 2, 2018 ("Reinstatement Date"), and he will receive back pay for the period between September 21, 2017 and the Reinstatement Date.

4. Additionally, in exchange for the waiver and release set forth in paragraphs 1 and 2 above, the School District will withdraw the pending tenure charges against Owens, will not bring further tenure charges against Owens based on his performance or any act or failure to act by Owens during the 2015-2016 or 2016-2017 school years, and will not report any such act or failure to act to the State Board of Examiners.

5. This Settlement shall not constitute a precedent in any matters involving other employees.

6. By entering into this Settlement Agreement, and in exchange for good consideration as set forth in Paragraphs 3 and 4 above, the sufficiency of which is hereby acknowledged, Owens hereby releases and discharges the School District, its Board of Education and its members, the State District Superintendent, and any and all other School District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") with respect to all claims or rights that he has or may have against the Board of Education of the School District regarding his employment with the School District. This includes without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Owens's employment with the School District. It specifically includes, without limitation, all claims which Owens may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act, the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of

2002; the Federal False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other alleged violation of any federal, state or local law, regulation or ordinance, common law and/or contract or implied contract or collective bargaining/contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on his employment by the School District, including, but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys' fees, costs, and/or future wage loss, except for workers compensation claims and for health insurance continuation coverage under and pursuant to ("COBRA"). Owens agrees to save, hold harmless and indemnify the Released Parties for any legal costs and attorneys' fees associated with the enforcement of the terms of this Settlement Agreement should enforcement become necessary.

7. Notwithstanding Paragraph 6 of this Settlement Agreement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit

against the Released Parties, or any of them, based upon any of the above-released claims in Paragraph 6, Owens agrees not to seek or accept any resulting relief whatsoever.

8. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Owens of the legal requirements of that Act, and fully incorporates the legal requirements by reference into this Settlement Agreement. Accordingly, by executing this Settlement Agreement, Owens acknowledges that he: (i) fully understands the terms and conditions of this Settlement Agreement; (ii) has consulted with an attorney to review the Settlement Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given twenty-one (21) days within which to consider this Settlement Agreement; and (v) has seven (7) days from the date of the execution of this Settlement Agreement to revoke it. Owens understands that he may rescind this Settlement Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the School District either by hand or by certified mail within the seven-day period.

9. The parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, without duress, coercion or pressure from the other party.

10. This Settlement Agreement constitutes the full agreement between the parties, and shall be construed and enforced in accordance with New Jersey law.

11. If any provision or portion of a provision of this Settlement Agreement is held by a court of competent jurisdiction, or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions or remaining portions of a provision will continue and remain in full force and effect.

12. This Settlement Agreement is subject to final approval by the State District Superintendent of the State-operated School District of the City of Newark and will only become effective upon the approval of the Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter further. The signatures below of the Superintendent and Attorney for the School District indicate that the Superintendent has consented to the terms of this Settlement Agreement.

Dated: 12/13/17

JOSEPH OWENS

Dated: 12/13/17

COLIN LYNCH, ESQ.
Attorney for Joseph Owens

Dated: 1/3/18

CHRISTOPHER CERE
State District Superintendent

Dated: _____

BRENDA C. LISS, ESQ.
Attorney for State-operated School District
of the City of Newark

CERTIFICATION

I, JOSEPH OWENS, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that I have been advised of the Commissioner of Education's duty to refer tenure determinations resulting in a loss of position to the state Board of Examiners for possible suspension or revocation of certificate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: 12/13/17

JOSEPH OWENS

AFFIRMATION

I, Dr. Andrée McKissick, do hereby affirm that I am the individual described in and who executed this instrument, which is my Opinion and Award.

DATE: January 9, 2018

Dr. Andrée McKissick

ARBITRATOR

62-18

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

IN THE MATTER OF THE TENURE CHARGES AGAINST	:	
	:	Arbitrator's
KEITH MASON	:	Decision and Award
	:	Approving Settlement
BY	:	
	:	Agency Docket No. 275-10/16
NEW PROVIDENCE BOARD OF EDUCATION, UNION COUNTY NEW JERSEY	:	

Peter Adomeit, Esq.
Arbitrator

APPEARANCES

FOR KEITH MASON
Anthony P. Sciarrilo
Sciarrillo, Cornell, Merlino, McKeever & Osborne, L.L.C.
238 St. Paul Street
Westfield, NJ 07090

FOR NEW PROVIDENCE BOARD OF EDUCATION
Stephen Hunter, Esq.
Detsky Hunter & DeFillippo
33 North Bridge Street
Somerville, N.J. 08876

Decision and Award

The terms of the Settlement Agreement, referred to by the parties as a Separation Agreement, having been negotiated by competent counsel representing the interests of their respective parties, are fair and balanced to both parties, and reflect the desire of both parties to avoid the uncertainty and cost of litigation, and are in the public interest.

Further, I conclude the Settlement Agreement is consistent with the requirements of N.J.A.C. 6:A3-5.6 and for that reason is hereby approved.

Dated: February 20, 2018

Peter Adomeit, Arbitrator CDL # 24296432 C

State of Connecticut)
ss: West Hartford
County of Hartford)

On this 20 Day of February, 2018, before me personally came Peter Adomeit, known to me to be the individual described herein, and who executed the foregoing instrument and acknowledged to me that he executed same. CT DL # 24296432 EXP 12/17/22.

Notary Public

My Commission Expires on

GLADYS CRUZ
NOTARY PUBLIC
STATE OF CONNECTICUT
MY COMM. EXP.09-30-2019

SEPARATION OF SERVICE AGREEMENT

This Agreement is hereby made this 27th day of July, 2017, by and between Dr. Keith Mason (hereinafter "Dr. Mason") and the NEW PROVIDENCE BOARD OF EDUCATION (hereinafter the "Board"/"District") (collectively the "Parties").

WHEREAS, the Board is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, and is entrusted with maintaining and conducting the public schools of New Providence;

WHEREAS, Dr. Mason is tenured in the position of Italian teacher with the New Providence Board of Education; and

WHEREAS, Dr. Mason is currently employed by the Board as an Italian teacher; and

WHEREAS, Dr. Mason has been on paid administrative leave from the District beginning September 1, 2016; and

WHEREAS, the Board certified tenure charges against Dr. Mason for purposes of inefficiency; and

WHEREAS, the Board and Dr. Mason have engaged in good faith discussions concerning Dr. Mason's future separation from employment with the Board and have reached an agreement, which they wish to memorialize herein; and

WHEREAS, the Board and Dr. Mason wish to fully and finally resolve any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which either party may have against them as provided herein; and

NOW THEREFORE, the Board and Dr. Mason, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the Parties, agree as follows:

1. RESIGNATION DATE: Dr. Mason agrees to sign and submit to the Board, simultaneously with this Separation of Service Agreement, an irrevocable letter of resignation from all employment with the Board effective June 30, 2019. The irrevocable letter of resignation shall be in the form attached hereto as Exhibit "A". The letter of resignation and this Agreement shall be subject to Dr. Mason's right to rescind pursuant to the Older Workers Benefit Protection Act, 29 U.S.C. 626(F)(1)(G), within seven (7) calendar days after the signing of this Agreement. The procedure for Dr. Mason to revoke this Agreement is set forth in paragraph 6 herein. If Dr. Mason does not rescind his letter of resignation and this Agreement within seven (7) calendar days of the signing of them, his resignation and this Agreement shall be binding and irrevocable. The Board shall accept Dr. Mason's letter of resignation simultaneously with the acceptance of this Agreement via resolution at a regular meeting of the Board.

2. COMPENSATION:

a. In consideration of this Agreement, Dr. Mason's increment shall be restored effective September 1, 2016, and Dr. Mason shall remain on payroll from July 1, 2017 through June 30, 2019. For the 2016-2017 school year, with the restoration of his increments, Dr. Mason shall be paid $3,396.60 in addition to what he was paid for the 2016-2017 school year. This payment shall be made within 45 days of Board approval of this Agreement. For the 2017-2018 school year, Dr. Mason's annual salary will be $102,545 ($100,745 (Step 15) plus $1,800 longevity); and for the 2018- 2019 school year, Dr. Mason's annual salary shall be in accordance with the successor Collective Bargaining Agreement (CBA) negotiated between the Board and the New Providence Education Association (NPEA).

Dr. Mason shall continue to receive his regular annual salary less the mandatory taxes, pension, health benefit payment, and any other deductions required by his employment with the Board.

Through June 30, 2019, as set forth above, Dr. Mason shall be eligible to progress through the salary guide and receive any salary increases received by those teachers similarly situated to Dr. Mason under the terms of the CBA between the Board and the NPEA.

Dr. Mason shall continue to receive health benefits available to any other employee on an annual basis subject to the appropriate payments towards the annual premiums required as an employee of the Board through June 30, 2019 or his date of resignation pursuant to Article 2b. of this Agreement.

Dr. Mason's accumulated unused sick days for purposes of reimbursement, as provided by the CBA between the Board and the NPEA, shall be capped at their amounts as of July 1, 2012 as per Article XVI, Section C of the CBA, and pursuant to N.J.S.A. 18A:30-3.5, $19,961.86. The value of Dr. Mason's accumulated sick days, $19,961.86, shall be paid within thirty (30) days of the effective date of Dr. Mason's letter of resignation, but only if Dr. Mason retires from employment effective on or before June 30, 2019, and the Board receives retirement approval from the New Jersey Division of Pension and Benefits.

Dr. Mason shall not be eligible for any of the other benefits offered other employees or as set forth in the CBA between the Board and the NPEA.

b. Should Dr. Mason become employed in a position covered by the Teachers' Pension and Annuity Fund prior to June 30, 2019, Dr. Mason shall submit an irrevocable letter of resignation effective prior to beginning his employment elsewhere. Dr. Mason shall not be entitled to any additional salary payments effective his first day of employment with a position covered by the Teachers' Pension and Annuity Fund prior to June 30, 2019. Dr. Mason shall be permitted to work as an adjunct in a community college that is not covered by the Teachers' Pension and Annuity Fund. Dr. Mason shall be permitted to work in any private employment capacity and may continue to receive supplemental income as an independent

contractor regarding the publication of his articles without any reduction in compensation provided in his Agreement by the Board through June 30, 2019.

c. Dr. Mason shall remain on administrative leave through June 30, 2019.

d. Dr. Mason forever waives any and all claims for any additional compensation or benefits or reimbursement of any kind not otherwise specified in this Agreement.

3. CONTINGENCY: This Agreement is contingent upon immediate receipt by the Board of an irrevocable letter of resignation, subject to the Board's compliance with the terms of the Agreement, effective on the date Dr. Mason signs this Agreement. The irrevocable letter of resignation shall be provided contemporaneously with the execution of this Agreement by both parties.

4. RELEASE: In consideration for the promises and undertakings described in this Agreement, Dr. Mason hereby releases, waive and discharges the New Providence Board of Education, and its present and former board members, officers, employees and representatives, and their estates and/or heirs thereof from any and all past, present, or future claims which Dr. Mason, his estate and/or heirs may have against any of them. This releases and waives all claims, known and unknown, resulting from anything which has happened up to now, that predates this Agreement, including claims for attorney's fees, back pay or any other claims related to Dr. Mason's absence from work and/or his employment with the Board.

Without limiting the scope of the foregoing provision in any way, Dr. Mason specifically releases all claims which were or could have been asserted by him. Dr. Mason also releases and waives all claims relating to or arising out of any aspect of his employment to date with the New Providence Board of Education, including but not limited to, all claims under Title VII of The Civil Rights Act, The Civil Rights Act of 1991 and the laws amended thereby; Sections 1981 through 1988 of Title 42 of the United States Code; the Employee Retirement Income Security Act of 1974; the Immigration Reform Control Act; the Fair Labor Standards Act; the Occupational Safety and Health Act; the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act of 1990, the Americans with Disabilities Act; the Family and Medical Leave Act of 1993; the New Jersey Family Leave Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Wage and Hour Act, and any related federal, state or local law claims, and any claims of discrimination based on race, age, sex, religion, color, creed, handicap or disability, citizenship, national origin and any other factor prohibited by any federal, state or local law, rule, regulation or guideline; any claim for wrongful discharge; any contract of employment, express or implied; any provision of the Constitution of the United States or the State of New Jersey; and any other law, common or statutory, of the United States, the State of New Jersey or any other state; any claims for the negligent and/or intentional infliction of emotional distress or specific intent to harm; any claims for attorneys' fees, costs and/or expenses; any claims for unpaid or withheld wages, severance pay, benefits, bonuses, deferred compensation, and/or other compensation of any kind; and/or any other federal, state or local human rights, civil rights, wage and hour, wage payment, pension or labor laws, rules and/or regulations, and all claims growing out of any legal

restrictions on the New Providence Board of Education's right to hire and/or terminate its employees.

Dr. Mason agrees not to seek any employment at any time with the New Providence Board of Education.

Dr. Mason also promises not to sue the New Providence Board of Education. Dr. Mason waives all claims against the New Providence Board of Education covered by this Agreement. If one party breaches this promise by suing the other for any such claims, the breaching party will pay all costs and expenses the other party incurs defending against the suit, including reasonable attorney's fees and costs. Notwithstanding the foregoing, the Parties reserve their right to enforce the terms of this Separation of Service Agreement and General Release and Waiver.

Dr. Mason acknowledges that he was advised to consult with attorneys regarding this Agreement; that he has had the opportunity to consult with legal counsel and representatives of his choice regarding this Agreement and prior to executing it; and that he has read and fully understands it and agrees to be bound by it. Dr. Mason also acknowledges that he has been given a reasonable period of time within which to consider this settlement and the terms of this Agreement prior to executing it.

Dr. Mason further understands that this Agreement shall not become effective or enforceable for a period of seven (7) days following the execution of this Agreement and that he may revoke this Agreement by delivering a written notice of any such decision to the Board within this seven (7) day period.

Dr. Mason agrees and acknowledges that no representations concerning the terms or effect of this Release were made by the New Providence Board of Education or its attorneys other than as set forth in the Agreement, and that he has voluntarily signed this Agreement as his own free act with full knowledge of its terms and conditions, which are final and binding upon him.

The Board hereby releases, waives and forever discharges any and all past, present or future claims that relate to any action that predates this Agreement that it may have against Dr. Mason related to his employment with the Board. The Board acknowledges that it has had the opportunity to consult with legal counsel and representatives of its choice regarding this Agreement; and that it represents that it has read this Agreement and fully understands it and agrees to be bound by it.

5. WAIVER: Dr. Mason agrees to waive any and all claims or demands which Dr. Mason now has or may have had against the Board; and in recognition of and in consideration for Dr. Mason's promise to provide the Board with a Release of all claims against it. Dr. Mason agrees that he will not reapply nor be eligible for employment with the Board after signing this Agreement.

6. OLDER WORKER BENEFIT PROTECTION ACT OF 1990: To comply with the Older Workers Benefit Protection Act of 1990, this Agreement advises Dr. Mason of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement as follows:

a. Dr. Mason fully understands the terms and conditions of this Agreement;

b. Dr. Mason has been advised to consult with an attorney to review the Agreement;

c. Dr. Mason specifically waives his right to pursue any claims under the Age Discrimination in Employment Act;

d. Dr. Mason does not waive any rights or claims under the Age Discrimination in Employment Act that may arise after the date the waiver is executed.

e. Dr. Mason is receiving consideration above and beyond anything of value to which he already is entitled;

f. Dr. Mason has been given at least twenty-one (21) calendar days within which to consider this Agreement; and

g. Dr. Mason has seven (7) calendar days from the date of the execution of this waiver to revoke it.

7. CONFIDENTIALITY: This Agreement shall remain confidential to the maximum extent permitted by law and neither party shall disclose the terms of this Agreement to third parties. Dr. Mason may disclose the terms of this Agreement to his immediate family, tax advisor and attorney who shall be subject to the confidential provision of this agreement, and also maintain the confidentiality of this Agreement. A copy of this Agreement shall not be maintained in Dr. Mason's personnel file. Should Dr. Mason make public any of the terms of the Agreement or any of the information identified this Agreement, all salary and health benefit payments made on his behalf shall cease immediately. Should Dr. Mason breach the confidentiality of the Agreement, he shall be subject to litigation which, if successful, will require the repayment to the Board of all payments made to Dr. Mason including health benefit premium payments and compensation or any other damages to the Board, its employees, agents or assigns and payment of the Board's attorneys' fees resulting from Dr. Mason's action. Responses to any inquiries concerning Dr. Mason's status shall be responded to with the statement "No comment," or words to that effect. If Dr. Mason writes an article while he is still on the District's payroll, Dr. Mason's article may not reference Dr. Mason's employment as a public school teacher with the District. Dr. Mason may indicate the number of years of experience and should a reference or acknowledgement of his experience be required, same shall be referred to the Superintendent of Schools. Any articles written by Dr. Mason and submitted for publication prior to the date of this Agreement shall be exempt from this provision. Dr. Mason shall provide a list of those unpublished submitted articles and same shall be attached hereto as Exhibit "B".

8. NO CONTACT AGREEMENT: Dr. Mason agrees that he will not apply for re-employment with the District.

9. ENTIRE AGREEMENT: This Agreement and General Release and Waiver contain the entire Agreement and understanding between the Parties and constitutes a full and final agreement in any and all issues relating to this matter, except that the Parties reserve their right to enforce this Agreement, if necessary.

10. CHOICE OF LAW: This Agreement shall be governed by the laws of the State of New Jersey.

11. SEVERABILITY: If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

12. BINDING EFFECT: The Parties shall be bound by the terms and conditions of this Agreement.

13. APPROVAL: The terms and conditions of this Agreement and Dr. Mason's irrevocable letter of resignation are subject to ratification and approval by the Board.

14. VOLUNTARY AGREEMENT: The Parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement.

15. ADMISSION OF LIABILITY: The Parties' entry into this Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on either of the Parties' part. Any such obligation or liability on either Party's part is expressly denied. The Parties have entered into this Agreement solely to compromise disputed claims.

16. OPPORTUNITY TO CONSULT WITH COUNSEL: The Parties acknowledge that each has been given the opportunity to consult with an attorney or a representative of their own choosing with respect to this Agreement and reviewed with their attorney or representative all the terms and conditions of this Agreement prior to executing this Agreement. Each Party signs this Agreement freely and voluntarily and without coercion or duress. The Parties further acknowledge that they fully understand the duties and obligations enumerated herein and have been informed of their legal rights and obligations.

17. BREACH: If either party breaches this Agreement, the breaching party shall bear the costs of the non-breaching party of any litigation or efforts to have such breach corrected or compensated for, including but not limited to, reasonable attorneys' fees.

    In the event that either party fails to fulfill its obligations under the terms of this Agreement, the aggrieved party shall have the opportunity to notify the breaching party of its breach in writing. The breaching party shall have thirty (30) days to cure its breach in full. Upon failure to cure, the aggrieved party shall have the right to cancel this Agreement.

18. RATIFICATION: The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms. Upon ratification of this Agreement, the Board authorizes its Board President to execute same on its behalf.

19. GOOD FAITH AND NONDISPARAGEMENT: The Parties expressly agree that they shall act in good faith to ensure implementation of this Separation of Service Agreement and General Release and Waiver. The Parties mutually agree to refrain from retaliation, in any manner, against the other party (or, their families, members, agents and employees). The Parties further mutually agree not to make any derogatory comments, statements or misrepresentations, written or oral, about the other (or, their families, members, agents and employees) and to refrain from disparagement, in any manner, against the other party or their families, family members, agents, officials, administrators, representatives and employees.

    The Board agrees that in the event it receives any inquiries or reference requests for Dr. Mason that its comments shall be limited to an acknowledgement of his position, a list and short description of the courses taught, length of employment and salary history. If the request is made after the effective date of his resignation, the date of resignation will be included in the response. Nothing contained in this Section shall be construed to prevent an employee from whom Dr. Mason has requested a reference to provide such a reference if that employee chooses to.

20. COBRA: Nothing contained within this Separation of Service Agreement shall alter Dr. Mason's rights to continuation of health insurance through Federal law, i.e. the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") upon separation from employment with the Board as of the date which coincides with the date that Dr. Mason no longer receives health insurance as provided by the Board.

21. MODIFICATIONS: This Agreement may not be altered, amended or modified except in writing, signed and duly authorized by all Parties.

22. EXECUTION IN COUNTERPARTS AND FACSIMILE SIGNATURES: This Agreement may be executed in two (or more) counterparts each of which, when executed and delivered shall be deemed to be an original, and of which counterparts, taken together, shall constitute one and the same agreement. An original signature transmitted by facsimile shall be deemed to be an original for purposes of this Agreement and for the accompanying letter of resignation.

IN WITNESS WHEREOF, the Parties hereunder set their hands and seals to this Agreement effective on this 27th day of July, 2017.

On Behalf of the Board:
NEW PROVIDENCE BOARD OF EDUCATION

Keith Mason, Ph.D.
DR. KEITH MASON

By: _____
ADAM M. SMITH, Board President

_____
WITNESS
Dated: June 5, 2017

_____
JAMES E. TESTA, Business Administrator
Dated: 7/07, 2017

EXHIBIT "A"

July 5, 2017

Dr. David M. Miceli, Superintendent
New Providence School District
356 Elkwood Avenue
New Providence, New Jersey 07974

RE: LETTER OF RESIGNATION

Dear Dr. Miceli:

Please accept this letter as notice of my resignation from employment with the New Providence Board of Education effective at the close of business on June 30, 2019.

Thank you,

Very truly yours,

Keith Mason, PhD.
DR. KEITH MASON

EXHIBIT B

Unpublished Articles in Review

"Musicals Foster Habits of Mind"

"*Hamilton, 1776* and Beyond: Musicals in the Social Studies Curriculum"

"Musicals in the Performing Arts Curriculum: 12 Approaches"

"Musicals Inspire Fabric Arts"

"Putting It Together: Musicals Inspire Art Displays"

"The 16 Habits of Mind to Foster Language Learning"

63-18

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
TRENTON, NEW JERSEY

IN THE MATTER THE TENURE CHARGES - against - URSULA WHITEHURST, Respondent - filed by - STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, District/Petitioner Agency Docket No. A-4740-14	ORDER OF DISMISSAL

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

APPEARANCES

FOR THE SCHOOL DISTRICT

Ramon E. Rivera, Esq., Scarinci, Hollenbeck, LLC

FOR THE RESPONDENT

Jason E. Sokolowski, Esq.,
Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C.

Procedural History

On January 5, 2015, the undersigned issued an Arbitration Award dismissing a tenure charge filed by the State-Operated School District of the City of Newark ("District"), pursuant to N.J.S.A. 18A:6-17.3 (Section 25) of TEACHNJ, against Ursula Whitehurst ("Whitehurst" or "Respondent"), a tenured teacher. The Arbitrator dismissed the tenure Charge, Docket No. 282-9/14, on procedural grounds, in accordance with N.J.S.A. 18A:6-17.3(c) and N.J.S.A. 6A:3-5.1(c) finding, inter alia, "the evaluation process has not been followed."

On or about January 27, 2015, the District filed an "Amended Notice of Inefficiency Charges" against Ms. Whitehurst, citing N.J.S.A. 18A:6-16 and N.J.S.A. 18A:6-17.1 as the basis for a single count of inefficiency under Section 8 of TEACHNJ.

The District submitted the amended charge to the Commissioner on March 30, 2015. On or about April 14, 2015, Respondent filed an Answer and Motion for Summary Decision with the Commissioner requesting that the amended charge be dismissed against Ms. Whitehurst.

On or about April 24, 2015, Ms. Kathleen Duncan, the Commissioner's designee, docketed the inefficiency charge as "new charges," processed the charge as "Section 8 inefficiency only," and referred the amended charge to Robert T. Simmelkjaer, the undersigned Arbitrator. On or about June 17, 2015, Director Duncan submitted the following correspondence to the parties:

> By way of clarification of my April 24, 2015 letter to you, please be advised that, following receipt of respondent's answer and motion for summary decision on April 14, 2015, the above captioned tenure charges – which have been docketed as new charges and

> which are being processed within respect to Section 8 inefficiency charges only – were reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the arbitrator of the motion for summary decision, and should it be denied, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator. The arbitrator shall review those charges which are not dismissed as the result of a motion under the preponderance of the evidence standard.
>
> Accordingly, the charges have been referred to Arbitrator Robert T. Simmelkjaer pursuant to N.J.S.A. 18A:6-16 as amended by P.L. 2012, c. 26.

The District filed a Notice of Appeal on or about June 16, 2015 and an Amended Notice of Appeal on or about June 19, 2015 from the Commissioner's decision.

> On or about June 19, 2015, the District filed a Motion for Emergent Relief with the Commissioner for an order staying the arbitration before Arbitrator Simmelkjaer pending appeal of the Commissioner's June 17, 2015 correspondence. On or about July 14, 2015, the Commissioner determined that he lacked jurisdiction to hear and decide the District's motion, stating that such determination does not preclude the parties from seeking a stay of the arbitration pending the present appeal to this Court.

On or about August 4, 2015, Arbitrator Simmelkjaer requested and was granted by the Commissioner permission to hold the amended tenure charge case in abeyance pending the outcome of the appeal to the Superior Court of New Jersey Appellate Division.

During the pendency of the appeal, the Respondent was terminated from her tenured teaching position in a decision rendered by Arbitrator Moscovitch in Agency Docket No. 263-9/16. The tenure charges were brought by the District pursuant to N.J.S.A. 18A:6-10, 6-11, 6-16, 6-17.1, 6-17.2 and N.J.A.C. 6A:3-5.1.

Given the foregoing determination of Arbitrator Moscovitch, the parties have collectively stipulated that their appeal "from the final decision of the Commissioner of Education of the Department of Education has been rendered moot and is thus resolved between the parties." Accordingly, the parties have submitted a Stipulation of Dismissal with prejudice dated 1/9/2018 and 1/10/2018 and signed by all parties, including Lauren A. Jensen, Deputy Attorney General, Attorney for Respondent New Jersey Commissioner of Education.

The Arbitrator further finds that the parties' Stipulation of Dismissal is consistent with N.J.A.C. 6A:3-5.6, "Withdrawal, settlement or mooting of tenure charges." In the Arbitrator's opinion, the criteria set forth in the matter entitled *In re Cardonick*, State Board decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846 has been satisfied. Inasmuch as the Stipulation of Dismissal has been signed by all parties, documentation as to the nature of the charges is contained in the record of appeal and accompanying briefs submitted by the parties, and the circumstances warranting the mooting of the tenure charges are in the public interest, the Arbitrator orders that the tenure charges set forth in Docket No. A-4740-14 shall be dismissed as moot.

AWARD

In accordance with the Stipulation of Dismissal collectively entered into by the parties, the foregoing case law and N.J.A.C. 6A:3-5.6, the Arbitrator dismisses the tenure charges brought by the State-Operated School District of the City of Newark, Docket No. A-4740-14, against Ursula Whitehurst.

February 20, 2018

Robert T. Simmelkjaer
Arbitrator

STATE OF NEW JERSEY}
COUNTY OF BERGEN} SS

On the 20th day of February 2018 before me came Robert T. Simmelkjaer to me known as the person who executed the foregoing instrument which is his Award.

February 20, 2018

Notary Public

Jin An
Notary Public
New Jersey
My Commission Expires 5-4-2021
No. 50037586

66-18

66-18

OAL DKT. NO. EDU 5472-02
AGENCY DKT. NO. 135-5/02

MARGARET FERGESON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination that the petition of appeal should be dismissed for failure to prosecute. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/1/18

Date of Mailing: 3/2/18

* 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).

66-18

MARGARET FERGESON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner alleged that the Board violated *N.J.S.A.* 18A:30-2.1 when it charged her sick days for a work-related injury/illness. Petitioner's appeal was filed in the Office of Administrative Law (OAL) in June of 2002.

The ALJ found, *inter alia*, that: this matter had remained dormant at the OAL for nearly 16 years; ALJ Celentano was assigned the case subsequent to the retirement of the original ALJ; in October 2013, the petitioner's counsel was contacted regarding the status of the case; the OAL was advised that an update would be provided; however, despite subsequent repeated inquiries, no response was forthcoming. The ALJ concluded that this matter should be dismissed with prejudice.

Upon review, the Commissioner concurred with the ALJ that the petitioner has failed to prosecute this matter. 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.

March 1, 2018

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 05472-02
AGENCY DKT. NO. 135-5/02

MARGARET FERGESON,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC, COUNTY,

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner (Oxfeld Cohen, attorneys)

Ellen M. Walsh, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: January 18, 2018 Decided: January 18, 2018

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner alleges the Board's action to charge her sick days for work related injury/illness violates N.J.S.A. 18A:30-2.1. The matter was filed on June 18, 2002 and initially assigned another Administrative Law Judge, and was reassigned to the undersigned upon the retirement of the prior ALJ.

On October 3, 2013, a judicial assistant at the Office of Administrative Law spoke with counsel for petitioner, inquiring as to the status of this matter, and was advised that an update would be provided. Nothing was heard thereafter.

On May 6, 2015, a voice mail was left for counsel for petitioner, however no return call was received as to the status of the matter.

On June 22, 2016, counsel for petitioner was emailed regarding the status of this matter, however no reply was received to that email.

On August 9, 2016, a voice message inquiring as to the status of this matter was left for counsel for petitioner in this matter, however no reply was received.

On August 6, 2017, counsel for petitioner was emailed and also left a voice mail, however there was no response received relative to the status of this matter.

On January 12, 2018, counsel for petitioner was emailed and a read receipt was requested. A confirmation read receipt was received however there has been no reply to the email.

Nearly sixteen years have elapsed since the filing and transmittal of this matter. Accordingly, based upon all of the foregoing I **FIND** that this matter should be and hereby is **DISMISSED** with prejudice.

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

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

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 18, 2018
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 1-18-18

Date Mailed to Parties: JAN 19 2018

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

67-18L

67-18

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Acting Commissioner

March 6, 2018

Richard D. McOmber, Esq.
McOmber & McOmber, PC
54 Shrewsbury Avenue
Red Bank, New Jersey 07701

Re: *Board of Education of the City of Long Branch, Monmouth County v. Reverend Caroline Bennett, Agency Dkt. No. 35-2/18.*

Dear Mr. McOmber:

I have reviewed the petition in the above-captioned matter, wherein the Board requests that the Commissioner construe the provisions of *N.J.S.A.* 18A:12-2 and determine whether Reverend Caroline Bennett may continue to serve as a member of the Board.

Upon review of the request, and pursuant to *N.J.A.C.* 6A:3-2.1, I have determined not to entertain this matter as the issues raised are not appropriate for declaratory ruling, and the Board's decision can be sufficiently guided by the legal authority and decisional law cited in its petition. The issues raised by the Board in this matter are within the scope of authority and responsibility of a local board of education, with the Commissioner's role being limited to adjudication of appeals taken from adverse actions. The Commissioner cannot permit declaratory judgments to become a vehicle for prospectively deciding potentially contested cases.

Please note that my decision to deny this petition in no way forecloses the filing, or affects the adjudication, of any contested matter that may arise from actions taken in conjunction with the situation described in the Board's papers.

Accordingly, pursuant to *N.J.A.C.* 6A:3-2.1, your request for declaratory judgment is denied.

Sincerely,

Lamont O. Repollet, Ed.D.
Acting Commissioner of Education

LOR/SLP/ATA

c: Reverend Caroline Bennett, *pro se*
Board Secretary
Clerk, OAL

68-18

OAL DKT. NO. EDU 9857-16
AGENCY DKT. NO. 169-6/16

C.W., on behalf of minor child, A.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTH STAR ACADEMY, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination that the petition of appeal should be dismissed for failure to prosecute. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/1/18

Date of Mailing: 3/2/18

* 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).

68-18

C.W., on behalf of minor child, A.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTH STAR ACADEMY, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's decision to give her child a one day and a five day suspension. Petitioner's appeal was transmitted to the Office of Administrative Law (OAL) in July 2016. Hearing dates were scheduled, but later adjourned based on the joint requests of the parties.

The ALJ found, *inter alia*, that: discovery demands were served on the petitioner in October 2017; during a conference call on November 8, 2017, counsel for petitioner represented that she had been unable to reach her client and had not been in touch with her for two months; counsel agreed to advise the petitioner that if discovery was not forthcoming by November 30, 2017, the case would be dismissed; on December 4, 2017, correspondence from petitioner's counsel advised that no response to the discovery requests had been received. Accordingly, the ALJ concluded that this matter should be dismissed with prejudice.

Upon review, the Commissioner concurred with the ALJ that the petitioner has failed to prosecute this matter. 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.

March 1, 2018



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 09857-16
AGENCY DKT. NO. 169-6/16

C.W., ON BEHALF OF MINOR CHILD, A.W.,
Petitioner,
v.
BOARD OF EDUCATION OF THE NORTH STAR ACADEMY, ESSEX COUNTY,
Respondent.

Julie Warshaw, Esq., for petitioner (Warshaw Law Firm, LLC, attorneys)

Cherie L. Adams, Esq., for respondent (Adams, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: January 18, 2018 Decided: January 18, 2018

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenged the Board's decision to give her child a one day and a five-day suspension. The petitioner's request for a hearing was granted and the matter was transmitted to the Office of Administrative Law (OAL) on July 5, 2016, for a hearing as a

contested case. Hearing days were scheduled and adjourned based on the joint requests of the parties to permit opportunities for resolution.

Discovery demands were served on petitioner on October 16, 2017. Thereafter a conference call was held on November 8, 2017, wherein petitioner's counsel represented that she had been unable to reach her client and had not been in touch with her for two months. The parties were advised that petitioner's failure to provide responses to discovery would result in dismissal of the within matter. Petitioner's counsel agreed that she would attempt to notify her client via certified and regular mail that the case would be dismissed if responses to the previously propounded discovery were not forthcoming by November 30, 2017. The parties agreed in that conference call that the hearing scheduled for November 13, 2017 would be adjourned.

On December 4, 2017, correspondence was received from counsel from respondent advising that no responses to discovery requests had been received, and requesting that the matter be dismissed. On January 2, 2018, counsel for respondent again corresponded with the undersigned, asking that the matter filed more than a year and a half ago be dismissed for failure to produce answers to discovery or otherwise prosecute the claims.

Based upon the foregoing, I **FIND** that this matter should be and 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.

January 18, 2018
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 1-18-18

Date Mailed to Parties:

dr

69-18

69-18

NADIA EL-RAYESS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT	:	

SYNOPSIS

Petitioner alleged that the Board violated *N.J.S.A.* 18A:30-2.1 when it charged her sick days for a work-related injury/illness. Petitioner's appeal was filed in the Office of Administrative Law (OAL) in March of 2000.

The ALJ found, *inter alia*, that: this matter had remained dormant at the OAL for nearly 18 years; ALJ Celentano was assigned the case subsequent to the retirement of the original ALJ; in October 2013, the petitioner's counsel was contacted regarding the status of the case; the OAL was advised that a letter withdrawing the matter would be forthcoming; despite subsequent repeated inquiries, no withdrawal letter was issued. The ALJ concluded that this matter should be dismissed with prejudice.

Upon review, the Commissioner concurred with the ALJ that the petitioner has failed to prosecute this matter. 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.

March 1, 2018

69-18

OAL DKT. NO. EDU 01879-00
AGENCY DKT. NO. 23-1/00

NADIA EL-RAYESS,	:	
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 have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner agrees with the Administrative Law Judge that petitioner has failed to prosecute this matter. 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.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/1/18

Date of Mailing: 3/2/18

* 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 01879-00
AGENCY DKT. NO. 23-1/00

NADIA EL-RAYESS,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

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

Charlotte Kitler, Esq., General Counsel, for respondent

Record Closed: January 18, 2018 Decided: January 18, 2018

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner alleges the Board's action to charge her sick days for work related injury/illness violates N.J.S.A. 18A:30-2.1. The matter was filed on March 8, 2000 and initially assigned to another Administrative Law Judge, and was reassigned to the undersigned upon the retirement of the prior ALJ.

On October 3, 2013, a judicial assistant at the Office of Administrative Law spoke directly with counsel for petitioner and was advised that a letter withdrawing the matter would be forthcoming. Nothing was heard thereafter.

On May 22, 2014, the same judicial assistant left a message for counsel for petitioner with his secretary, who indicated she would speak to him and advise. No return call was received.

On May 6, 2015, the same judicial assistant left a message for counsel for petitioner, again with his secretary. No return call was received as to the status of the matter.

On June 22, 2016, counsel for petitioner was emailed, inquiring as to the status of this matter, however no reply was received to that email.

On June 23, 2016, another email was sent to counsel for petitioner, however no reply was received.

On August 9, 2016, a message was left for counsel for petitioner, again with his secretary, to which no reply was received.

On August 2, 2017, counsel for petitioner was emailed and also was left a voice message, however there was no response to either the email or the voice mail relative to the status of this matter.

On January 17, 2018, another voice mail was left for counsel for petitioner, and no reply has been received.

Nearly eighteen years have elapsed since the filing and transmittal of this matter. Accordingly, based upon all of the foregoing I **FIND** that this matter should be and hereby is **DISMISSED** with prejudice.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 18, 2018
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency:

1-18-18

Date Mailed to Parties: JAN 19 2018

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

70-18LM

70-18

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

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

LAMONT O. REPOLLET, ED.D.
Acting Commissioner

March 2, 2018

Paul P. Josephson, Esq.
Duane Morris, LLP
1940 Route 70 East
Suite 100
Cherry Hill, NJ 08003

Joseph F. Betley, Esq.
Sanmathi Dev, Esq.
Capehart & Scatchard, PA
8000 Midlantic Drive
Suite 300S
Mount Laurel, NJ 08054

Re: *In the Matter of the International Academy of Trenton Charter School, Mercer County, Agency Dkt. No.43-2/18.*

Dear Counsel:

I have reviewed the materials filed in connection with the International Academy of Trenton Charter School's ("IATCS") combined Motion for Reconsideration and Motion to Stay Pending Appeal of the Commissioner's January 12, 2018 decision denying IATCS's application for renewal of its charter.[1,2]

Pursuant to New Jersey Court Rule 2:9-1(a), "the supervision and control of the proceedings on appeal or certification shall be in the appellate court from the time the appeal is taken or the notice of petition for certification is filed." Therefore, as IATCS has filed a Notice of Appeal with the Superior Court of New Jersey, Appellate Division, relating to the Commissioner's January 12, 2018 decision, I do not have jurisdiction to consider IATCS's present motion for reconsideration.

For sake of completeness, however, I will briefly address the merits of the motion for reconsideration herein, followed by my decision on the motion to stay.

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[1] IATCS initially filed the joint motion on February 21, 2018, advising that a Notice of Appeal in connection with the request for a stay would only be filed if the motion for reconsideration was denied. On February 27, 2018 – prior to the Commissioner's issuance of a decision on the motion for reconsideration – the Commissioner received a Notice of Appeal.

[2] I have also considered the submissions of the International Academy of Trenton Charter School Education Association and the New Jersey Education Association in support of IATCS's motions.

Motion for Reconsideration

Pursuant to *N.J.A.C.* 6A:3-1.15(b)(2), a motion for reconsideration shall be determined based upon the following:

i. claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;
ii. newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;
iii. newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation could not have been previously known; or
iv. reversal of a prior judgment on which the present matter is based.

Upon review and consideration of the submissions, I find that IATCS's request for reconsideration of the Commissioner's decision was filed significantly out of time, and there is no good cause for such delayed filing.[3] Notwithstanding, IATCS has also failed to satisfy the factors set forth in *N.J.A.C.* 6A:3-1.15(b)(2). Significantly, IATCS's reliance on *N.J.A.C.* 6A:3-1.15(b)(2)(ii) is misplaced.

IATCS asserts that the Commissioner failed to consider "relevant evidence that warrants charter renewal" – *e.g.*, IATCS's "turnaround efforts" – in rendering the January 12, 2018 decision. IATCS further argues that new developments following issuance of the January 12, 2018 decision – and prospective changes – warrants reconsideration of said decision. Neither of these bases, and arguments therefrom, constitute "newly discovered evidence" for the purpose of seeking reconsideration; nor does IATCS satisfy any of the other prongs set forth in *N.J.A.C.* 6A:3-1.15(b)(2).

It is clear that IATCS's disagreement is with the outcome of the Commissioner's January 12, 2018 decision and the analysis upon which it is based. Contrary to IATCS's assertions, I find that the decision is well supported by the Department's comprehensive review of IATCS's operations and performance since its inception.

Motion to Stay Pending Appeal

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a motion to stay is considered an extraordinary remedy that may only be granted upon a finding that the moving party has met *each* prong of the four-part test set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Specifically, a movant must establish that: they will suffer irreparable harm without such relief; the legal right underlying their claim is settled; they have a likelihood of prevailing on the merits; and, in weighting of the equities and interests, they will suffer greater harm if relief is not granted.

Upon review of the submissions, I find that IATCS has failed to meet the standard for granting a stay of the January 12, 2018 decision. IATCS argues that its legal right underlying the claim is settled and that it has the likelihood of prevailing on the merits. Movant further argues that IATCS, and its

[3] As noted above, IATCS's motion for reconsideration of the January 12, 2018 decision was filed on February 21, 2018. *N.J.A.C.* 6A:3-1.15(b) provides in relevant part that a motion for reconsideration must be made *within 10 days* of the filing of the Commissioner's decision.

students, families and staff, will suffer irreparable harm if a stay is not granted. IATCS, however, has not presented evidence supporting same.

IATCS alleges that the Commissioner failed to consider IATCS's "turnaround efforts," new developments, and prospective changes; however, IATCS has neglected to address how such evidence establishes a legal right to the underlying claim and why it may prevail on the merits. Notably, pursuant to *N.J.S.A.* 18A:36A-17 – which endows the Commissioner with the authority to grant or revoke charters, and develop procedures and guidelines pertaining to same – the Commissioner has implemented *N.J.A.C.* 6A:11-2.3, which outlines the charter renewal review process and criteria. A cursory examination of the subject statute and regulation should inform IATCS that it does not have a legal right to an automatic renewal of its charter.

IATCS has also failed to demonstrate a likelihood of success on the merits, as it has not established that the Commissioner's denial of the renewal application was arbitrary, capricious or unreasonable.[4] Veritably, the Commissioner's consideration of the renewal application included comprehensive review of various factors enumerated in *N.J.A.C.* 6A:11-2.3(b), as reflected in the renewal review report and as thoroughly set forth in the January 12, 2018 decision. Furthermore, I am not persuaded by IATCS's unsubstantiated claims that closing the school at the conclusion of the 2017-2018 school year – in light of the pervasive academic performance challenges and ongoing organizational/operational issues – will result in irreparable harm, particularly when there will not be a disruption of educational services, and there is sufficient time for students to find alternative placement for the 2018-2019 school year.

Accordingly – as IATCS has failed to demonstrate that its legal right is settled; that it is likely to prevail on the merits of its underlying claim; and that denial of the stay will result in irreparable harm – the motion to stay the January 12, 2018 decision is hereby DENIED.[5]

Sincerely,



Lamont O. Repollet, Ed.D.
Acting Commissioner of Education

c: Keith Waldman, Esq.
State Law Library

LOR/SLP/ATA

VIA REGULAR MAIL

---

[4] It is well-settled that the scope of appellate review of a final agency decision is limited: there must be a clear showing that the agency's determination was arbitrary, capricious, or unreasonable. *See In the Matter of the Proposed Quest Academy Charter Sch. of Montclair Founders Group*, 216 *N.J.* 370, 386 (2013) (internal citations omitted).

[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).

New Jersey Judiciary
Superior Court - Appellate Division

Civil Case Information Statement

Please type or clearly print all information

Title in Full	Trial Court or Agency Docket Number
IN THE MATTER OF INTERNATIONAL ACADEMY OF TRENTON CHARTER SCHOOL RENEWAL APPLICATION	DECISION

• Attach additional sheets as necessary for any information below.

Appellant's Attorney Email Address: JBETLEY@CAPEHART.COM
ACLEMENTI@CAPEHART.COM

☐ Plaintiff ■ Defendant ☐ Other (Specify)

Name	Client
JOSEPH FRANCIS BETLEY, Esq.	INTERNATIONAL ACADEMY OF TRENTON CHARTER SCHOOL

Street Address	City	State	Zip	Telephone Number
8000 MIDLANTIC DR STE 300S P.O. BOX 5016	MT. LAUREL	NJ	08054-5016	856-234-6800

Respondent's Attorney Email Address: DOL.APPEALS@LAW.NJOAG.GOV
DOLAPPEALS@LPS.STATE.NJ.US

■ Plaintiff ☐ Defendant ☐ Other (Specify)

Name	Client
MELISSA H RAKSA, Esq.	EDUCATION

Street Address	City	State	Zip	Telephone Number
25 MARKET ST PO BOX 112	TRENTON	NJ	08625-0106	609-984-3900

Give Date and Summary of Judgment, Order, or Decision Being Appealed and Attach a Copy:
The International Academy of Trenton Charter School appeals the New Jersey Department of Education's decision dated January 12, 2018 denying its Renewal Application and directing the School to cease operations effective June 30, 2018.

Have all issues as to all parties in this action, before the trial court or agency, been disposed? That is, are there any claims against any party in the trial court or agency, either in this or a consolidated action, which have not been disposed? These claims may include counterclaims, cross-claims, third-party claims and applications for counsel fees. ■ Yes ☐ No

If outstanding claims remain open, has the order been properly certified as final pursuant to R. 4:42-2? ☐ Yes ☐ No ■ N/A

A) If the order has been properly certified, attach copies of the order and the complaint and any other relevant pleadings to the order being appealed. Attach a brief explanation as to why the order qualified for certification pursuant to R. 4:42-2.

B) If the order has not been certified or has been improperly certified, leave to appeal must be sought. (See R. 2:2-4; 2:5-6.) Please note that an improperly certified order is not binding on the Appellate Division.

If claims remain open and/or the order has not been properly certified, you may want to consider filing a motion for leave to appeal or submitting an explanation as to why you believe the matter is final and appealable as of right.

(*) Truncated due to space limit. Please find full information in the additional pages of the form.

Were any claims dismissed without prejudice? ☐ Ye ■ No

If so, explain and indicate any agreement between the parties concerning future disposition of those claims.

Is the validity of a statute, regulation, executive order, franchise or constitutional provision of this State being questioned? (*R* 2:5-1(h)) ☐ Yes ■ No

Give a Brief Statement of the Facts and Procedural History:

The International Academy of Trenton Charter School ("IATCS") opened in 2014 and is currently in its fourth year of operation. On August 10, 2017, IATCS submitted its Renewal Application to the New Jersey Department of Education ("DOE") to renew its educational charter for a five year term. DOE conducted two site visits of IATCS on October 10, 2017 and on December 6, 2017. On January 12, 2018, IATCS received DOE's decision denying the Renewal Application of IATCS' educational charter and ordering IATSC to cease operations, effective June 30, 2018.

To the extent possible, list the proposed issues to be raised on the appeal as they will be described in appropriate point headings pursuant to *R.* 2:6-2(a)(5). (Appellant or cross-appellant only.):

1. Whether the New Jersey Department of Education's ("DOE") January 12, 2018 decision denying the International Academy of Trenton Charter School's Renewal Application of IATCS' educational charter for a five year term must be reversed because it is arbitrary, capricious, unreasonable, contrary to law, and inappropriate.

If you are appealing from a judgment entered by a trial judge sitting without a jury or from an order of the trial court, complete the following:

1. Did the trial judge issue oral findings or an opinion? If so, on what date? _____ ☐ Yes ■ No
2. Did the trial judge issue written findings or an opinion? If so, on what date? _____ ☐ Yes ■ No
3. Will the trial judge be filing a statement or an opinion pursuant to *R.* 2:5-1(b)? ☐ Yes ☐ No ■ Unknown

Caution: Before you indicate that there was neither findings nor an opinion, you should inquire of the trial judge to determine whether findings or an opinion was placed on the record out of counsel's presence or whether the judge will be filing a statement or opinion pursuant to *R.* 2:5-1(b).

Date of Your Inquiry:

Is the validity of a statue, regulation, executive order, franchise or constitutional provision of this State being questioned? **(R.2:5-1(h))** ☐ Yes ■ No
If yes, you will need to serve the appropriate government attorney.

1. Is there any appeal now pending or about to be brought before this court which:
   (A) Arises from substantially the same case or controversy as this appeal? ☐ Yes ■ No
   (B) Involves an issue that is substantially the same, similar or related to an issue in this appeal? ☐ Yes ■ No

If the answer to the question above is Yes, state:

Case Title	Trial Court Docket#	Party Name

2. Was there any prior appeal involving this case or controversy? ☐ Yes ■ No

If the answer to question above is Yes, state:

Case Name and Type (direct, 1st PCR, other, etc.)	Appellate Division Docket Number

Civil appeals are screened for submission to the Civil Appeals Settlement Program (CASP) to determine their potential for settlement or, in the alternative, a simplification of the issues and any other matters that may aid in the disposition or handling of the appeal. Please consider these when responding to the following question. A negative response will not necessarily rule out the scheduling of a preargument conference.

(*) truncated due to space limit. Please find full information in the additional pages of the form.

State whether you think this case may benefit from a CASP conference. ☐ Yes ■ No

Explain your answer

The New Jersey Department of Education's January 12, 2018 decision is a final agency decision pursuant to N.J.S.A. 18A:6-9.1 and N.J.A.C. 6A:11-2.5, and there is no potential for settlement and/or resolution.

Whether or not an opinion is approved for publication in the official court report books, the Judiciary posts all Appellate Division opinions on the Internet.

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).

INTERNATIONAL ACADEMY OF TRENTON CHARTER SCHOOL
Name of Appellant or Respondent

JOSEPH FRANCIS BETLEY, Esq.
Name of Counsel of Record
(or your name if not represented by counsel)

02/26/2018
Date

s/ JOSEPH FRANCIS BETLEY, Esq.
Signature of Counsel of Record
(or your signature if not represented by counsel)

039901983
Bar #

JBETLEY@CAPEHART.COM,ACLEMENTI@CAPEHART.COM
Email Address

(*) truncated due to space limit. Please find full information in the additional pages of the form.

New Jersey Judiciary
Superior Court - Appellate Division

Notice of Appeal

TITLE IN FULL (AS CAPTIONED BELOW)	ATTORNEY / LAW FIRM / PRO SE LITIGANT
IN THE MATTER OF INTERNATIONAL ACADEMY OF TRENTON CHARTER SCHOOL RENEWAL APPLICATION	NAME **JOSEPH FRANCIS BETLEY, Esq.**
	STREET ADDRESS **8000 MIDLANTIC DR STE 300S P.O. BOX 5016**
	CITY: **MT. LAUREL** / STATE: **NJ** / ZIP: **08054-5016** / PHONE NUMBER: **856-234-6800**
	EMAIL ADDRESS **JBETLEY@CAPEHART.COM** **ACLEMENTI@CAPEHART.COM**

ON APPEAL FROM

TRIAL COURT JUDGE	TRIAL COURT OR STATE AGENCY	TRIAL COURT OR AGENCY NUMBER
	EDUCATION	**DECISION**

INTERNATIONAL ACADEMY OF TRENTON

Notice is hereby given that **CHARTER SCHOOL** appeals to the Appellate Division from a ☐ Judgment or ☐ Order entered on _____ in the ☐ Civil ☐ Criminal or ☐ Family Part of the Superior Court ☐ Tax Court or from a

■ State Agency decision entered on **01/12/2018**

If not appealing the entire judgment, order or agency decision, specify what parts or paragraphs are being appealed.

For criminal, quasi-criminal and juvenile actions only:

Give a concise statement of the offense and the judgment including date entered and any sentence or disposition imposed:

This appeal is from a ☐ conviction ☐ post judgment motion ☐ post-conviction relief ☐ pre-trial detention
If post-conviction relief, is it the ☐ 1st ☐ 2nd ☐ other _____ (specify)

Is defendant incarcerated? ☐ Yes ☐ No

Was bail granted or the sentence or disposition stayed? ☐ Yes ☐ No

If in custody, name the place of confinement:

Defendant was represented below by:

☐ Public Defender ☐ self ☐ private counsel _____ (specify)

(*) truncated due to space limit. Please find full information in the additional pages of the form.

Notice of appeal and attached case information statement have been served where applicable on the following:

	Name	Date of Service
Trial Court Judge		
Trial Court Division Manager		
Tax Court Administrator		
State Agency		**02/26/2018**
Attorney General or Attorney for other Governmental body pursuant to *R.* 2:5-1(a), (e) or (h)		**02/26/2018**

Other parties in this action

Name and Designation	Attorney Name, Address and Telephone No.	Date of Service
EDUCATION	**MELISSA H RAKSA, Esq.** **ATTORNEY GENERAL LAW** **25 MARKET ST** **PO BOX 112** **TRENTON NJ 08625-0106** **609-984-3900** **DOL.APPEALS@LAW.NJOAG.GOV** **(DOLAPPEALS@LPS.STATE.NJ.US,DOLAPPEALS@LPS.STATE.NJ.US)**	**02/26/2018**

Attached transcript request form has been served where applicable on the following:

	Name	Date of Service
Trial Court Transcript Office		
Clerk of the Tax Court		
State Agency		

Exempt from submitting the transcript request form due to the following:

■ There is no verbatim record for the transcript.

☐ Transcript in possession of attorney or pro se litigant (four copies of the transcript must be submitted along with an electronic copy).

List the date(s) of the trial or hearing:

☐ Motion for abbreviation of transcript filed with the court or agency below. Attach copy.

☐ Motion for free transcript filed with the court below. Attach copy.

I certify that the foregoing statements are true to the best of my knowledge, information and belief. I also certify that, unless exempt, the filing fee required by *N.J.S.A.* 22A:2 has been paid.

02/26/2018
Date

s/ JOSEPH FRANCIS BETLEY, Esq.
Signature of Attorney or Pro Se Litigant

(*) truncated due to space limit. Please find full information in the additional pages of the form.

BAR ID #	039901983	EMAIL ADDRESS	JBETLEY@CAPEHART.COM,ACLEMENTI@CAPEHART.COM

(*) truncated due to space limit. Please find full information in the additional pages of the form.

JOSEPH FRANCIS BETLEY, Esq.
CAPEHART & SCATCHARD PA
8000 MIDLANTIC DR STE 300S
P.O. BOX 5016
MT. LAUREL, NJ 08054-5016
856-234-6800
JBETLEY@CAPEHART.COM
ACLEMENTI@CAPEHART.COM

Before Appellate Division,
Superior Court of New Jersey
DOCKET NO.

STATE AGENCY

IN THE MATTER OF INTERNATIONAL ACADEMY OF TRENTON CHARTER SCHOOL RENEWAL APPLICATION

PROOF OF SERVICE

I hereby certify that an original of the following documents, **NOTICE OF APPEAL, PROOF OF SERVICE, TRIAL COURT ORDER, CASE INFORMATION STATEMENT** were submitted and transmitted to the parties listed below in the following format:

ELECTRONICALLY TO:
ATTORNEY NAME: MELISSA H RAKSA, Esq.
DOL.APPEALS@LAW.NJOAG.GOV(DOLAPPEALS@LPS.STATE.NJ.US DOLAPPEALS@LPS.STATE.NJ.US)
STATE AGENCY: EDUCATION

BY MAIL:

I certify that the forgoing 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.

Attorney for APPELLANT
INTERNATIONAL ACADEMY OF TRENTON CHARTER SCHOOL

Dated: **02/26/2018**

By: **S/ JOSEPH FRANCIS BETLEY, Esq.**

(*) truncated due to space limit. Please find full information in the additional pages of the form.

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Commissioner

January 12, 2018

Mr. Larry Chenault, President
Board of Trustees
International Academy of Trenton Charter School
500 Perry Street
Trenton, NJ 08618

Dear Mr. Chenault:

International Academy of Trenton Charter School (IAT) opened in 2014 and is currently in its fourth year of operation. IAT submitted its Renewal Application on August 10, 2017, and has been evaluated by the New Jersey Department of Education (Department) on its academic performance, fiscal viability, and organizational stability. Pursuant to *N.J.S.A.* 18A:36A-17 and *N.J.A.C.* 6A:11-2.3(b), the Department has completed a comprehensive review of IAT including but not limited to, the Renewal Application, annual reports, student performance on statewide assessments, structured interviews with school officials, public comments, and the fiscal impact on sending districts in order to make a renewal decision.

A primary goal of the Department is to ensure that all New Jersey charter schools are offering students a high-quality education. Charter schools must demonstrate strong academic performance and are held accountable for student outcomes. No charter school is automatically granted a renewal of its charter. Rather, a charter school must demonstrate both a high level of achievement and the capacity to continue to cultivate student learning in order to have its charter renewed. After a comprehensive review, it is clear that IAT has failed to provide a strong educational program and sustained organizational stability. Therefore, I am not renewing the charter for IAT. A Renewal Summary Report, which contains findings gathered from the comprehensive review is forthcoming.

A review of IAT's academic performance strongly suggests that it is not offering its students a high-quality education. Since its inception, IAT has been among the lowest performing schools in the state on PARCC assessments. In 2014-2015, IAT only served one tested grade level, third grade. According to the Office of Charter and Renaissance School's Academic Performance Framework Report from 2014-2015, 13% of students scored at or above grade level expectations (i.e., scored proficient) in ELA and 16% did so in mathematics (math). Those results

are better than only 5.2% and 9.9%, respectively, of public schools serving any or all of grades 3-5 in the state. In 2015-2016, according to the Academic Performance Framework Report from 2015-2016, IAT's proficiency rate decreased in math bringing IAT's proficiency rates in both subjects to the bottom fifth percentile in the state in both subjects. Based on its 2016-2017 performance on PARCC assessments, student growth percentiles and chronic absenteeism rate, in accordance with the *Every Student Succeeds Act* (*ESSA*) on December 18, 2017, the Department identified IAT as in need of Comprehensive Support and Improvement for falling into the lowest 5% of all Title I schools in New Jersey.

Providing students with a high-quality education is a priority not only for the Department, but is also an integral component of IAT's mission and vision. IAT is not delivering on some of the mission and key design elements of its charter, in particular, for students to master "a standards-driven, international, college-preparatory curriculum," by setting "clear goals, high expectations, and strong accountability for performance." The academic performance results described above signal that IAT has failed to prepare students to master the New Jersey Student Learning Standards as measured by PARCC assessments. During the Department's renewal visit on October 10, 2017, and another unannounced visit requested by IAT that occurred on December 6, 2017, it appeared that IAT does not individualize the curriculum developed by its Education Management Organization (EMO) based on teacher feedback or student need; nor does the curriculum appear to be modified for students with disabilities. Further, the EMO-prescribed academic program, which includes EMO-specified teaching methods, was not used consistently or effectively in many classrooms, despite the onsite presence of EMO staff. During the scheduled renewal visit, there were few observed instances of high-quality, rigorous instruction. The level of instruction and student engagement appeared to be low, and disruptive behavior, such as using cell phones, talking during class, and frequently leaving the classroom, was observed. Observed teachers did not appear to effectively redirect student behavior. The unannounced site visit in December did little to alleviate concerns regarding the academic rigor, culture and climate of IAT. Faculty still appeared unable to manage their classrooms. There were frequent disturbances in classrooms across grade-levels, including roughhousing and students speaking inappropriately to each other and to the teacher.

In addition to its academic performance struggles, IAT has consistently suffered from organizational instability. IAT has had three Executive Directors and two interim Executive Directors in four years of operation, which does not provide continuity for students and school operations. IAT's staffing deficiencies reach all levels of personnel. Through interviews, the Department learned that IAT has only two ELL teachers for over 100 ELL students, and four teaching staff members and one administrator resigned between the renewal visit in October and the unannounced visit in December. Moreover, on the day of the unannounced visit, there were at least nine substitute teachers in the building and two classes, Spanish and Music, had been cancelled due to lack of coverage.

As a consequence of non-renewal, IAT is hereby directed to cease operations, effective June 30, 2018. Pursuant to *N.J.A.C.* 6A:11-2.4(c), the Board of Trustees shall, within

48 hours of receipt of this notification, provide in writing to the Commissioner a complete list of the names and addresses of all students and staff currently enrolled and working in the school and notify in writing all administrators, staff, parents, guardians, students and vendors that the charter has not been renewed. Within 10 business days of receipt of this notification, or the 27th of January 2018, the Board of Trustees must appoint an independent trustee whose appointment is subject to Commissioner approval. If the Board of Trustees does not appoint an independent trustee within the requisite deadline, the Commissioner will appoint one for the Board of Trustees. The independent trustee will assume primary financial responsibility upon appointment.

Furthermore, IAT is directed to limit the expenditure of funds and the occurrence of debt to only those expenditures and debts that are reasonable and necessary for the ongoing day-to-day operation of the charter school. These expenditures are limited to salaries, benefits, utilities, rent, insurance and existing accounts payable. The expenditures must be already authorized in the budget approved by the Board of Trustees. Pursuant to *N.J.A.C.* 6A:23A-22.4(e), please be advised that the distribution of assets upon revocation must be consistent with applicable provisions of your bylaws, and that all assets of the charter school, after satisfaction of all outstanding claims by creditors, will be distributed equitably among the participating districts of residence.

IAT is an entity incorporated pursuant to the laws of the state. IAT is required to submit requisite filings to ensure the enrollment of employees in the Teachers' Pension and Annuity Fund, the Public Employees Retirement System, where applicable, and the Social Security Fund for the 2017-2018 school year. All required filings must be submitted. This action to not renew IAT's charter to serve public school students of Trenton and Ewing does not absolve the entity's rights and obligations of incorporation as set forth in Title 15, and other applicable New Jersey State Statutes.

It is paramount that the interests of students, parents, staff and the district of residence are protected during this process, and that the process is carried out expeditiously and in accordance with state statutes and regulations. In that regard, it is expected that IAT will work with the Executive County Superintendent, Trenton Public Schools, Ewing Public Schools, and Department staff to effectuate a smooth transition for IAT's students. Pursuant to *N.J.A.C.* 6A:11-2.4(c)2.ii, Trenton Public Schools, Ewing Public Schools, and area charter schools will, in cooperation with the Department and the school, establish dates and times for parents and guardians to enroll students in another school for school year 2018-2019, and IAT must make all reasonable efforts to ensure that students enrolled at this time take action to enroll in another school in their district of residence for school year 2018-2019. The Department will provide additional direction and technical assistance regarding the specific tasks to be completed and the procedures and timeline to be followed during the dissolution process.

The decision to close a school is one of the hardest made, and not one taken lightly. Please be advised that this decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36. Should you have any questions, you may contact the Office of Charter and Renaissance Schools at 609 376 9083.

Sincerely

Kimberley Harrington

Kimberley Harrington
Commissioner

KH/CSF/KC/LC/o Accountability/Renew 2018 Renewals/Renewal Letter Intercultural Academy of Trenton Charter School

c: Colleen Schulz-Eskow
Katherine Czehut
Kevin Dehmer
Nicole Kane
Yasmine Hernandez-Manno
Fredrick McDowell
Michael Nitti

71-18

AGENCY DKT NO. 20-1/18

IN THE MATTER OF THE TENURE	:	
HEARING OF JUNE JOHNSTON,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TENAFLY SCHOOL DISTRICT,	:	
BERGEN COUNTY.	:	

For the Petitioner, Fogarty & Hara, Esqs.
No appearance by or on behalf of Respondent, June Johnston

This matter was opened before the Commissioner of Education on January 25, 2018 through tenure charges of conduct unbecoming, insubordination, abandonment of position and other just cause certified by Yas Usami, Board Secretary/School Business Administrator of the Tenafly School District – together with supporting evidence against respondent, June Johnston, a tenured secretary in the petitioner's employ. The petitioner provided respondent with written notice of such certification at the respondent's last known address – via certified mail, return receipt requested, as well as overnight and hand delivery – on January 23, 2018.

On January 25, 2018, the Commissioner directed the respondent – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause

shown – result in the charges being deemed admitted. No reply to the tenure charges was received from or on behalf of respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate that respondent has been employed as a full-time secretary in the District since July 1, 2002. She received tenure on July 2, 2005. In the Spring of 2017, respondent's supervisor began complaining about respondent's deteriorating work performance and mental health. Numerous examples are detailed in the Statement of Evidence filed with the tenure charges. Because of these concerns, respondent was directed to submit to a fitness for duty examination with a qualified medical professional selected by the petitioner. As of the date these charges were filed, respondent had not provided documentation that she had complied with the petitioner's August 29, 2017 requirement that she undergo the examination. She has not reported to work since June 20, 2017.

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 conduct unbecoming a tenured secretary, insubordination, and abandonment of position have been proven, and overwhelmingly warrant the respondent's dismissal. Accordingly, summary decision is hereby granted to the petitioner, and the respondent is dismissed from her tenured position with the District.

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/05/18
Date of Mailing: 3/05/18

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

AGENCY DKT. NO. 58-3/15

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

For Petitioner: Theresa L. Moore, Esq.
For Respondent: Samuel Wenocur, Esq.

The tenure charges at issue in this matter are actually the second set of inefficiency tenure charges filed against respondent regarding her performance during the 2012-2013 and 2013-2014 school years. On December 20, 2014, Arbitrator David Gregory granted respondent's motion to dismiss the first set of charges as premature under *N.J.S.A.* 18A:6-17.3 (Section 25 of TEACHNJ – the Teacher Effectiveness and Accountability for the Children of New Jersey Act – P.L. 2012, c.26.) because petitioner had used respondent's 2012-2013 annual summative evaluation. Petitioner then filed the charges again, but this time pursuant to *N.J.S.A.* 18A:6-16 (Section 8 of P.L. 2012, c. 26), the statutory section in effect and governing inefficiency charges prior to the enactment of TEACHNJ in August 2012. The second set of charges was also assigned to Arbitrator Gregory, with a sufficiency determination which read in pertinent part:

> . . . (P)lease be advised that, following receipt of respondent's answer on March 31, 2015, the above-captioned tenure charges – which have been docketed as new charges and which are being processed with respect to Section 8 inefficiency charges only – were reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator. The arbitrator shall review those charges – which are not dismissed as the result of a motion – under the preponderance of the evidence standard.
>
> Accordingly, the charges have been referred to Arbitrator David L. Gregory pursuant to *N.J.S.A. 18A:6-16* as amended by *P.L. 2012, c. 26.*

Petitioner appealed the assignment of the matter to Arbitrator Gregory and the sufficiency determination to the Appellate Division of the Superior Court, and Arbitrator Gregory issued an order placing the matter before him in abeyance pending a determination from the Appellate Division.

On February 9, 2018, the Appellate Division issued a decision dismissing the appeal, and thereafter petitioner's attorney advised that the District had learned that respondent is now deceased. Petitioner's attorney further advised that petitioner consequently wished to withdraw the pending tenure charges.

In view of the foregoing, the Commissioner concludes that this matter is moot and no further proceedings are necessary in regard to the pending tenure charges. This matter is therefore dismissed with prejudice.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/06/18
Date of Mailing: 3/06/18

75-18

A.M., on behalf of minor child, O.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Pro se petitioner A.M. challenged the decision of the respondent Board to retain O.M. in kindergarten for the 2017-2018 school year. Petitioner initially sought to have O.M. promoted to first grade pursuant to an Emergent Relief application, which was denied because petitioner failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982). The Commissioner issued a final decision in this matter on October 6, 2017, concurring with and adopting the OAL's September 13, 2017 Order denying emergent relief. The matter was then scheduled for a plenary hearing before the OAL. The Board subsequently filed a motion for summary decision, asserting that the issue of O.M.'s promotion to first grade is moot and, accordingly, the petitioner's appeal must be dismissed.

The ALJ found, *inter alia*, that: that there were no genuine issues of material fact in this case, and the matter is ripe for summary decision; an issue is considered moot when the determination sought, when rendered, can have no practical effect on the existing controversy; in the instant case, O.M. was not promoted, and has continued in kindergarten from September 2017 to the present; a hearing in the matter would have no practical effect since it is not reasonable to promote O.M. to the first grade in the Spring of 2018. The ALJ concluded that the matter is moot, and granted the Board's motion for summary decision.

Upon consideration and review, the Commissioner concurred with the ALJ's determination for the reasons expressed in the Initial Decision. The Commissioner noted that the assertion made by petitioner in his exceptions – that petitioner was "not allowed" to present his case during the Emergent Relief hearing – is without merit. Further, petitioner's allegations regarding the ALJ's conduct is not within the Commissioner's jurisdiction, nor can the Commissioner award money damages relating to same. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed with prejudice.

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

Issued 3/08/18

OAL DKT. NO. EDU 12751-17
AGENCY DKT. NO. 196-8/17

A.M., on behalf of minor child, O.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and petitioner's exceptions have been reviewed. In this matter, petitioner challenged the Board's decision to retain O.M. in kindergarten for the 2017-2018 school year. Petitioner filed a request for Emergent Relief in August 2017, seeking to have O.M. promoted to first grade; the requested relief was denied, as petitioner failed to demonstrate entitlement to same. The matter was then scheduled for a plenary hearing before the OAL. The Administrative Law Judge (ALJ), following receipt of petitioner's letter correspondence of January 18, 2018, decided the matter on the papers and dismissed the case as moot – finding that a hearing on the merits would have no practical effect as it would be unreasonable to promote O.M. to first grade in the Spring of 2018.

Petitioner's exceptions allege "misconduct" by the ALJ, and argue that petitioner was "not allowed" to present his case during the Emergent Relief hearing. Petitioner asserts that the relief sought – to advance O.M. to first grade – is now moot, but his allegations against the ALJ remain unresolved. Petitioner also seeks damages in the amount of $100,000.

Upon consideration and review, the Commissioner is in accord with the ALJ's determination, for the reasons thoroughly set forth in the Initial Decision. The Commissioner notes, however, that petitioner's assertion that he was "not allowed" to present his case is without merit, as the ALJ's Order on Emergent Relief clearly set forth and considered petitioner's contentions – despite petitioner's failure to comply with *N.J.A.C.* 6A:3-1.9 and *N.J.A.C.* 1:1-5.4. Furthermore, the ALJ considered the parties' submissions and arguments – specifically the parties' agreement that the matter was now moot and a plenary hearing was not necessary – in rendering the Initial Decision. Lastly, any allegations pertaining to an ALJ's conduct is not within the Commissioner's jurisdiction, nor can the Commissioner award money damages relating to same. Therefore, petitioner's arguments concerning the ALJ in this matter, and his request for money damages, are improperly raised in his exceptions.

Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter. Respondent's motion for summary decision is granted and the petition of appeal is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/08/18

Date of Mailing: 3/08/18

[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 GRANTING
SUMMARY DECISION
OAL DKT. NO. EDU 12751-17
AGENCY DKT. NO. 196-8/17

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

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY,

Respondent.

A.M., petitioner, pro se

Amy E. Canning, Esq., for respondent (Fogarty and Hara, attorneys)

Record Closed: January 18, 2018 Decided: January 26, 2018

BEFORE **EVELYN J. MAROSE**, ALJ:

Petitioner, A.M. o/b/o O.M., challenged the decision of Respondent, the Board of Education of the Borough of Maywood (Board), to retain O.M. in Kindergarten for the 2017-2018 School Year. The matter was transmitted to the Office of Administrative Law on August 29, 2017.

Petitioner initially sought to have O.M. promoted to first grade pursuant to Emergent Relief. After reviewing several hundred papers submitted in support of and in

opposition to Emergent Relief, an Order Denying Emergent Relief was entered in September 13, 2017. That Order was forwarded to the parties and the Commissioner of Education. On October 6, 2017, the Commissioner of Education issued a Final Decision, concurring that petitioner had 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, and adopting the September 13, 2017 OAL Order for the reasons set forth therein. The Commissioner further noted that the "matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure." Accordingly, in November 2017, upon receipt of the Commissioner of Education's Final Decision, a Due Process Hearing was scheduled for January 30, 2018.

The Board filed a Motion for Summary Decision on December 29, 2017. The Board asserted that O.M.'s promotion to first grade is no longer practical or feasible and therefore this matter has become purely academic, and in the interests of judicial economy and restraint necessitates dismissal pursuant to the doctrine of mootness. The Petitioner filed responding papers on January 18, 2018. Petitioner asserted his disagreement with the Initial Order and the Final Decision of the Commissioner, but agreed that there was no benefit to a hearing on O.M. being promoted at this time since she has been retained in kindergarten for the 2017-18 academic year.

STANDARD FOR SUMMARY DECISION

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." N.J.A.C. 1:1-12.5(b).

The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995). In Brill, the Court looked at the precedents established in Matsushita Electrical Industrial Co. v. Zenith Radio Corporation, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), and Celotex Corporation v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), wherein

the Supreme Court adopted a standard that "requires the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for a direct verdict: 'whether the evidence presents a sufficient disagreement to require submission to a Jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill, 142 N.J. at 533 (quoting Liberty Lobby, 477 U.S. at 251-52, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214). The Court stated that under the new standard,

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder 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."
>
> [Brill, 142 N.J. at 540 (quoting Liberty Lobby, 477 U.S. at 249, 106 S. Ct. at 2511, 91 L. Ed. 2d at 212).]

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to 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, 142 N.J. at 541.

In addressing whether the Brill standard has been met in this case, further guidance is found in R. 4:46-2(c):

> 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.

An issue is considered moot "when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." The doctrine of mootness should be disregarded only with regard to "those cases in which the challenge relates to a matter of public interest, capable of repetition, yet evading

review." L.H. and L.H. o/b/o H.R. v. Rahway Bd of Educ., OAL DKT. No. EDU 05449-00 (Nov. 14, 2002), aff'd following remand Comm'r (Nov. 18, 2002).

STATEMENT OF FACTS & LEGAL ARGUMENT

It is uncontroverted that O.M. was not promoted and accordingly has been attending kindergarten from September 2017 to date. A hearing of this matter cannot have any practical effect since it would not be reasonable to promote O.M. to the first grade in the Spring of 2018, without the benefit of academics that first grade students have been receiving since September. It would also not be reasonable to promote her directly into second grade for the 2018-19 school year, without the benefit of a year of first grade academics.

I **FIND** that this matter is moot. I also **FIND** that this matter is not appropriate for hearing based upon the limited and narrow exception to the general doctrine of mootness, since promotion and retention issues are challenged with sufficient regularity to reserve judicial review for live controversies where such relief is available. I **CONCLUDE** that this matter is ripe for Summary Decision.

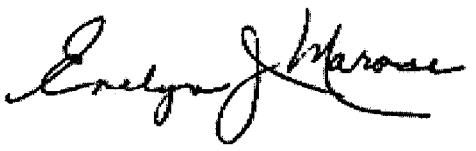
ORDER

I hereby **ORDER** that the Board's Motion for Summary Judgment is **GRANTED.**

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

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, BUREAU OF CONTROVERIES AND DISPUTES, NEW JERSEY DEPARTMENT OF EDUCATION, 100 Riverview Plaza, Route 29, P.O. Box 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



January 26, 2018

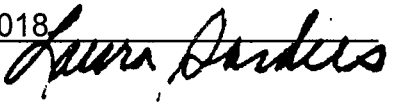
DATE

EVELYN J. MAROSE, ALJ

Date Received at Agency: JAN 29 2018

Date Mailed to Parties:

January 26, 2018



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, BUREAU OF CONTROVERIES AND DISPUTES, NEW JERSEY DEPARTMENT OF EDUCATION, 100 Riverview Plaza, Route 29, P.O. Box 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 26, 2018

DATE

EVELYN J. MAROSE, ALJ

Date Received at Agency: January 26, 2018

Date Mailed to Parties:

sej

76-18

MICHELLE GUELI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent – the State Board of Examiners (SBE) – that she had not met the requirements, as set forth in *N.J.A.C.* 6A:9B-8 et seq., for issuance of a Teacher of Elementary School Certificate of Eligibility (CE). Specifically, petitioner did not achieve the required a cumulative grade point average of 2.75 in her baccalaureate program. Petitioner contended that she qualified for the CE under *N.J.A.C.* 6A:9B-8.3(b)(2)(i), which – prior to September 1, 2016 – permitted an applicant with a GPA between 2.50 and 2.75 to satisfy the GPA requirement be exceeding a passing score on the appropriate state test of subject matter by ten percent or more. The SBE argued that although petitioner's application for certification was initiated on August 30, 2016, her application was not complete until September 29, 2016, the date upon which petitioner submitted the required oath of allegiance; therefore, her application was deem filed on the date of completion, by which time the regulations no longer permitted the exception under which petitioner claimed qualification.

The ALJ found, *inter alia*, that: petitioner asserted that pursuant to *N.J.A.C.* 6A:9B-5.3(b), the SBE should have considered her application based on the regulations in effect until September 1, 2016, because her application was marked "received" by the New Jersey Department of Education on August 30, 2016; however, the controlling regulation states that "An application shall be deemed filed with the Office when it and all required supporting documentation has been received"; petitioner's application was therefore not complete until the required oath of allegiance was submitted on September 29, 2016; and petitioner's application must be considered based on the regulatory requirements in effect after September 1, 2016. Accordingly, the ALJ concluded that the SBE's decision relative to petitioner's application for certification was reasonable, consistent with the regulatory intent, and is entitled to deference.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, for the reasons expressed therein. The petition was dismissed.

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

March 8, 2018

OAL DKT. NO. EDU 06766-17
AGENCY DKT. NO. 63-3/17

MICHELLE GUELI,	:	
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.[1] The parties did not file exceptions.

Upon such review, the Commissioner agrees with the Administrative Law Judge (ALJ) that the New Jersey State Board of Examiners (Board) did not act in an arbitrary, capricious, or unreasonable manner when it denied petitioner's application for a Teacher of Elementary School Certificate of Eligibility for failing to meet the grade point average (GPA) requirement. Applicants for a certificate of eligibility who graduated before September 1, 2016 are required to achieve a cumulative GPA of at least 2.75, and petitioner's 2.58 GPA fell short of this requirement. *N.J.A.C.* 6A:9B-8 .3(b)(1). The regulation also provides that until September 1, 2016, a candidate with a GPA of below 2.75 but at least 2.50 who exceeds the passing score on a State test of subject matter knowledge by 10 percent may still meet the requirements. *N.J.A.C.* 6A:9B-8.3(b)(2)(i). However, the Commissioner is in accord with the ALJ that the regulation does not apply to petitioner because her application was deemed filed after she submitted the oath of allegiance on September 29, 2016, rather than when she initiated

[1] The Commissioner was not provided with a transcript of the December 13, 2017 hearing at the OAL.

the application on August 30, 2016. *See N.J.A.C.* 6A:9B-5.3(b) ("An application is deemed filed with the Office when it and all required supporting documentation has been received.")

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter – for the reasons expressed therein – and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/08/18

Date of Mailing: 3/08/18

[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 6766-17
AGENCY DKT. NO. 63-3/17

MICHELLE GUELI,
Petitioner,
v.
NEW JERSEY STATE
BOARD OF EXAMINERS,
Respondent.

Michelle Gueli, petitioner, pro se

Geoffrey Stark, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: December 13, 2017 Decided: January 24, 2018

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

Petitioner, Michelle Gueli ("Gueli") challenges respondent's denial of her application for the issuance of a Teacher of Elementary School Certificate of Eligibility. Respondent, New Jersey State Board of Examiners ("Board") denied the application alleging that petitioner did not satisfy the regulatory requirements to be issued a Teacher of Elementary School Certificate of Eligibility.

PROCEDURAL HISTORY

The original petition of appeal was filed with the Department of Education on March 22, 2017. The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on May 11, 2017, N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A hearing was conducted on December 13, 2017, and the record closed.

FACTUAL DISCUSSION

Petitioner testified on her own behalf. Her grade point average (GPA) for her baccalaureate degree program at Stockton University was 2.58 (P-7). She initiated the application process for a teacher of social studies on June 21, 2016 (P-1). She took the core praxis examination necessary to complete the certification process on July 15, 2016. The oath of allegiance necessary to complete the certification process for the social studies certificate was signed by petitioner on June 21, 2016 (P-8). Petitioner paid the fee and initiated the application process to obtain her elementary education certificate on August 30, 2016 (P-3). She took the elementary education examination July 8, 2016, and received a passing grade on three of the four required parts of the examination. Petitioner retook the fourth part on September 15, 2016, and received a passing grade (P-4). The oath of allegiance necessary to complete the certification process for the elementary education certificate was signed by petitioner on September 29, 2016 (R-1). The received date did not change on the state computer system even though the oath of allegiance was filed after August 30, 2016 (P-3).

Robert Higgins, Ph.D. testified on behalf of the Board. Dr. Higgins is the Director of the Office of Certification and Induction at the New Jersey Department of Education. He is also the Secretary to the State Board of Examiners. He has worked for the Board since 2001. Dr. Higgins explained the internal process of reviewing on-line applications for teacher certification. Once an application is made and the fee is paid, the application awaits other documents including test scores which are sent to them electronically from the testing entity and the signed oath of allegiance ("Oath.") The Oath in a statutory requirement, contains questions relating to an applicant's

criminal history and whether they have ever been certified or revoked as a teacher in another state. The application remains in the state computer system until all required documents are received. It is given to an examiner once all documents are received and the application is complete. The state computer system then marks the application "to examiner."

Petitioner's application for an elementary education certificate was not sent to an examiner to review until the Oath was received on September 29, 2016. Prior to September 1, 2016, state regulations permitted flexibility for individuals with GPA's below 2.75 seeking to become certificated teachers. Because petitioner's Oath was received by the Board after September 1, 2016, the Board could not approve her application as her GPA was below 2.75.

Based on the testimony of the witnesses and examination of the documentary evidence, I **FIND** the following **FACTS**:

On August 30, 2016, petitioner initiated the application process for a Teacher of Elementary School Certificate of the Eligibility ("Certificate.") Respondent deemed petitioner's application filed a few weeks later when the Office of Certification and Induction ("Office") received her oath of allegiance/verification of accuracy form, dated September 29, 2016. The Office evaluated petitioner's credentials and determined that she lacked the required cumulative grade point average (GPA) for a certificate. On December 9, 2016, the Board heard petitioner's application for credentials review and held that petitioner did not satisfy the regulatory requirements in effect at the time her application was deemed filed because she had not achieved a cumulative GPA of at least 2.75 from her baccalaureate degree program at Stockton University. Prior to September 1, 2016, N.J.A.C. 6A:9B-8.3(b)(2)(i) permitted an applicant with a GPA between 2.50 and 2.75 to satisfy the GPA requirement by exceeding a passing score on the appropriate state test of subject matter by ten percent or more. Petitioner asserts that her application should have been be deemed filed on August 30, 2016, because that is the date the respondent marked the application received and the Administrative Code requires that applications shall be evaluated under the requirements in effect on the date the application is received.

LEGAL ANALYSIS AND CONCLUSION

The Board is responsible for the issuance and revocation of certificates to teach in New Jersey Public Schools. N.J.S.A. 18A:6-38. To be eligible for an elementary education certificate, an applicant must hold a bachelor's or advanced degree from a regionally accredited college or university, meet the minimum requirements for citizenship, age, physiology, hygiene and substance abuse, pass the appropriate State tests of subject matter knowledge, achieve a minimum score on a Commissioner approved test of basic reading, writing, and mathematic skills, and demonstrate knowledge of basic pedagogical skills. N.J.A.C. 6A:9B-8.3(a). N.J.A.C. 6A:9B-8.3(B)(1) states that:

> To be eligible for a Certificate of Eligibility candidates graduating before September 1, 2016, shall achieve a cumulative GPA of at least 2.75 when a GPA of 4.00 equals an A in a baccalaureate degree program, higher degree program, or a Commissioner-approved post-baccalaureate certification program with a minimum of 13 semester-hour credits. Effective until September 1, 2016, a candidate with a GPA that is below 2.75, but at least 2.50 when a GPA of 4.00 equals an A grade, and whose score on the appropriate State test of subject matter knowledge exceeds the passing score by 10 percent or more shall meet the eligibility requirements. N.J.A.C. 6A:9B-8.3(B)(2)(i).

In this matter, petitioner graduated from Stockton University before September 1, 2016, with a GPA below 2.75 but at least 2.50. Petitioner asserts that pursuant to N.J.A.C. 6A: 9B-5.3(b), the Board should consider her application based on the criteria in effect until September 1, 2016, because her application was filed and marked "received" by the state on August 30, 3017. N.J.A.C. 6A: 9B-5.3(b) states that:

> the Board shall issue the appropriate certificate upon the candidate's completion of all certification requirements in effect at the time the Office receives the application. Requirements include, but are not limited to, coursework, degree, tests, fees, GPA, and all certificate rules pursuant to N.J.A.C. 6A:9B-8 through 13. **An application shall be deemed filed with the Office when it and all required**

> **supporting documentation has been received.** (emphasis added)

It is clear the petitioner's application could not be deemed filed or received until September 29, 2016, which is the date the last required supporting document was provided to the Board, namely, petitioner's signed oath of allegiance. Simply because the state website did not revise the date the application was received when all required supporting documentation was filed does not change the fact that petitioner's application was not complete until after September 1, 2016. Therefore, I **CONCLUDE** that petitioner's application must be considered based on the regulatory requirements in effect after September 1, 2016.

Petitioner 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, Final Decision (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. Farrar, supra, EDU 13763-08 (citing Fisher v. State Bd. of Exam'rs, 96 N.J.A.R.2d (EDU) 58). N.J.A.C. 6A:4-4.1 provides that:

> In determining appeals from decisions of the State Board of Examiners or the School Ethics Commission pursuant to this chapter, 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 or the Commission acted in a manner that was arbitrary, capricious or contrary to law.

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). Based on the above, I **CONCLUDE** that petitioner 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.

I **CONCLUDE** that the Examiners' decision relative to petitioner's application for certification is reasonable, consistent with the regulatory intent and is entitled to deference.

ORDER

It is hereby **ORDERED** that the Board of Examiners' denial of petitioner's application for the issuance of a Teacher of Elementary School Certificate of Eligibility is **AFFIRMED** and the petition of appeal is **DISMISSED**.

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

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

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

January 24, 2018
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: 1/24/18

Date Mailed to Parties: 1/24/18

JSK/jdw/lam

APPENDIX

LIST OF WITNESSES

Petitioner

Robert Higgins, Ph.D. – Director of the Office of Certification and Induction

LIST OF EXHIBITS

For Petitioner

P-1 Teacher Certification Information System Screen relating to petitioner's applications

P-2 Teacher Certification Information System Screen relating to petitioner's application for Social Studies Certificate

P-3 Teacher Certification Information System Screen relating to petitioner's application for Elementary Education Certificate

P-4 Examination Description for State tests taken by petitioner

P-5 Board of Examiners Decision, dated January 19, 2017

P-6 Order Denying Summary Decision

P-7 Petitioner's Stockton University transcript

P-8 Oath of Allegiance for application for teacher of Social Studies Certificate, dated June 21, 2016

For Respondent

R-1 Oath of Allegiance for application for Elementary Education Certificate, dated September 29, 2016

79-18

79-18SEC
AGENCY DKT. NO. 40-1/18

IN THE MATTER OF RICHARD WELLS,	:	
PAUL ROBESON CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
MERCER COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission) – finding that respondent violated the School Ethics Act for failure to timely complete training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed the training after the issuance of the Commission's November 2, 2017 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

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

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

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/6/18
Date of Mailing: 3/14/18

[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)

IN THE MATTER OF RICHARD WELLS	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	
	:	**DECISION FOR FAILURE TO**
PAUL ROBESON CHARTER SCHOOL FOR THE HUMANITIES,	:	**COMPLETE MANDATORY**
MERCER COUNTY	:	**TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	
	:	**DOCKET NO.: T16-17**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on October 31, 2017, and mailed on November 2, 2017, via regular and electronic mail directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on November 2, 2017, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of N.J.S.A.18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of a charter school located in the City of Trenton, County of Mercer. As a result of his position as a charter school trustee, Respondent is required, pursuant to N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by June 30, 2017.

On September 8, 2017, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2017, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More specifically, on August 3, 2017, Respondent was registered to take Governance 1, and an e-

mail with the link to complete the training was sent to Respondent's registered e-mail address. In addition, on September 8, 2017, September 14, 2017, September 21, 2017, September 29, 2017, October 5, 2017, October 12, 2017, and October 19, 2017, additional e-mail notices were sent through the Weekly Program Update to all charter school trustees who had not yet completed training, including Respondent. The NJSBA also sent a reminder communication to Respondent's Charter Lead on August 7, 2017. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in September 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2017. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated October 13, 2017, via regular and electronic mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on November 2, 2017.

The OTSC directed Respondent to show cause, in writing and under oath, within twenty (20) days, why a penalty up to and including removal should not be imposed. The twenty (20) day deadline for Respondent to submit a written response to the OTSC was November 23, 2017. At its meeting on November 28, 2017, and because Respondent had not yet completed training or otherwise responded to the OTSC, the Commission discussed recommending that the Commissioner of Education (Commissioner) impose a penalty of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education. The Commission further discussed that if Respondent failed to complete training within the period of his thirty (30) day suspension, Respondent should be removed from office on the thirty-first (31st) day.

A decision memorializing the Commission's discussion from its meeting on November 28, 2017, was adopted by the Commission at its meeting on December 19, 2017, and mailed to Respondent, and to the NJSBA, on December 20, 2017. On December 22, 2017, the NJSBA advised the Commission that Respondent completed training on December 5, 2017, which was after the Commission had discussed a recommended penalty on November 28, 2017, but before the Commission adopted its decision on December 19, 2017. At its meeting on January 23, 2018, the Commission voted to rescind the previously issued decision, and to adopt the within decision recommending a penalty of reprimand.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33.

Based on the record as set forth above, at its meeting on January 23, 2018, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required, and only completed it after an OTSC was issued.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, 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 Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

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

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: January 24, 2018

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on January 23, 2018.

Kathryn A. Whalen

Kathryn A. Whalen, Director

IN THE MATTER OF RICHARD WELLS	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***PAUL ROBESON CHARTER SCHOOL FOR THE HUMANITIES*, MERCER COUNTY**	:	
	:	**DOCKET NO.: T16-17**

WHEREAS, pursuant to N.J.S.A. 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq.; and

WHEREAS, Richard Wells, Respondent, is a charter school trustee of the Paul Robeson Charter School for the Humanities; and

WHEREAS, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete his Governance 1 training program by June 30, 2017; and

WHEREAS, at its meeting on October 31, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2017, as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2017, and also failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, at its meeting on November 28, 2017, the Commission discussed recommending that the Commissioner of Education impose a penalty of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education; and

WHEREAS, if at the conclusion of the thirty (30) day suspension, Respondent still has not completed his mandatory training requirement, the Commission discussed recommending that he be removed from office on the thirty-first (31st) day; and

WHEREAS, at its meeting on December 19, 2017, the Commission voted to approve a decision memorializing its findings and recommendations from its meeting on November 28, 2017;

WHEREAS, the Commission's decision was mailed to Respondent, and to the NJSBA, on December 20, 2017; and

WHEREAS, on December 22, 2017, the NJSBA advised the Commission that Respondent completed training on December 5, 2017, which was after the Commission had discussed a recommended penalty on November 28, 2017, but before the Commission adopted its decision on December 19, 2017; and

WHEREAS, at its meeting on January 23, 2018, the Commission voted to rescind the previously issued decision, and to adopt the within decision recommending a penalty of reprimand for his violation of N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

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

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted
by the School Ethics Commission at its public meeting
on January 23, 2018.

Kathryn A. Whalen

Kathryn A. Whalen, Director

80-18

STATE OF NEW JERSEY
COMMISSIONER OF THE DEPARTMENT OF EDUCATION

IN THE MATTER OF THE TENURE CHARGES AGAINST CHARLES WEBBER BY THE ELIZABETH BOARD OF EDUCATION UNION COUNTY, NEW JERSEY	)	Dkt. No. 123-6/17

OPINION AND DECISION

Before		Alan A. Symonette, Impartial Arbitrator
Appearances:	Charles Webber	Thomas S. Mirigliano, Esq. Joshua F. McMahon, Esq. Shiller McMahon, LLC
	The Elizabeth Board of Education, Union Cty. New Jersey	Joseph D. Castellucci, Jr., Esq. Nishali Rose, Esq. Lester Taylor, Esq. Florio, Perrucci, Steinhardt & Fader, LLC
Dates of Hearing		September 28, 2017 September 29, 2017 December 18, 2017 January 18, 2018

Statement of Decision: Based upon the evidence presented herein, I find that the School District has substantiated the charges filed against the Respondent Charles Webber. He has engaged in a pattern of conduct unbecoming a staff member and there is just cause to terminate his employment. The charges are sustained.

INTRODUCTION

This matter was brought to arbitration before the undersigned pursuant to P.L. 2012 Chapter 26 of Title 18A *N.J.S.A.* This involves certain charges filed on June 21, 2017 against the Respondent Charles Webber by the School District of Elizabeth, New Jersey. The charges seek to remove Mr. Webber from his position as Custodian for the School District. The Statement of Tenure Charges is set forth as follows:

BACKGROUND INFORMATION COMMON TO ALL CHARGES

Mr. Webber was hired by the Board on or about October 2008 as a substitute custodian. Effective January 18, 2011, Mr. Webber was hired as a full – time employee in the position of custodian. Mr. Webber subsequently earned tenure in that position.

During his employment with the Board, Respondent was, at all times, subject to the terms and conditions of his employment contracts, including but not limited to, the contract for the 2016 – 2017 school year. These contracts obligated Respondent to faithfully perform the duties of the position in accordance with any and all Board policies and any and all applicable laws, rules and regulations.

Elizabeth Board of Education Policy No. 4117.52/4217.52 *Dismissal/Suspension,* states: "The Board will endeavor to protect the school children of this district from the influence of unfit employees. The Board of Education shall challenge the continued employment of any employee who....violates by unbecoming conduct the public trust placed upon employees of this district, or by other means fails to exhibit the good behavior necessary to continued employment..."

Elizabeth Board of Education Policy No. 4119.23/4219.23, *Employee Substance Abuse Procedure* states: "Inducing or attempting to induce others to use illegal drugs, narcotics or alcohol is prohibited on school property and at all school functions."

Elizabeth Board of Education Policy 4119.26, *Electronic Communication by School Staff* states: "Employee and student electronic communications of any kind shall be limited to legitimate school business as defined within this policy and should be conducted through the district's computers, district email addresses and telephone systems. School employees will not give out their private cell phone or home phone numbers or personal email addresses to students without prior approval of the principal." Additionally, Policy 4119.26 states: "As a general rule, employees should not use their personal cell phones to call students, additionally, employees shall not contact students' cell phones unless directed to do so by the parent/guardian of the student. If cell phone

contact with a student is necessary, the contact shall be as brief and direct as possible. When brief contact is not sufficient and/or feasible to resolve the matter, where appropriate, teachers shall schedule face-to-face conferences during regular classroom and extra-help periods to confer with the student. No cell phone contact shall exceed three replies." Finally, Policy 4119.26 states: "As a general rule, text messaging is not a preferred method of communication between employees, coaches and volunteers and students. However, any text messages that are sent by staff members, coaches and volunteers shall, as a general rule be sent to the entire class, team, club or organization and not to any student individually. Exceptions may include situations involving confidential medical issues, emergencies or individual issues not involving the entire group. *Staff shall not send messages containing inappropriate material, which includes, but is not limited to, material that: A. May be perceived as profane, obscene, racist, sexist or promote illicit, illegal or unethical activity; B. Violates the district's affirmative action policies File Codes 2224, 4111.1, 4211.1 and 6121; C Is personal in nature and not related to the business of the district; D. Can be interpreted as provocative, flirtatious or sexual in nature ...or G. Violates other board policies or federal or state laws or regulations.* (emphasis added.)

Elizabeth Board of Education Policy No. 4119.22, *Conduct and Dress,* states, "When an employee, either within the schools or outside normal duties, creates conditions under which the proper operation of the schools is affected, the Board upon recommendation of the Chief School Administrator and in accordance with statutes shall determine whether such acts or lack of action constitute conduct unbecoming a school employee, and if so, will proceed against the employee in accordance with the law. Unbecoming conduct sufficient to warrant board review may result from a single flagrant incident or from a series of incidents."

Elizabeth Board of Education Policy No. 4199.3, *Duties,* states that, "Each employee shall comply with all requirements of the law, and shall perform all duties commonly performed in his/her position."

Elizabeth Board of Education Policy No. 6131, *Pledge of Ethics,* states, "All students and adults in the Professional Learning Community are held to the same high ethical standards."

Additionally, Elizabeth Board of Education Policy No. 4111.1/4211.1, *Affirmative Action/Nondiscrimination,* includes the Board's policy on sexual harassment and states, "Sexual harassment of staff or children interferes with the learning process

and will not be tolerated in the Elizabeth Public Schools. Harassment by Board members, employees, parents, students, venders and others doing business with the district is prohibited."

On November 4, 2016, student A.S., age fifteen (15) divulged to school social worker, Sam Bernstein ("Mr. Bernstein"), that she had inappropriate contact with the Respondent, including that he bought her lunch almost every day, spoke to her about matters of a sexual nature and discussed using a controlled dangerous substance with her.

Acting Assistant Superintendent for Human Resources, Francisco Cuesta ("Mr. Cuesta") was notified of the allegations and requested that Investigator Tomas Escribano ("Mr. Escribano") notify the Elizabeth Police Department. Officer Banks (Badge #412) responded to P.S. #2 Winfield Scott School and interviewed Mr. Bernstein and A.S.

Mr. Escribano conducted subsequent interviews with Mr. Bernstein, teacher Shara Greenberg ("Ms. Greenberg"), Mr. Cuesta, A.S. and Respondent. Mr. Bernstein completed a written report and contacted the Division of Child Protection and Permanency. In his report, dated November 4, 2016, Mr. Bernstein stated that A.S. approached him on that date and stated that she had an inappropriate contact with the Respondent. A.S. reported that the inappropriate contact began in September 2016 when Respondent approached A.S. because she was unable to purchase school lunch. A.S further stated that Respondent began to purchase lunch for her on a daily basis and asked A.S. to eat with him in the school's boiler room. A.S. reported that during these lunches, Respondent would ask her about her relationship with her boyfriend and discuss her sexual activity. A.S. stated that she did not stop these conversations with Respondent because he was providing her with lunch, which she could not afford and she feared he would stop. Additionally, A.S. also reported to Mr. Bernstein that Respondent gave her $25 at the end of the 2015 – 2016 school year so that she could have her nails done before graduation.

Further, A.S. reported to Mr. Bernstein that Respondent spoke to her about her time in a rehabilitation facility for marijuana addiction. Respondent admitted to A.S. that he smoked marijuana and offered to smoke marijuana with A.S. after school hours and off school grounds. A.S. declined this offer.

When Mr. Bernstein asked A.S. why she was reporting Respondent at this juncture despite this behavior persisting for months, A.S. stated that she feared Respondent. A.S. stated that Respondent never physically threatened her, but he suggested violence when revealed stories of his violent past and that he, "has stomped on

people's faces and likes fighting people." Additionally, A.S. reported to Mr. Bernstein that Respondent requested her cellphone number and that she complied with his request. Respondent and A.S. exchanged several inappropriate text messages, including several in which Respondent requested a hug from A.S. and one in which Respondent acknowledged that his behavior with A.S. was against school rules and that he would get into trouble for his actions.

On November 7, 2016, Mr. Escribano interviewed teacher Shara Greenberg, Ms. Greenberg reported that she was aware of one time that Respondent purchased lunch for A.S. Ms. Greenberg was aware of this incident because Respondent asked her if he could give lunch to A.S. and Ms. Greenberg gave him permission.

Subsequent to Mr. Bernstein's report, Assistant Superintendent Francisco Cuesta removed Respondent from P.S. #2 and informed him of the allegations against him. While in Mr. Cuesta's office, Respondent admitted that he bought A.S. lunch and coerced her into eating it with him in the boiler room, out of sight of the rest of the school community. Respondent also told Mr. Cuesta that he exchanged numbers with A.S. and that he sent her messages regarding when and where to meet for lunch.

Mr. Escribano conducted a formal interview with A.S. on March 8, 2017. A.S. reported that Respondent purchased lunch for her nearly every day for a few months during the 2016-2017 school year, beginning in or about October 2016. A.S. stated that she would meet Respondent in the boiler room to retrieve her lunch from him. A.S. stated that Respondent requested her cell phone number and that he would text her regarding where and when to meet for lunch as well as after school hours. A.S. stated that Respondent would text her messages such as, "goodnight," "what you doing?" and "have a good weekend." A.S. also reported that Respondent asked her for a hug in one text message and that this message made her feel uneasy because she does not hug the teachers and they do not hug her. Additionally, A.S. reported that Respondent asked her if she was a virgin and for intimate details about her relationship with her boyfriend. A.S. explained that Respondent asked her about what she and her boyfriend do when they get physical in a sexual way.

A.S. also reported to Mr. Escribano that she spoke to Respondent about her time in a rehabilitation facility for marijuana addiction and that Respondent invited her to smoke marijuana with him after school and off school grounds. A.S. stated that she did not meet with Respondent after school and off school grounds. A.S. stated that she did not meet with Respondent after school.

A.S. further reported that Respondent gave her $25 at the end of the 2015-2016 school year as a reward for finishing summer school and maintaining passing grades. A.S. stated that she decided to report Respondent because he told her to come to his office to show her something and began asking her additional personal questions that made her uncomfortable. A.S. specified that Respondent asked her about her virginity and if she, "liked it on the top or in the bottom." A.S. reported that she feels scared of Respondent being in the school, especially in light of the fact that she came forward with these allegations. A.S. stated that she is uneasy because Respondent told her that he liked to stomp people's faces. Finally A.S. stated that Respondent told her that she would get in trouble if she ever told the principal or the lunch aide about Respondent buying her lunch.

SPECIFICATION OF CHARGES

CHARGE I

CONDUCT UNBECOMING A STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S INAPPROPRIATE CONDUCT TOWARD A STUDENT

The foregoing background information, common to all charges, and the facts alleged therein, are incorporated by reference as if fully set forth herein.

Charles Webber has engaged in unbecoming conduct including misconduct, dishonesty, insubordination, inappropriate conduct with a student, and other just cause by his acts and omissions relative to student A.S. at P.S. #2 Winfield Scott. These acts and omissions, as specifically set forth below, constitute just cause for immediate dismissal due to conduct unbecoming.

Count 1

During the 2016-2017 school year, Respondent behaved inappropriately with student A.S. in a multitude of ways. Beginning in or around October 2016, Respondent offered to purchase a school lunch for A.S. as she was unable to purchase one for herself. Respondent began to purchase a school lunch for A.S. on a near daily basis and invited her to eat lunch with him in the boiler room. Respondent purchased lunch for purposes of luring A.S. into the boiler room to be out of sight of the school community.

Count 2

While they were eating lunch, Respondent would ask A.S. intimate details about her relationship with her boyfriend, including discussing her sexual activities. Specifically, Respondent inappropriately questioned A.S. about her virginity, causing her to feel extremely uncomfortable. Additionally, Respondent questioned A.S. about her sexual preferences, again causing her to feel extreme discomfort.

Count 3

During the 2016-2017 school year, Respondent requested A.S.'s cell phone number. On numerous occasions during the 2016-2017 school year, Respondent exchanged inappropriate text messages with student A.S. after school hours and unrelated to an emergency or school business, including a message wherein A.S. requested a sandwich and Respondent replied, "got it already u owe me a hug." On another occasion, Respondent texted A.S., "still waiting for my hug. Lol."

Count 4

During the 2016-2017 school year, while eating lunch, Respondent discussed with A.S. his penchant for fighting others, specifically, that he liked to "stomp people's faces," causing A.S. to become uneasy around Respondent and reticent to report Respondent's behavior for fear of reprisal against her.

CHARGE II

CONDUCT UNBECOMING A STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S ENDANGERING THE WELFARE OF A CHILD BY BRINGING HER TO A BOILER ROOM

The foregoing background information, common to all charges, and the facts alleged therein, are incorporated by reference as if fully set forth herein.

Charles Webber has engaged in unbecoming conduct including misconduct, dishonesty, insubordination, inappropriate conduct with a student, and other just cause by his acts and omissions relative to student A.S. at P.S. #2 Winfield Scott. These acts and omissions, as specifically set forth below, constitute just cause for immediate dismissal due to conduct unbecoming.

By bringing A.S. to the boiler room, Respondent exposed A.S. to dangerous and hazardous conditions, to which a student should not be subjected.

CHARGE III

CONDUCT UNBECOMING A STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S VIOLATION OF THE EMPLOYEE SUBSTANCE ABUSE POLICY

The foregoing background information, common to all charges, and the facts alleged therein, are incorporated by reference as if fully set forth herein.

Charles Webber has engaged in unbecoming conduct including misconduct, dishonesty, insubordination, inappropriate conduct with a student, and other just cause by violating Board Policy 4119.23/4219.23 *Employee Substance Abuse Procedure*. His acts and omissions relative to student A.S. at P.S. #2 Winfield Scott, as specifically set forth below, constitute just cause for immediate dismissal due to conduct unbecoming.

During the 2016-2017 school year, while Respondent was eating lunch with A.S. in the boiler room, he discussed with A.S. her admission to a rehabilitation facility for marijuana addiction. At that time, Respondent disclosed to A.S. that he smoked marijuana and asked A.S. to smoke marijuana with him after school off school grounds. A.S. declined this offer. While the act alone is illegal and against school policy, this offer was especially egregious given Respondent's knowledge that A.S. previously received treatment for an addiction to marijuana.

CHARGE IV

CONDUCT UNBECOMING A STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S VIOLATION OF THE BOARDS' POLICY AGAINST VIOLENCE AND THREATENING BEHAVIOR

The foregoing background information, common to all charges, and the facts alleged therein, are incorporated by reference as if fully set forth herein.

Charles Webber has engaged in unbecoming conduct including misconduct, dishonesty, insubordination, inappropriate conduct with a student, and other just cause by violating Board Regulation 4119.22/4219.22 *Violence and Threatening Behavior by Employees of the Elizabeth Board of Education and Parents of Students*. His acts and omissions relative to student A.S. at P.S. #2 Winfield Scott, as specifically set forth below, constitute just cause for immediate dismissal due to conduct unbecoming.

During the 2016-2017 school year, while he was eating lunch with student A.S. in the boiler room, Respondent discussed his violent past with A.S. including that he has stomped on people's faces and likes fighting people. Additionally, Respondent told A.S. that she would be in trouble if she ever told the Principal or lunch aide that Respondent was buying her lunch. Respondent's acts caused A.S. to feel threatened by him and fear

reprisal if she were to divulge Respondent's inappropriate actions with her to anyone, in direct violation of school policy.

CHARGE V

CONDUCT UNBECOMING A STAFF MEMBER, INSUBORDINATION AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S INAPPROPRIATE CONDUCT TOWARD A STUDENT

The foregoing background information, common to all charges, and the facts alleged therein, are incorporated by reference as if fully set forth herein.

Charles Webber has engaged in unbecoming conduct including misconduct, dishonesty, insubordination, inappropriate conduct with a student, and other just cause by his acts and omissions relative to student A.S. at P.S. #2 Winfield Scott. These acts and omissions constitute just cause for immediate dismissal due to conduct unbecoming.

On July 7, 2017 Respondent, through counsel submitted a "Sworn Statement of Position" in response to the charges. Initially, Respondents stated that he "vehemently" denies "that I have demonstrated a lack of character, integrity and/or good faith during the course of my employment and I maintain that I am fit to serve as a member of the custodial staff." He further claims that throughout his career as a custodian he has performed his duties with integrity and good faith. He maintains that he has always been a "diligent, conscientious and hardworking member of the school staff."

With respect to the specific allegations, he states that he was approached by A.S. in the school cafeteria in September 2016 and told that she was refused the service of hot lunches due to her mother's failure to pay for such services. Since she was not entitled to a hot lunch, she would only receive a cheese sandwich which was inadequate. He informed her that she could apply for assistance from the school but A.S. stated that her mother had refused to fill out the necessary paperwork. He stated that A.S. claimed that her mother was neglectful and sometimes she did not eat at all at home. Since he felt sorry for her he asked Shara Greenberg whether he could provide A.S. a hot lunch. She advised him that he could do so.

After purchasing the lunch Respondent claimed that A.S. told him that cafeteria personnel were aware of which students were ineligible for a hot meal and if discovered with same, the food would be

taken away. Since he did not want A.S. to worry about her meal being taken, he suggested that she go to his office in the boiler room to eat.

Respondent denied purchasing lunch for A.S. "on a daily basis." In addition, he did not remain with her and talk to her while she was in boiler room. Rather he would leave the lunch in the boiler room, text A.S. to inform her that it was there and leave. As far as him texting A.S., respondent maintained that A.S. requested his cell phone number to communicate. As noted in the copies of the messages, there was only minimal communication with each other. Moreover, there was always substantial traffic in the boiler room so they were not really alone. The door to the boiler room was always open and unlocked. He also noted that the hallway to the boiler room was under consistent video surveillance. From then until his suspension he provided at most four lunches to A.S. Otherwise, he never came in contact with her. Respondent denies ever sending inappropriate text messages nor did he initiate any conversations with A.S.

Respondent maintains that his actions were as a result of an attempt to "help an underprivileged child who came to me for assistance." He never "lured" or 'coerced" A.S. into the boiler room. In this regard he noted that the Department of Children and Families investigated the incident and determined that A.S. was never in any imminent harm.

Respondent denied ever discussing sexual activity or drug use with A.S. Her statements in that regard are a "complete fabrication." He further denied ever suggesting any violence against her especially stating that he had a penchant for fighting others.

Regardless, Respondent maintains that none of the alleged acts singularly or in combination amount to unbecoming conduct nor do the actions constitute just cause for dismissal. He therefore demands reinstatement with all attendant benefits and emoluments due to him.

BACKGROUND AND SUMMARY OF EVIDENCE PRESENTED

The School District presented a total of five witnesses in support of its Charges. Those witnesses were Tomas Escribano, AS, Dominic De Anthony, Samuel Bernstein and Francisco Cuesta. The

Respondent presented a total of four witnesses; Giuseppe Paparatto, Shara Greenburg, Respondent and Kaye Gervasi.

Mr. Escribano testified that he was initially hired by the school district in March 2016 and is serving as the lead investigator of employees and students. He also serves as an investigator of residency issues in the District. In November 2016, he was asked by the Francisco Cuesta Acting Assistant Superintendent for Human Resources to go to P.S. #2 Winfield Scott School to investigate an allegation by a student of inappropriate behavior by a staff member.

Once he arrived, he spoke to Mr. Bernstein the School Social Worker. Mr. Bernstein told him that AS had confided in him about a relationship with Respondent and that she had been having lunch with him in the boiler room. He also claimed that AS told him that Respondent had been engaging in inappropriate conversations concerning her virginity and intimate details of what she did with her boyfriend. He also stated that Respondent had engaged in conversations with her about smoking marijuana. She had become afraid because the Respondent stated that he had "bashed" peoples "heads in."

The police department was also called. The student was summoned to the school's office and was interviewed by a police officer. In the subsequent police report, AS identified Respondent who she referred to as Mr. Gray as the individual she had met with in the boiler room. The officer did not testify but the report stated as follows:

> "On 11-4-2016 I responded to PS#2 Winfield Scott, and was met by Tommy [sic] Escrabiano the Board of Education investigator and Mr. Sam Bernstein the school's social worker who stated AS who's a 8th grade student gave the following statement. During the last school year (2015 – 2016) she met the Head Custodian Charles Webber who she called Mr. Gray.
>
> Mr. Gray became concerned about AS not being able to have school lunch due to improper or incomplete paper work filled out by her parents, so Mr. Gray began to give A lunch inside the boiler room during her lunch break. As Mr. Gray became more comfortable his line of question also became more inappropriate, he would ask about her virginity and her boyfriend and invited her to smoke SDS marijuana with him off of school property.
>
> While gathering this information A entered the office and further stated she was given $25.00 last year to get her nails done which lead to her having lunch in the boiler room this September…."

Mr Escribano subsequently requested video of the boiler room and the hallway. However he could not obtain anything because it is regularly destroyed every two to three weeks.

He returned to see Mr. Cuesta and was told that Respondent was inquiring about what was happening. Mr. Cuesta told him about the accusations. At that time the Respondent stated that he was indeed providing her lunch because he did not want to see a kid go hungry. According to his report, Mr. Escribano stated that in addition, Respondent pulled out his cell phone and showed it to Mr. Cuesta indicating that he had the student's phone number and that they would text each other about the time to meet in the boiler room.

Mr. Escribano also testified that he visited the boiler room as part of his investigation. He noted that the cafeteria is on the same level. The boiler room is down a hallway through a set of doors and then down a few steps. He took photos which were presented at the hearing. He noted that there was no evidence that students had been present in the area.

Mr. Escribano obtained a copy of several text messages between AS and the Respondent. These messages were provided by AS upon a request by Mr. Cuerta. According to Mr. Escribano, the messages showed that AS and Respondent had at least one exchange that was outside of school hours. The following Monday, he interviewed Mr. Webber who stated that he was advised by his attorney that he should not turn over his cell phone.

Mr. Escribano spoke to other witnesses, some provided statements and others he determined did not add to the investigation. One individual he spoke to was Shara Greenberg a teacher in School 2. Ms. Greenberg stated that she had worked in the lunchroom monitoring the students and was approached by the Respondent who told her that he had purchased something for AS and if it was permissible to give the lunch to her. She told him that it was permissible but she did not know where AS was consuming the lunch. She also identified other teachers who worked lunch but according to Mr. Escribano, those teachers did not know anything.

Mr. Bernstein also provided a statement stating that AS had confided that there was a relationship with Respondent; that he was buying her lunch and had asked questions about her virginity. As part of the discussion, AS mentioned to him that she had prior issues with smoking marijuana.

On March 8, 2017 Mr. Escribano took a statement from AS in the principal's office. He concluded that her statement had been consistent with the ones she initially provided to Mr. Bernstein, Mr. Cuesta, and the police. He therefore had no reason to believe that she was lying and did not appear nervous during the interview. AS stated that she became worried about her conversations with Respondent because he had stated to her that he liked to fight and to smash people's faces in and about the sexual questions. She became uncomfortable because the nature of the conversation had changed. She also stated as part of her statement that on two occasions in text messages, Respondent asked for a hug but she did not return it because she did not give teachers hugs.

On cross examination, Mr. Escribano stated that he did not know how or why AS referred to Respondent as Mr. Gray. In recounting his involvement he stated that Mr. Cuesta initially called him about an allegation but Mr. Bernstein told him what was initially said by AS. He also recalled that he was told that AS had initially spoken to Mr. DiAnthony, her teacher who referred her to Mr. Bernstein.

In describing his reporting relationship, Mr. Escribano stated that he reported directly to the school superintendent and report to the Board's Counsel. As far as his methodology, he stated that he did attend other interviews notably in which the police were involved but he did not ask questions at that time. He only observed. In addition, Mr. Escribano admitted that during the time the New Jersey Department of Children and Families was investigating the incident, he stopped proceeding with his inquiries. Thus he did not complete the investigation with the interview of teachers and AS until March, 2017.

Mr. Escribano admitted that he did not interview any students or Mr. D Anthony. In further response to Counsel's questioning, he admitted that he had only read about the $25 gift. He admitted that

he did not know if teachers house supplies in the boiler room or if there was a security guard posted who could monitor the hallway between the cafeteria and boiler room

AS testified after Mr. Escribano. She stated that she know Respondent as a janitor in her school and had known him for two to three years. She would say hello to him and knew him as Mr. Grey shirt because of the color of shirt he would wear. She recalled that Respondent had given her $25 as a reward for finishing summer school the prior year. This was the first time he had given her money.

AS testified that Respondent bought her lunch and had "sneaked" it from the cafeteria. She recalls this as the beginning of the 2016 – 17 semester. This, according to AS occurred almost every day. Respondent stated that he was feeling bad because she was not eating lunch. Initially he bought the food and gave it to her. He started bringing the lunch to the boiler room because she was told that they both would be in trouble if the cafeteria lady found out he was buying her lunch. At first he gave hand signals to tell her that the food was available. When they ate in the boiler room she stated that other people were coming around mostly janitors.

During the conversations he asked her about what she and her boyfriend did while they were together. To her it seemed "weird' at first. He also spoke to her about drugs. I had mentioned that I was in a program for "smoking dope." It was then he offered to smoke with me after school.

AS testified that at one point he had asked her for her cell phone number because he wanted to know when she was at school and when lunch would be available. In reviewing a transcript of the messages, she noted that he would text her inquiring about what she was doing. He had also asked for a hug more than once but she never gave him a hug. According to AS she considered these requests to be weird. She noted that her teachers did not ask her for a hug. She also admitted that there was no mention of drugs in the text messages.

She decided to approach Mr. DiAnthony because Respondent began making her feel uneasy. She told Mr. DiAnthony in the form of a hypothetical. He told her to report to Mr. Bernstein. She remembered initially being hypothetical but eventually disclosed to him that it was the Respondent.

AS was subjected to a very extensive cross examination. She admitted that she had a "friendly" relationship with Respondent that started in 6th grade. In that regard, it became immediately apparent that AS was having difficulty associating the year with the grade she was in at the time. She testified that she attended 6th grade for 3 years so she was confused. She recalled that at the time of her testimony she was in 9th grade so as of June 2017 she was in summer school completing 8th grade.

She stated that according to her recollection, there was no alternative to an unpaid lunch so she told Respondent that she had to pay for lunch and did not have the resources. She told Respondent that her mother did not care about her and her brother had passed away. She felt neglected. Indeed she stated that she did not want Respondent to stop buying her lunch.

AS testified that she was not aware that Respondent had once asked Ms. Greenberg for permission to buy her lunch. She stated that she believed that the "head cafeteria lady" would take her lunch if she could not pay. When Respondent would buy lunch, he would use hand signals and eye contact to tell her that a hot lunch was available. She recalled that Respondent was buying her lunch for a full year.

She recalled that when she returned from drug rehabilitation, Respondent had asked her why she had not been in school for so long. She told him that she was in Trimitas but did not recall his response.

When pressed, AS stated that she did not recall the number of times she went to the boiler room. Regardless, she considered it to be a good idea. The plan was to go to lunch when everyone else started eating. Lunch period for her was 45 minutes. Normally it took about 15 to 20 minutes for her to eat.

With respect to the investigation, he initially approached Mr. DiAnthony because he was one of her favorite teachers. Ms. Greenburg was her homeroom teacher. Mr. DiAnthony encouraged her to go speak to Mr. Bernstein. During her discussion with him, he asked her about the text message so she agreed to print them out. She stated that she was pretty sure she printed them all out. She specifically recalled that Respondent asked for her phone number. However, she stated that they never spoke over the phone.

She also told Mr. Bernstein that Respondent asked inappropriate questions and asked me for a hug. She recalled that he also asked her in person in addition to the text message. She recalled that Respondent disclosed to her that he smoked marijuana also and suggested that they should smoke off campus. She also testified that she did give a statement to the investigator.

AS agreed with Respondent's counsel that Respondent never threatened him nor did she feel unsafe while in the boiler room.

Dominic DiAnthony testified that he was a teacher at School #2 and had been teaching for 15 years. In 2017 he was an art teacher in the AVID college prep program. He taught art education and history. He recalled Respondent as the janitor in his building for a few years. He considered him to be an "awesome" custodian. They would interact regularly in the cafeteria during elementary lunch. He also knew AS because he had her in 5th or 6th grade.

One day AS approached him and asked a hypothetical question asking what if she encountered someone who made her feel uncomfortable. Mr. DiAnthony stated that he immediately took her into the hallway and began asking her questions. She was generally uncomfortable. When he asked her who it was she would just say a man in the building. She said that he would make her feel uncomfortable and they got personal in nature. He described her demeanor as "not confident." It was apparent that she did not want to get the person in trouble. After talking to AS Mr. DiAnthony immediately passed the matter on to Mr. Bernstein.

Mr. DiAnthony recalled AS as being a student who was loud, obnoxious, bold and forward. During this encounter, she appeared to be embarrassed talking to me about it. Therefore he told her that he would give her to the end of the day to speak to Mr. Bernstein. Therefore she took it on herself to go and see him. His office was next door.

On cross examination Mr. DiAnthony said AS would stroll in the class at any time just to say hello. He recalled that she was a "girl [who] did not miss a meal. On occasion, she would drop into his class room during the lunch period to work. He stated that he would ask her if she had permission to

come into his classroom. During that time he recalled that she was doing some artwork relating to student government. As far as her personal life, DiAnthony never met her family and never knew anything about her family life. He did hear about her having and older boyfriend.

Mr. DiAnthony also recalled that AS was polite to him. While she was brash from time to time he recalled her as being mellower in the 7th and 8th grade. She was still loud especially in the hallways and would sometimes lash out at teachers.

Samuel Bernstein testified that he was the school based social worker for 17 years. He retired in June, 2017. He was the person responsible for reporting incidents involving students. He knew AS as a student and recalled Respondent as a custodian at School #2. He considered the Respondent to be an excellent head custodian that kept the building clean and neat. AS on the other hand had a history of family issues that were reflected in her attendance.

AS was referred to him by the art teacher. She came and sat in his office and told me that she had an issue with her mother and her mother was not up to date with payments for lunch. Thus she could not have lunch. AS stated that Respondent overheard this and told her that they could meet in the boiler room for lunch. Respondent had previously paid to have her nails done. AS stated that Respondent had questioned her about her sexual activity and marijuana. She said that he knew people in the community and he likes to stomp on people. This made her uncomfortable. She reported that afterwards she became fearful of the Respondent. When she passed him in the hallway, she felt threatened.

Mr. Bernstein was also concerned about where she was eating lunch. He was not aware of the policy regarding the exchange of phone numbers.

With respect to the lunch policy, Mr. Bernstein testified that if he had been aware that AS had a lunch issue, he would have worked out the situation with the kitchen staff. He maintains that he has a small lunch fund to offset student costs. He testified that every week he did fundraising for this purpose. The fund was also used to pay for the 8th grade party. Often times he would sponsor a 50/50 raffle to

raise funds. Indeed he recalled the Respondent giving to the fund. Yet Respondent did not report to him about AS and her problems with lunch.

He subsequently reported the conversation with AS to building administration. As the school based social worker it was his responsibility to report such incidents to the state and the police which he did.

On cross examination stated that he normally hosted both group and individual counselling with students regarding academic and family issues. He did not hear of any problems with Respondent through that group. He did know that AS was in and out of the group. That she had an attendance issue at school

He was first notified by Mr. DiAnthony but then AS approached him by himself. She initially refused to name the person to him as well. He gave her the night to think about it. He was concerned that the person may have been doing the same thing to other students. He told AS that she needed to resolve the issue if she felt threatened and the person would be removed so the immediate threat would be resolved. She came in the following morning voluntarily and spoke to him. After he reported the incident, the Board sent the investigator and the police sent a patrolman and a detective. He sat in on the investigatory meetings and submitted an incident report. There were a series of meetings. In each case AS was walked through the incident consistently.

He was aware of AS' issues with lunch. She was eligible to receive a cheese sandwich but did not want it. AS however never disclosed to him that she was going hungry at home. Mr. Bernstein stated that he was aware that AS had been in rehabilitation because he was in communication with counselors about her eventual return to school.

The last witness in the School District's case was Mr. Francisco Cuesta the Interim Superintendent for Human Resources. He has been with the District for 34 years. The last two was with Human Resources. He only knew Respondent "by reputation." When Respondent became aware of the

allegations, he had him brought to his office. He knew the nature of the allegations but not the detail. Mr. Cuesta advised him of the allegations and told him he was entitled to representation.

Respondent replied that he did not do anything wrong only to make sure that the student had lunch. He stated that he communicated with the student through text messages. He had her cell number and would arrange for a time to have lunch. He knew that it was not appropriate for staff to have the personal numbers of students. Subsequently and after speaking with the investigators and reviewing the report, it was brought to his attention that Respondent had asked AS if she wanted to smoke pot. Mr. Cuesta then reviewed the policies involved in the determination that the Respondent would be subject to charges.

On cross examination, Mr. Cuesta stated that he was not involved in the decision to revoke tenure. His only involvement in discipline concerned recommendations of suspension and reprimands. He spoke to the superintendent and she made the decision. It is the Superintendent's responsibility to recommend to the Board that an individual's tenure be terminated.

The Respondent's first witness was Giuseppe Paparatto. Mr. Paparatto is employed as a Carpenter with the School District. He had been employed for approximately 6 years. In his employment is familiar with School #2. He would report to that school at the beginning of the day to receive his assignment. He would then be dispatched to School #2 or other schools where is skills are needed. I recalled that Respondent was the head custodian.

He essentially knew Respondent from work. They would normally collaborate on the jobs at the beginning and at the close of the day. In performing his job, he became familiar with the workings in the school's boiler room. The cafeteria is on the same floor as the boiler room. He testified that there is security around the cafeteria as well as CCTV cameras around the area. The boiler room itself was quite busy according to Mr. Paparatto. There was a door that allowed access from outside the building. One would normally see plumbers walking through, as well as teachers. As far as he was concerned, he never saw Respondent in the boiler room with children. He was performing is job.

On cross examination Mr. Paparatto acknowledged that even though he reported to School #2 every morning, he was gone and on assignment by 9:00 am.

The following witness was Ms. Shara Greenberg who appeared with counsel from her Union. Ms. Greenberg is a middle school language arts teacher. At the time of the hearing, she was assigned to School #4. While working in School #2 Ms. Greenberg was at times assigned to monitor lunch and recess. Mostly she was on the outside playground. She would work inside for a couple of days to replace someone on medical leave.

The cafeteria itself is located in the basement where there are a few classrooms. The boiler room is close by. There are security guards stationed throughout the school. They are assigned to lunch but that would include both indoor and outdoor assignments. The area outside of the cafeteria is covered by security cameras.

There are two lunch periods, one for the elementary and the other for the middle school children. Another teacher was responsible for identifying the children when they came into the cafeteria. The children had to show their id numbers which were checked by computer. One of her assignments was to make sure the cafeteria tables are cleared off. During the lunch period, students may leave the cafeteria to outside for recess. Students have to seek permission from an adult in order to leave the cafeteria. She was not familiar with the policy that addresses ones eligibility for a hot lunch.

Ms Greenberg testified that she knew AS. She was her mentor for a period of time. She provided academic support and was involved in intervention and referral services. She recalled that AS did have issues with absences but does not know of any particular issues outside of the school. Ms. Greenberg knew Respondent from the building. As the custodian, he had an office in the boiler room. She however did not recall any interaction between Respondent and AS. During the investigation, she was called by Tom Escribano but was not told what the investigation was about. She did provide a statement.

Ms. Greenburg is familiar with Mr. Bernstein but never participated in a 50/50 raffle but knows that he engages in raffles to raise money. At the end of the year, 8th graders have a party at a local

restaurant. However, she did not know the specific purpose for the money. Ms. Greenberg testified on cross that she did not know the "protocol of the cafeteria; namely who gets lunch and who does not.

Ms. Lauren Bowers was also called by Respondent's counsel. She is a fifth grade teacher in School #2. She was hired in 2001 and had worked in other schools teaching 4th grade and middle school at other locations. She states that she was assigned to cafeteria duty for the last nine years. Her assignment was to get children to come in, sit down, clear tables. If a student wanted to leave he or she would have to ask one of the security guards or her. There is a security station on the bottom floor and security cameras but she is not sure the cameras cover the boiler room.

Ms. Bowers testified that she was familiar with AS. She had taught her in 6th grade. She recalled that she had a poor home life. She repeated 6th grade three times. "She wanted to do what she wanted to do with an attitude." At times she would come to school unwashed and had dirty clothes. She was apparently feeling poor since she was a 14 or 15 year old and still in 6th grade. However, she did not know of any romantic relationships between Respondent and her.

Ms. Bowers was also familiar with Respondent. Custodial staff were always in the cafeteria during lunch, cleaning or otherwise assisting. She would frequently see him cleaning up. However she never saw him with AS either inside or outside the cafeteria. She has been to the boiler room but is unfamiliar with what goes on there.

She had been approached by an investigator and asked if she saw any interaction between AS and the Respondent. She was not asked anything about Respondent purchasing her lunch. As far as she is concerned, every student is entitled to a hot lunch. However, the computer knows who is eligible and who is not. If the student does get a hot lunch and cannot pay for it, they are billed for the full amount. However, Respondent did not ask her for permission to give lunch to AS.

The Respondent testified on his own behalf. At the time he was hired by the Board of Education, he was 21 or 22 years old. He stated that his father got him the job through the President of the Board. He claimed that he was hired through "politics." He became a head custodian in 2014 or 2015 after he

got his boiler license. His work hours are 6:00 am to 3:00 pm. He is responsible for opening the building. He would pick up trash and debris around the property. He then does breakfast and checks for cleanliness in the property. Respondent states that his office is in the boiler room. Teachers keep papers and books. He works with two other custodians. There are security cameras in the area.

Respondent recalled AS as a student who is "loud." He recalled giving her money during the summer of 2015 and 2016. She came up to him and said "if I graduate, will you give me money." He gave her $25 for graduating summer school. The first time he purchased lunch was near the end of November 2016. According to Respondent AS approached him in the cafeteria and asked "Mr. Charlie can you purchase me lunch?" I responded telling her why didn't she go on line and get lunch. She stated that her mother owed $450. He subsequently spoke to Shara Greenberg and asked if it was ok to purchase AS a lunch. She responded that she did not see a problem with it. Respondent said he was just trying to help a hungry child. AS told Respondent that she was neglected at home because her brother had died and her mother was mourning his death.

After purchasing the lunch Respondent said that he told AS to go sit down. He said that AS said that if they see her with a hot lunch, they would take it away from her. She did not say who would take the lunch away. As a result, Respondent told her to go to the boiler room to get lunch and when done to report back to him to close the door. Respondent denies ever staying and eating with her. Respondent stated that he purchased lunch for AS about 3 to 4 times.

After the second time, she asked for Respondent's number so that she can text him when she wanted lunch. Whenever she asked, Respondent purchased her lunch. Respondent stated that he bought her lunch because he felt bad and did not want to see her go hungry. However, he never joined her for lunch in the boiler room. Respondent denied ever talking sex with her or smoking marijuana. He stated that he was drug tested to become a custodian and head custodian. All tests were negative. Respondent denied ever discussing fighting with AS. AS at the same time never told her about her drug history or that she was in rehab. After about the 4th time, Respondent stopped buying her lunch. He told her to ask

Ms. Kay about qualifying for a free lunch. Respondent told her that he could not do this anymore after about the 4th time.

Respondent admits that he did text AS outside of school hours. He felt that she was being neglected. He responded to her texts just trying to be a nice person. He rather tried to end the conversation every time. He also asked for a hug just trying to be nice.

Respondent testified that he first learned of the allegations when he was asked to report to Mr. Cuesta's office. He told Respondent about texting AS and Respondent told him that he simply did not want to see a student go hungry. Respondent did offer to show his phone. I was told to report to HR and report to the "rubber room." He was assigned to the rubber room for about a week. After that time he was told he was suspended without pay. However, the Union challenged the decision stating that Respondent was a tenured employee who cannot be suspended without pay. He ended up going without pay for five months. However, counsel was successful in getting the wages which he was owed during the time of his suspension.

During the years of 2016 and 2017 the respondent was engaged in local politics. He handed out flyers supporting one of the mayoral teams. Approximately three days the election he was approached by Mr. Trillio and two other people who said that he should not forget who got him his job. He said "karma is a bitch." According to Respondent he was implying that he got me my job. He was also familiar with Olga Hugelmeyer the School Superintendent. She was working in opposition to the team he was supporting. His team won the election. When he had his charges filed he asked members of the Board to assist him. They responded that it was out of their hands.

On cross examination Respondent stated that he started buying her lunch in September or October. Yet he brought he lunch only 3 or 4 times. He maintained that he felt bad for AS and asked permission. However, he admitted that he did not ask permission the second time. Respondent also maintained that he never spoke to her about her sex life. He only asked for a hug. Respondent admitted

that it was not okay to give her his cell number. Respondent also admitted that he made a mistake because he asked a 15 year old girl for a hug. He felt bad for her.

Respondent also maintained that he did not know it was wrong to purchase a hot lunch for a student. This was the first school that he worked where the students were poor. Respondent stated that he never ate lunch with A. She asked him for lunch saying that her brother died and her mother was neglecting her. He did not know if A asked other people for lunch nor did he see AS taking any money from a staff member. Respondent testified that he finally told Ms. K to get an application after the 4th time. She said that she gave it to her mother but she did not fill it out.

Respondent further admitted that there are nine members on the Board and they had to vote on the tenure charges. Yet Respondent claims that Trillio retaliated against him because he opposed him. All that he knew was that Ms. Hugelmeyer was campaigning for the Trillio team in 2017,

The Respondent's final witness was Kay Gervasi. She had been a cook manager for 18 years. She had been employed by the District for 29 years. She had been working at School #2 for 8 years. Her responsibility was "to make sure the kids were fed." She knew the Respondent from work.

Ms. Gervasi testified that she knew AS was a student. She was eligible for a hot lunch but she had to pay for it. Ms. Gervasi is responsible for enforcing who gets lunch. AS was eligible for a reduced lunch however, she owed about $205.00 which had been carried over from the previous year. As a result of her arrearages, AS was only entitled to a cheese sandwich with fruit and milk. When this was offered this AS would start screaming and cursing. She refused to have a regular lunch. Eventually Ms. Gervasi acquiesced and gave AS a regular lunch rather than have her curse at her. She did charge her account however. During this period Respondent never approached her for an application for a free lunch on behalf of AS. Rather she did recall AS asking for an application which she provided.

It was understood in the lunch room that kids could not leave without permission. However, Ms. Gervasi stated that she never saw the Respondent and AS eating lunch together. Since June 2017, Ms.

Gervasi has not had to deal with AS. However, the bill for the lunches remains the responsibility of AS and her family.

Ms. Gervasi further testified that she was not familiar with Mr. Bernstein giving money to purchase a lunch on behalf of students. However teachers can come up and purchase a lunch.

At the end of their case, Respondent requested to have Ms. Hugelmeyer testify. Counsel for the School District objected. After initially reviewing the evidence, the undersigned denied the request based on the conclusion that Respondent had not presented sufficient evidence on the issue of political discrimination to extend the hearing for additional days to receive this testimony.

SUMMARY OF THE ARGUMENTS OF THE PARTIES

The School District argues that Respondent is guilty of engaging in conduct unbecoming a staff member. According to the District the term unbecoming conduct is defined as "conduct which has a tendency to destroy public respect for employees and confidence in the operation of public services." This includes any conduct that adversely affects the morale or efficiency of the District. This may include any conduct that adversely affects the School's morale or efficiency. This does not necessarily need to be predicated on a violation of any particular rule or regulation but may be merely based upon the violation of an implicit standard of good behavior which applies to an individual who stands in the public eye as an "upholder of that which is morally and legally correct."

In this case the District maintains that the Respondent is guilty of conduct unbecoming a staff member and/or just cause regarding his inappropriate conduct toward a student. He engaged in what the District describes as "a pattern of inappropriate, dishonest, insubordinate and alarming behavior with AS." According to the District, Respondent was an adult male 20 years older than AS who "secreted her in the boiler room so as to be out of the prying eyes of other staff members." Respondent told AS that she should eat lunch in the boiler room so that they did not get into trouble. Respondent stated that he sought permission from Ms. Greenberg to purchase lunch. The District maintains however that "if Greenburg granted him permission, why ask her to come to the boiler room for lunch if not for a more nefarious

purpose?" Furthermore, "if he told AS to eat in the boiler room so that nobody would see her eating a hot lunch, it cannot stand that teachers and custodians were constantly in and out of the boiler room."

According to the District, numerous witnesses testified that students were not allowed in the boiler room due to the dangerous nature of the room. AS could not point to a specific rule but knew that students were not allowed in the boiler room and never saw another student there. By placing her in that room, Respondent exposed her to dangerous and hazardous conditions.

The District then argues that the Respondent engaged in further unbecoming conduct by the way he engaged with AS in violation of a number of District policies. As AS credibly testified, she grew uncomfortable after the Respondent discussed a number of intimate and inappropriate matters with her. He raised a number of questions of a sexual nature in violation of the District's harassment policy. He discussed her involvement with marijuana and offered to smoke with her. This was in violation of the District's substance abuse policy. In this regard, the District notes that in one of the text messages, Respondent asked AS why she was out of school for a period of time during the school year. In this regard the District has surmised that she tell him that she had been attending a rehab program for marijuana use.

Respondent engaged AS through an number of text messages which was not only in violation of the District's policy on the subject, it contradicted his description of the motivation for buying her lunch in the first place. Respondent testified that he was concerned for AS because her brother recently passed away and that he only texted her asking for a hug to try to comfort her. This is not supported by the evidence as set forth in the text messages.

The District has also stated that part of the reason AS decided to come forward was because she was concerned for her safety. She stated that Respondent had discussed with AS his proclivity for fighting with others and that he likes to "stomp people's faces." Indeed AS testified that Respondent discussed his violent past with her and stated that he liked fighting people. Even though Respondent

never directly physically threatened AS, he revealed stories of his violent past. This not only violated Board policy, this behavior was counter to everything school employees were supposed to represent.

The District maintains that the charges in this case should be viewed in their totality. The determination requires consideration of the nature of the act, the totality of the circumstances and the impact on the employee's career. These series of events demonstrate a pattern of behavior which is an indication of unbecoming conduct. Given that each act is so flagrant, once incident should suffice to remove a teaching staff member from his position

In response to Respondent's assertion that his termination was politically motivated, the District maintains that there is no evidence that he obtained his job and subsequent promotion to head custodian "through politics" and that his termination is similarly motivated. Respondent had to be licensed to become a head custodian. Moreover, the Board certified the charges by a vote which involved many of those people that he supported in the prior election. Finally by the time those charges were certified, the DCP&P investigation was no longer ongoing.

In conclusion the District asserts that each of the charges and counts individually warrant dismissal. Respondent took a young female student and capitalized on her vulnerability due to home and school issues. He violated numerous school policies and regulations and tried to keep AS complicit by his plan to indirectly threaten her by discussing his violent past and threatened her ability to continue to receive a hot lunch. Moreover, he exposed AS to dangerous conditions in the boiler room and sexually harassed her by asking her about wildly inappropriate questions about her sex life. Given these circumstances, the charges should be sustained.

The Respondent on the other hand asserts that the claims brought against him were "nothing more than a thinly veiled attempt at retribution by AS and the School District." Respondent claims that AS had a personal motive by reporting false charges against him in response to his unwillingness to continue purchasing her hot lunch while at school. Moreover, the School District showed political animus against Respondent as a result of his "constitutionally – protected exercise of support in favor of an adverse

political candidate in Elizabeth's 2016 election." Respondent also maintained an unblemished personnel file and has consistently received pay raises each year. He has always been a diligent, conscientious and hardworking member of the school staff.

In its argument, Respondent describes unbecoming conduct as "an elastic phrase encompassing conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy the public respect in the delivery of governmental services. In the context of a dismissal based on charges related to one's tenure, the touchstone is fitness to discharge the duties and functions of one's office or position." This, according to Respondent, takes into account any harm or injurious effect which the conduct may have had on the proper administration of the school system.

In reviewing the testimony, Respondent contends that AS' testimony stands as the sole means by which the School District can demonstrate that he engaged in unbecoming conduct warranting termination. The case turns significantly on the credibility that be reasonably accorded to AS testimony. According to Respondent, AS' testimony is not only unreliable but she contradicts the Board's position in several material respects.

The School District unfairly presents Respondent as "a predator trying to lure a child to a dangerous area of the school for an unknown nefarious purpose." That theory according to Respondent is not supported by the testimony. There are no witnesses to support that AS was somehow lured into a boiler room. In fact, Respondent claims that other janitors were in the area and AS needed permission from a teacher to leave the cafeteria during the lunch period. Given that environment, there was never an opportunity for anyone to engage in any lengthy conversation.

Respondent also asserted that AS requested his phone number, not the other way around. In this regard, Respondent admits that he should not have engaged AS in any text message conversations even though this communication was based on good intentions. Indeed he contends that his request for a hug was not meant to be inappropriate. Rather he was trying to show AS compassion since she had encountered some serious issues at home.

Respondent denies that he demonstrated any threatening conduct that put AS in immediate fear for her safety. Indeed in her testimony, AS denied that she was afraid of Respondent. Her testimony in fact supports Respondent's position that she was never in fear for her safety. Moreover, there were no collaborative facts that indicated that AS presence in the boiler room was inherently dangerous.

Respondent further states that he never violated the Board's substance abuse policy by asking AS to smoke marijuana with him after school. The evidence, notably AS' testimony, could not provide any detail regarding any alleged interaction with Respondent during this period. Respondent's file shows that he does not use drugs.

In addition, AS could not recall when or for how long the conduct which formed the basis for the charges occurred. The School District alleged that the relationship lasted approximately six weeks while AS testified that it actually went on for over a year. She did not have a credible time line which according to Respondent created a serious time line of events. Therefore, her testimony should be completely rejected.

Respondent also maintains that the investigation of the allegations was improper. According to Respondent, the investigation was conducted in such a way that there would be "absolute certainty" that he would be removed from the school as punishment for his adverse political support. According to Respondent the School Board Superintendent, whose discretion stood as the final word on Respondent's position crafted tenure charges to paint him as a "perverse deviant who was preying on the children." In the Respondent's opinion, his transgressions were minimal given the fact that he was only motivated to help a child in need who had reached out to him and told him of the difficulties she was encountering. Respondent conducted himself in good faith motivated only by the best of intentions.

In conclusion, Respondent claims that the School District failed to demonstrate that the charged conduct outlined in the tenure charges even occurred as they claim let alone that it warrants his termination. Respondent categorically denies all allegations other than those indiscretions he admitted. Those do not amount to any terminable offense. Respondent should be reinstated.

ANALYSIS

I have reviewed all of the evidence presented including my notes of testimony, documents and post – hearing summations. The School District has filed five tenure charges against Respondent asserting in general that he engaged in Conduct Unbecoming a Staff Member arising out of an inappropriate contact with a student.

The District alleged that Respondent purchased lunch for AS and invited her to eat with him in the school's boiler room. In that regard, the District has maintained that the boiler room is considered to be a dangerous and hazardous area that is not appropriate for student visitors. While eating that lunch Respondent asked AS intimate details about her relationship with her boyfriend including describing any sexual activities with him. He had also asked her about her virginity. In addition, the School District alleged that on another occasion Respondent discussed his violent past and stated that he liked to stomp people's faces in in violation of the School Board's regulations regarding workplace violence. The District also alleged that Respondent asked for AS' cell phone n umber and engaged her in exchanges of text message which were against policy but that the text messages contained inappropriate content. Finally it was asserted that the Respondent violated the District's substance abuse policy by disclosing to AS the he smoked marijuana and invited AS to smoke with him off of school property.

The New Jersey courts have clearly established a definition of unbecoming conduct to be applied in tenure matters. Unbecoming behavior has been defined as "conduct which has the tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." In re Young, 202 N.J. 50, 66, 995 A.2d 826, 835 (2010) quoting from Karins v. City of Atlantic City, 152 N.J. 532, 706 A.2d 706 (1996) "Unbecoming conduct may include "any conduct which adversely affects the morale or efficiency of the department." *Ibid.* (citation omitted). "The touchstone of the determination lies in the certificate holders, 'fitness to discharge the duties and functions of one's office or position." *Ibid* Citing In Re Grossman, 127 N.J. Super 13, 29; 316 A.2d 39 (App. Div., 1974).

It should be noted that the Court in In Re Young vacated the award of an arbitrator who applied the wrong standard in determining the validity of tenure charges filed against a teacher. Notably the arbitrator erroneously credited the determination of the Department of Children and Families which applied a completely different standard in its investigation. This is important in this case because Respondent's counsel has argued that the School District described Respondent's actions as sexually motivated. This arbitrator has to determine whether the conduct charged as unbecoming based on the definition cited above regardless of the descriptive language used by the District or the specific policy applied. See Bound Brook Bd. Of Education v Ciripompa, 228 N.J. 4, 152 A.3d 931 (2017) "A finding of unbecoming conduct "need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the 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. *Ibid* at 13 – 14 (citations omitted) Indeed, the District does not have to sustain every charge in order to establish a pattern of unbecoming conduct. See In RE Tuitt, 2015 N.J. Super (unpub.)

The evidence that has served as the basis for the charges concerns the nature of a relationship that was formed between AS and the Respondent over a period of time beginning in the 2015 – 2016 school year. The School District alleges in essence that Respondent offered to purchase hot lunches for AS and then "lured" her into the boiler room to eat her lunch. In order to facilitate these rendezvous, Respondent and AS exchanged cell phone numbers and engaged in a series of messages. It is through these text messages that Respondent and AS made arrangements to meet for lunch with him purchasing the food and delivering it to the boiler room. These messages were inappropriate in themselves because they violated School policy.

Finally the School District asserts that it was during these lunch meetings Respondent made inappropriate statements questioning AS about her sexuality, inviting her to smoke marijuana and describing his history of violence and stating that he enjoys physically fighting people. This final statement made AS uncomfortable and lead her to report the relationship to a faculty member.

Respondent explains that he began buying lunch for AS because he was feeling sorry for her. She had a difficult home life in which her older brother had passed and she was neglected by her mother. Before he purchased lunch, he asked and received permission from a teacher in the lunchroom. Respondent offered the boiler room because AS stated that she would get into trouble if found eating a hot lunch she did not purchase. The boiler room was an active location with other custodians coming and going as well as teachers.

Respondent denies making the statements alleged by AS. Rather, he alleges that AS concocted the story because Respondent told her that he was going to discontinue buying lunch. Finally the decision to file tenure charges were politically motivated because he was campaigning on behalf of a slate of candidates that opposed the group which was supported by the Schools superintendent. There charges were in retaliation for those efforts.

A review of the evidence shows that Respondent and AS had a complex relationship that extended beyond the facts alleged in the Statement of Charges. One would wonder why AS engaged Respondent in order to ask him to purchase a hot lunch for her. Why didn't AS approach Mr. DiAnthony, the person she identified as her favorite teacher? The evidence shows that this was because Respondent and AS had a friendship that had extended into the prior year. We do not know how their relationship began but we do know as acknowledged by Respondent that he paid AS $25.00 for graduating summer school the prior semester. This is consistent with AS testimony.[1] There had to be some familiarity between AS and Respondent in order for the initial lunchroom request to take place. AS approached Respondent because she knew she had a supporter who would help her out. In that regard, I acknowledge that Respondent felt sorrow and some empathy for AS given her unfortunate situation at home. However, and as explained below, rather than taking appropriate steps to remedy AS' situation through appropriate

[1] During her cross examination AS became quite frustrated in describing the time line of events. She became confused as to what grade she was in at the time of the incident. This however did not change her consistent description of facts. One must not that AS is an unusual student because she repeated 6th grade 3 times. She had extensive absenteeism due to a number of home related issues. I am not surprised that she would be confused when describing events under such a confused timeline.

channels, Respondent engaged in surreptitious arrangements to provide lunch and engaged in unprofessional communications that were contrary to his role as a member of the school community.

The evidence also showed that AS could have taken other avenues to receive a hot lunch. At all times she would have eaten something if just a cheese sandwich and apple. It was clear that she felt that it was sufficient. She could have also sought more aggressive counseling to assist her to qualify. Indeed, Mr. Greenberg testified that AS could have come to him for support in qualifying for lunch. Respondent could have facilitated this. However, for AS, it was either go to the Respondent or go through the drama with Ms. Gervasi and receive a hot lunch the cost of which would have been placed on an ever escalating tab.

Respondent's offer in and of itself was not good judgement but it was not unbecoming conduct by itself. However, the Respondent's actions after he began buying lunch for AS showed how this mistake in judgement led to more serious issues. Respondent stated that after purchasing lunch for AS he invited her to eat in the boiler room because he understood that AS would "get into trouble" if found eating such a meal. This explanation raises a number of questions regarding Respondent's testimony. Respondent testified that he sought permission to buy AS lunch. This was substantiated by Ms. Greenberg. If respondent had received this permission, then why couldn't he intervene with Ms. Gervasi to explain that he had purchased the lunch? Since he believed that he had permission, he really did not have anything to hide.

Even though there were no explicit policy forbidding students to be in the boiler room, it is clear that that was not a place intended for students. The room contains complex and dangerous machinery as well as an exit to the outside of the building. Even though there may have been other people in the area to make sure nothing inappropriate would occur, this does not excuse in inappropriateness of the decision in the first place. In this regard, the Respondent notes that there was a security desk in the hallway between the boiler room and cafeteria. Accordingly, if security was present, at the time AS walked to the boiler room an alarm would have been raised. However, given the Respondent's argument that AS would have

been in trouble for eating a hot lunch they would have taken steps to avoid security in order to accomplish that goal. This was clearly a breach of school policy and again conduct contrary to Respondent's staff responsibilities.

This need to avoid detection led to the need to set up a system so that Respondent could notify AS when lunch was available. Given the conflict in the testimony between AS and Respondent, the transcript of these text messages is the best evidence available that would describe the nature of the relationship between AS and Respondent during this time. It is my view that the text message exchanges were initiated by Respondent. Even though the initial contact on September 16, 2016 shows that Respondent did not initially know AS' number when she texted, the transcript of the communication the next day shows R telling AS "this is why I tell you text me so she doesn't know u eat." This indicated that Respondent had initially suggested this method of communication as a solution to AS' concern about getting into trouble.

The content of the text messages establishes that AS and Respondent communicated to each other on the following dates: September 16, 19, 20, 21, 23, 26, and 29, October 11, 20 and 21, 2016. These ten days extended from just after the beginning of the semester through the Jewish High Holy Days. The communications occurred through half of the fall semester which is a significant amount of time. Even though Respondent did not purchase lunch every day as alleged in the charges, if one looks at the text messages once can only conclude that arrangements were made to deliver lunch on September 16, 19, 20, 21 and 23. These do not include lunches that were delivered before Respondent and AS exchanged cell numbers. This is contrary to Respondent's claim that he only purchased lunch for AS only three or four times.

The content of the text messages also show that AS and Respondent were engaging in a relationship that was increasingly inappropriate. For example, on September 20, 2016 Respondent and AS had the following exchange:[2]

[2] Text message translations are in brackets when applicable.

AS: We got two more periods to lunch

R: k

R: what time ur lunch

AS 1:40

R: k come to my office

AS try to get me a sandwich please

R: got it already u owe me a hug

R: lol

AS: lol I got you

R: lol

AS: thanks Mr. Charlie for the lunch and risking getting in trouble for me.

R: its all good don't worry

R: wyd [what you doing?] u home

AS: I am doing my homework and yea

R; ok good I'll see you tomorrow night.

On September 23, 2016 they engaged in the following exchange:

R: Pizza today

AS: thanks

R: ye

R: yw [you're welcome]

AS: Can you get me two? Lol I'm hungry asf [and so forth]

R: lol I'll try

AS: you the best

R: I try

R: still waiting for my hug

R: lol

AS: you never asked lol

R: should I have to ask

AS: yea

R: ok now I know

AS: lol

AS: wya [where you at?]

R: boiler room

AS: have a good weekend

R: thanks you too

On September 29, 2016 Respondent asked AS what did she do and why she was suspended. Respondent continued to reach out to AS on October 10, 11 asking if she was in school with no response. Then on October 20, 2016, the Respondent and AS had the following exchange:

AS: Hey mr. Charlie -- got my old phone number

R: ok I got u wyd [what you doing?]

AS: laying down hbu [how about you?]

R: something

AS: what's that something lol

R: lol my same thing trying put my nephew to sleep

R: bad

AS: aww that's cute

R: lol that's my boy

AS: aww you're such a good uncle

R: thank you

AS: your welcome.

Finally, in the last text entry on October 21, 2016 Respondent asks AS to come see him. She was unable to do so. So Respondent decided to see her the following Tuesday October 25. As week later AS reported the exchange to Mr. Bernstein. We don't know what was said when AS and Respondent met, however based upon the consistent testimony of AS, what was said made her very uncomfortable and made her feel the need to approach Mr. DiAnthony and Mr. Bernstein.

In summary, the evidence as shown through these text messages an increasingly personal exchange of messages that while not sexual in nature are highly inappropriate for a member of a school staff and a student. The nature and timing of these messages lend some credibility to AS' assertions with respect to the District's allegations stating that R asked AS about her intimate relationships with her boyfriend or offered her the opportunity to smoke marijuana or statements about his history of violence.

School personnel, whether pedagogical, support or administration are responsible for maintaining a professional relationship with students in their charge. In many cases, school personnel are described as being *in loco parentis*. They stand in place of the parent and must assume responsibility to exercise appropriate care with a student. To engage in extremely personal relationships severely compromises that standard of responsibility and as such diminishes the morale and respect for the role.

Given these facts, the ultimate question concerns whether Respondent's behavior amounts to unbecoming conduct that warrants the termination of his employment. Does the conduct "have the tendency to destroy public respect for [government] employees and confidence in the operation of [public] services? Respondent contends that he initiated his friendship with AS because he felt sorry for her because she was poor and had a poor home life. Indeed, he admitted that his interactions with AS especially as described in the text messages were simply an instance of poor judgement and should be punished with less discipline. After all, the Respondent has otherwise maintained a clean record as a custodian.

I disagree. While I don't describe Respondent to be a sexual predator as described in some of the School District's allegations, I find that he has exercised exceptionally poor judgement that is highly

DECISION

Based upon the evidence presented herein, I find that the School District has substantiated the charges filed against the Respondent Charles Webber. He has engaged in a pattern of conduct unbecoming a staff member and there is just cause to terminate his employment. The charges are sustained.

Dated: March 6, 2018

Alan A. Symonette, Arbitrator
For the Commissioner of Education
State of New Jersey

Commonwealth of Pennsylvania)
) ss.:
County of Philadelphia)

I, Alan A. Symonette, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Dated: March 6, 2018

Alan A. Symonette

Megan McCrea 3/6/2018

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Megan Mc Crea, Notary Public
City of Philadelphia, Philadelphia County
My Commission Expires Sept. 5, 2021
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

81-18

STATE OF NEW JERSEY – DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Arbitration Between:

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

"Petitioner"

and

MARIA LOPES-ANASTASI

"Respondent"

OPINION AND AWARD ON MOTION TO DISMISS COUNT ONE

Agency Docket No. 259-11/17
[Maria Lopes-Anastasi]

BEFORE
ARNOLD H. ZUDICK
ARBITRATOR

Appearances:

For the Petitioner
Shana T. Don, Esq.
Scarinci Hollenbeck, LLC

For the Respondent
Genevieve M. Murphy, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C.

PROCEDURAL HISTORY

On October 4, 2017 the Newark School District [District or Petitioner] served Maria Lopes-Anastasi [Respondent or Anastasi] with a Notice of Tenure Charges pursuant to *N.J.S.A.* 18A:6-11. Charge One alleged Inefficiency; Charge Two alleged Conduct Unbecoming; and, Charge Three alleged Respondent failed to adhere to District policies and procedures. This is a Decision on the Respondent's Motion to Dismiss [Motion] Charge One – the Inefficiency allegations - made by the Petitioner in its tenure charges against the Respondent.

In its Notice of Tenure Charges the District, through Mario Santos, Principal of East Side High School, alleged in Charge One that Anastasi's Annual Summative Rating for the 2015-2016 school year was "Ineffective" prompting it to place her (Anastasi) on a Corrective Action Plan (CAP) for the 2016-2017 school year. Nevertheless, the District alleged Anastasi still received an Ineffective Annual Summative Rating for the 2016-2017 school year.

The Petitioner alleged, for example; that Respondent failed to: implement curricular goals and objectives; design coherent instruction; manage student behavior; engage students in learning; demonstrate promptness and attendance and other allegations in addition to the above noted Ineffective Summative Ratings.

On or about October 17, 2017 the Respondent filed a response to those allegations and on November 9, 2017 filed an Answer to the Charges. Respondent denied all of the Charges, but with regard to Charge One specifically denied her performance was ineffective in either 2015-2016 or 2016-2017. Rather, Respondent argued that her 2015-2016 and 2016-2017 observations and evaluations failed to comply with applicable

statutory and regulatory procedures, they contained mistakes of fact, and thus her summative evaluations for those years were inaccurate and should not be considered. The Respondent in her Answer also argued that her Corrective Action Plan was inadequate; did not measure student growth objectives; failed to contain time frames or deadlines and did not contain steps to assist in the improvement of her teaching performance.

The Respondent argued that the Inefficiency Charge was in part the product of harassment and retaliation for refusing to execute election to work agreements; her evaluators failed to consider that her students made measurable progress during the 2015-2016 school year; her CAP was created inappropriately and was not given to her until December of the 2016-2017 school year; and, other arguments.

On October 30, 2017, the Petitioner's State District Superintendent having considered the charges, supporting evidence and the Respondent's submission, concluded that the charges, if credited, were sufficient to warrant Respondent's dismissal or reduction of salary. The Superintendent, therefore, certified the charges to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-17.3. Based upon the Superintendent's certification the Respondent was suspended pursuant to *N.J.S.A.* 18A:6-14 effective November 2, 2017.

On November 27, 2017 the Department of Education, Bureau of Controversies and Disputes [Bureau] determined that the charges, if true, were sufficient to warrant dismissal or reduction in salary and it referred the matter to me as the Arbitrator pursuant to *N.J.S.A.* 18A:6-16.

The Respondent filed its Motion to Dismiss with me on December 5, 2017. The District filed its responsive brief on December 19, 2017.

POSITIONS OF THE PARTIES ON THE MOTION

RESPONDENT

Respondent alleged that Anastasi's 2016-2017 summative evaluation was fatally flawed and, therefore, could not be considered as the basis for the Inefficiency charge. Respondent primarily alleged:

> 1) that Anastasi did not receive a CAP until December 5, 2016 for the 2016-2017 school year, alleging it was more than a month after the October 31 deadline set forth in *N.J.A.C.* 6A:10-2.5(b).
>
> > *N.J.A.C.* 6A:10-2.5(b) provides in relevant part:
> >
> > (b) The corrective action plan shall be developed and the teaching staff member and his or her designated supervisor shall meet to discuss the corrective action plan by October 31 of the school year following the year of evaluation . . .
>
> 2) that Anastasi was formally observed by the District twice prior to receiving her CAP in contravention of *N.J.A.C.* 6A:10-4.4(c)(5).
>
> > *N.J.A.C.* 6A: 10-4.4(c)(5) provides in relevant part:
> >
> > (c)(5)Upon receiving a final summative evaluation that necessitates a corrective action plan, in accordance with *N.J.A.C.* 6A:10-2.5(a), any remaining required observation(s) shall not be conducted until the corrective action plan has been finalized.

Respondent more specifically explained that Anastasi had received her summative evaluation for the 2015-2016 school year on June 15, 2016 and, therefore, consistent with *N.J.S.A.* 6A:10-2.5(b) she should have received – and placed on a CAP – no later than October 31, 2016. The Respondent also noted that the District's evaluation guide entitled "Framework for Effective Teaching" [Framework] contained the same October 31

deadline as contained in *N.J.A.C.* 6A:10-2.5(b). That Framework language provides in pertinent part that:

> CAP's must be completed and on file with their administrator by October 31st.

The Respondent emphasized that two of the four observations Anastasi received for the 2016-2017 school year occurred on October 27 and November 11, 2016, respectively, which were before she received her CAP on December 5, 2016 and, therefore, they were in contravention of the law. Her other two observations occurred on December 12, 2016 and April 6, 2017.

Respondent acknowledged in her brief that although the regulation in *N.J.A.C.* 6A:10-4.4(c)(5) was not formally adopted until February 2017; the *AchieveNJ 2016-17 and Beyond* guide the Department published in June 2016, and the *Summary of Legal Requirements for Teacher Evaluation and Tenure Cases* document it issued emphasized that teacher "observations may not occur between receipt of summative score and implementation of a CAP". Thus, the Respondent noted that the Petitioner had notice of that requirement in the summer of 2016 and prior to the commencement of the 2016-2017 school year. According to the Respondent, the District was aware of the requirement noting that the "CAP Reflection" portion of Anastasi's October 27, 2016 observation form was blank because the CAP had not yet been completed and implemented.

Relying upon *N.J.A.C.* 6A:10-4.4 the Respondent also argued that where a District's tenure charges have failed to follow the required evaluation process the Commissioner of Education is prohibited from forwarding such charges to arbitration, *N.J.A.C.* 6A:3-5.1(c)(6). According to the Respondent, by letter of October 17, 2017, it notified the Superintendent that the District had not implemented Anastasi's CAP by

October 31, 2016 as required, but the Commissioner still forwarded the matter to arbitration.

The Respondent asserted that the practical effect of the District's failure to provide Anastasi with a timely CAP was:

> 1) Respondent was denied the "robust" and "necessary support" legally required for teachers identified as struggling based upon their annual summative rating; and,
>
> 2) Respondent was denied an opportunity to demonstrate improvement since two (2) out of her four (4) observations were conducted without the benefit of a CAP.

The Respondent relied upon several arbitration decisions governed by TEACHNJ to support its argument. See, *In re Tenure Hearing of Davis Hannah, State Operated School District of the City of Newark*, Essex County,.(279-9/15) (motion to dismiss inefficiency charges granted for failure to comply with evaluation procedures); *In re Tenure Hearing of Rinita Williams, State Operated School District of the City of Newark*, Essex County,(241-8/14 and 17-1/15) (dismissed charges for failure to conduct an announced observation and failure to adhere to evaluation process) and, *In re Tenure Hearing of Lawrence Henchey, New Milford School District*, Bergen County,(322-11/14) (dismissed charges for District's failure to perform minimum number of observations as required by law).

PETITIONER

The Petitioner disputed the arguments the Respondent made in support of the Motion. The District contends that only the Commissioner can determine the sufficiency of the evaluation procedures and that I lack the authority – particularly prior to conducting an evidentiary hearing- to decide a Motion to Dismiss over whether the

District properly conducted the evaluation; that an evidentiary hearing is required to determine if the District complied with the evaluation procedures; and, that such a hearing would support its position that it has substantially complied with the CAP requirements in *N.J.A.C.* 6A:10-2.5 and 6A:10-4.4(c)(5).

First, in questioning my authority to decide this Motion the District, relying on *N.J.S.A.* 18A:6-16, argued that a motion to dismiss tenure charges based upon a district's alleged failure to follow the evaluation process may only be made to the Commissioner of Education prior to referral of the matter to an arbitrator. That Statute requires the Commissioner to make a determination on the sufficiency of the charges and provides in pertinent part:

> If, however he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator . . .for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

The District explained that pursuant to *N.J.A.C.* 6A:3-5.3(a)(1) and *N.J.A.C.* 6A:3-1.5(g) a respondent may file a motion to dismiss to the Commissioner in lieu of an answer to the tenure charges. According to the District, a respondent's failure to file such a motion with the Commissioner precludes the respondent from filing that motion with an arbitrator. Rather, the District contends that pursuant to *N.J.S.A.* 18A:6-17.3(2)(c), the Commissioner is solely authorized to determine if a district properly followed the evaluation process in assessing the sufficiency of tenure charges.

N.J.S.A. 18A: 6-17.3(2)(c) provides:

> c. Notwithstanding the provisions of *N.J.S.A.* 18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the commissioner

> shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charges to the commissioner. The commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed.

The District argued in this case that by the issuance of the November 27, 2017 letter to the parties [Don, Exhibit C] the Commissioner determined that the evaluation process had been followed. That letter provides in pertinent part:

> Please be advised that, following receipt of respondent's answer on November 15, 2017, the above-captioned tenure charges have been reviewed pursuant to *N.J.S.A.* 18A:6-17.3c. Upon review, the Commissioner is unable to determine that the evaluation process has not been followed. The arbitrator's decision with regard to those charges shall be made pursuant to *N.J.S.A.* 18A:6-17.2, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator.
>
> The balance of the charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator. The arbitrator shall review those charges brought pursuant to *N.J.S.A.* 18A:6-16 – which are not dismissed as the result of a motion – under the preponderance of the evidence standard.

According to the Petitioner, any appeal of the Commissioner's decision must be filed with the Appellate Division pursuant to *N.J.S.A.* 18A:6-9.1.

The District argued that an arbitrator's authority is limited as provided by *N.J.S.A.* 18A:6-17.2 (23)(a) to consider whether or not:

> (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
>
> (2) there is a mistake of fact in the evaluation;
>
> (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as

> prohibited by State or federal law, or other conduct prohibited by State or federal law; or
>
> (4) the district's actions were arbitrary and capricious.

Second, the District contends that there is no provision in the TEACHNJ Act or the regulations for an arbitrator to dismiss a tenure case without a hearing on the facts. It vigorously argued that to the extent that the Respondent claimed that the CAP rules were not fully complied with, a question of fact existed over whether the evaluation procedures were followed which could not be resolved without a hearing.

Relying on the language in *N.J.S.A.*18A:6-17.2 (23)(a) and (b):

> Section (b) provides:
>
> (b) In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

the District argued that in order for the Arbitrator to consider whether Anastasi's evaluation failed to adhere substantially to the evaluation process as listed in 18A:6-17.2 (23)(a)(1) above, and in order to determine whether any such failure materially affected the outcome of the evaluation as required by 18A:6-17.2(23)(b) above, I must hear evidence to determine if such error materially affected Anastasi's evaluation.

Third, the District argues that it substantially complied with the intent of *N.J.A.C.* 6A: 10-2.5(b) and 6A:10-4.4(c)(5) which could be demonstrated at hearing. It contends that the procedures contained within its Framework for Effective Teaching include procedures for the implementation of an Individualized Professional Development Plan (IPDP) and a CAP. The District notes that the Framework provides that teachers must

initiate the IPDP or CAP forms online in the District's computer system and share them with their administrator. According to the Framework, the CAP replaces an IPDP for teachers rated Ineffective or Partially Effective, and that the content of a CAP resembles the content of the IPDP but is more robust to give the teacher more support. The Framework also provides that:

> CAPs must be completed and on file with their administrator by October 31st.

The District contends that Respondent was fully aware that she had received an "Ineffective" rating at the end of the 2015-2016 school year and should have known she was required to use a CAP form, not an IPDP form in September 2016. Nevertheless, the District argues that Respondent's IPDP is "identical in substance" to the CAP she eventually received in December 2016. According to the District, Anastasi participated in creating her IPDP which included a goal-setting conference on or about September 20, 2016. The District disputed the Respondent's claim that Anastasi was denied "robust and necessary support" by not having her actual CAP form by October 31, 2016. Rather, it contends she was observed on October 27 and November 15, 2016; provided a pre-observation conference on or about October 25, 2016 and two post observations on or about October 28 and November 23, 2016 respectively, allegedly in accordance with her IPDP.

The District distinguished the Respondent's reliance upon the *Hannah* case where a motion to dismiss was granted arguing that there the District had conceded that it had not substantially complied with the observation requirements and, therefore, there was no dispute of material facts. But the District maintains it has substantially complied with the CAP requirements in this case because Anastasi's IPDP was essentially the same as her

CAP, and a hearing is needed to resolve the dispute. The District distinguished other arbitration decisions granting motions to dismiss arguing those motions were granted after a full hearing.

Finally, the District argued that it complied with *N.J.A.C.* 6A:10-2.5(b)(1) by developing Anastasi's CAP within 25 days of learning on November 21, 2016 that Anastasi had failed to prepare a CAP form. *N.J.A.C.* 6A: 10-2.5(b)(1) provides:

> (b)(1) If the ineffective or partially effective summative evaluation rating is received after October 1 of the school year following the year of evaluation, a corrective action plan shall be developed, and the teaching staff member and his or her designated supervisor shall meet to discuss the corrective action plan within 25 teaching staff member working days following the school district's receipt of the teaching staff member's summative rating.

According to the District any error created by not having the actual CAP form completed by October 31, 2016 did not materially affect the outcome of Anastasi's evaluation.

DISCUSSION

The Arbitrators Authority

This case is not the first time this District raised the argument that an arbitrator on the TEACHNJ panel lacks authority to determine - in a motion to dismiss - the sufficiency of the evaluation process. In *I/M/O Tenure Hearing of Marie Ebert, State Operated School District of the City of Newark, Essex County*, (#267-9/14) [*Ebert*] this District raised many of the same arguments it raised here.

The issue regarding the *Ebert* motion concerned whether the District complied with the production of evidence and discovery requirements after the arbitrator was appointed. Relying on *N.J.S.A.* 18A:6-17.3c the District apparently argued – as it did in

the instant case – that the Commissioner had sole authority to determine whether the evaluation process was properly followed; that a motion to dismiss must be filed with the Commissioner prior to the case being referred to an arbitrator; and that the Commissioner's determination can only be appealed in accordance with *N.J.S.A.* 18A:6-9.1. The District in *Ebert* further argued that in accordance with *N.J.S.A.* 18A:6-17.2 (a) and (b) an arbitrator is confined to determining whether:

> (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
>
> (2) there is a mistake of fact in the evaluation;
>
> (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
>
> (4) the district's actions were arbitrary and capricious.

and argued that an arbitrator could not determine whether a flawed evaluation process materially affected the outcome of the evaluation without an evidentiary hearing.

In *Ebert,* Arbitrator Denenberg rejected the District's arguments and concluded that the motion was properly before her for determination. She explained that in creating TEACHNJ the Legislature intended the Commissioner to decide whether a district had taken the necessary steps for completing an evaluation, whereas arbitrators are asked to determine whether those steps were correctly followed in accordance with the regulations. She noted that the issues raised by the motion in *Ebert* arose after her appointment – that is, whether the District complied with its obligation to timely produce evidence – and could not have been a matter for the Commissioner.

Arbitrator Denenberg also concluded in *Ebert* that a full evidentiary hearing is not a prerequisite to considering a motion to dismiss finding no statutory provision limiting an arbitrator's ability to resolve motions before conducting a hearing. In *Ebert* she found that the District failed to comply with *N.J.S.A.* 18A:6-17.1(b)(3) and granted the motion to dismiss without conducting a full hearing.

In *Hannah* this District again questioned the arbitrator's authority to consider a motion to dismiss and contended that a full evidentiary hearing was required for the arbitrator to determine whether any error made by the District in the evaluation process materially affected the outcome of the evaluation.

Relying on her decision in *Ebert*, Arbitrator Denenberg again held that the Commissioner's statement – that he was unable to determine that the District had not followed the evaluation process – did not preclude her from determining whether the District properly carried out each step of the evaluation process. She again held that no statutory provision limited her ability to rule upon such motions without holding a hearing. In *Hannah,* Arbitrator Denenberg found – without hearing – that the District failed to comply with *N.J.A.C.* 6A:10-4.4 (c) regarding observation requirements and granted the motion to dismiss.

In addition to *Ebert* and *Hannah* where motions to dismiss were granted by an arbitrator, in another case involving this District, *I/M/O Tenure Hearing of Va'Lorie James State-Operated School District of the City of Newark, Essex County* 181-6/16 (4/17/17) [James], I too, without a hearing, granted a motion to dismiss concerning most of the charges in the case.

Having considered the parties' arguments and the holdings in both *Ebert* and *Hannah* I agree with Arbitrator Denenberg's conclusion that the Commissioner's issuance of a letter referring tenure charges to an arbitrator does not automatically mean that an arbitrator lacks authority to decide a motion to dismiss before hearing over whether a district has properly carried out the steps of the evaluation process.

In fact, a review of the Commissioner's November 27, 2017 letter in this case referring the matter to me for arbitration [Don, Exhibit C contained above] shows that it twice refers to motions which may be filed with the arbitrator. The first paragraph of that letter clearly explains that the arbitrator's decision on the charges must be made pursuant to the requirements listed in *N.J.S.A.* 18A:6-17.2, but such decision is subject to determination by the arbitrator – not only of the respondent's defenses - but also subject to:

> . . . any motions which may be filed with the arbitrator.

The second paragraph of the letter begins with explaining that the charges were deemed sufficient, if true, to warrant dismissal or reduction in salary of the Respondent, but made that holding subject to the arbitrator's determination of the Respondent's defenses and – just like the first paragraph – subject to:

> . . . any motions which may be filed with the arbitrator.

The second sentence of the second paragraph is even more telling because it recognizes that the arbitrator may, as a result of any motion – dismiss charges brought pursuant to *N.J.S.A.* 18A:6-16. That sentence provides:

> The arbitrator shall review those charges brought pursuant to *N.J.S.A.* 18A:6-16 – which are not dismissed as the result of a motion – under the preponderance of the evidence standard.

The reference in that sentence to dismissing charges based on a motion is not referring to motions made to the Commissioner before a case is referred to arbitration. Rather, that authority in the second sentence of the second paragraph to dismiss charges based upon a motion refers back to the first paragraph and the first sentence of the second paragraph where motions are filed with the arbitrator.

Based upon the above I find that the Department of Education's letter of November 27, 2017 recognizes that the arbitrator has the authority to consider and decide motions regarding the charges and there is no requirement stated therein that limits consideration of such motions until after the conduct of an evidentiary hearing. Consequently, I consider the Respondent's Motion properly before me for determination.

Merits of the Motion

Having determined that I have the authority to consider the Respondent's Motion, I now consider the Petitioner's other defenses to the Motion. They include:

> 1) That having received an Ineffective rating at the end of the 2015-2016 school year, and as required by the District's Framework for Effective Teaching, Anastasi knew – or should have known - to use a CAP form, not an IPDP form in September 2016, and that she failed to notify the administration of her error.
>
> 2) That the Respondent participated with the Vice Principal in creating the IPDP including a goal- setting conference on or about September 20, 2016, and that the Respondent's IPDP form is identical in substance to the CAP form she executed in December 2016.
>
> 3) That Respondent was provided with robust and necessary support consistent with a CAP as a result of the goal-setting conference with Vice Principal DeAntonio on or about September 20, 2016 and a pre-observation conference on or about October 25, 2016 and two post observation conferences on or about October 28, 2016 and November 23, 2016 in accordance with her IPDP which functioned as a CAP.
>
> 4) That an evidentiary hearing is necessary for me to determine whether any errors I may find in the completion of the evaluation process materially affected the outcome of the evaluation.

5) That the cases Respondent relied upon are distinguished from the instant matter, and;

6) That consistent with *N.J.A.C.* 6A:10-2.5 (b)(1) Respondent's CAP was completed, signed and executed in less than 25 days of the time Vice Principal DeAntonio discovered that an IPDP rather than a CAP form had been created.

Overlaying all of those defenses is the Petitioner's argument that a full evidentiary hearing is required in order for those defenses to be properly considered. In addressing that concern I am mindful of the New Jersey Supreme Court's decision in *Brill v. Guardian Life Insurance Co. of America*, 142 *NJ* 520, 540 (1995). In that decision the Court explained that where a dispute of material facts is asserted as a defense to a summary judgment motion, the fact finder – in determining whether a genuine issue regarding material facts exists – must consider the competent materials presented viewed in the light most favorable to the non-moving party. If by viewing such materials in favor of the non-moving party the fact finder finds those materials sufficient to resolve the disputed facts in favor of the non-moving party then, at the very least, a hearing would be required otherwise the motion must be denied. I have applied that concept here in considering the Petitioner's defenses.

First, I find that there are no material facts in dispute regarding the Motion. There is no doubt that by the end of the 2015-2016 school year, Anastasi knew she had received an Ineffective rating in her 2015-2016 Summative Evaluation making her a candidate for a CAP, not an IPDP, for the 2016-2017 school year. Based upon that fact the District seems to put all of the responsibility for creating the CAP on the Respondent. But the language in the District's Framework for Effective Teaching (Don, Exhibit E) indicates that administrators share in the creation and implementation of the CAP.

According to the Framework, a CAP must include both student learning goals and professional development goals which are set by a teacher and administrator working together at a goal-setting conference. While the Framework indicates that teachers must initiate the IPDP or CAP, they must share them with administrators. *Id.* p.16.

The Framework refers to the completion of the CAP by teachers and administrators stating:

> By completing the IPDP or CAP during the goal-setting conference at the start of the year, teachers and administrators will have a shared tool to use in communicating about goals and anticipating growth areas. *Id.*

That same section of the Framework requires that the CAP, be completed, and on file with their administrator by October 31st.

The documents submitted to me by the parties show that Vice Principal DeAntonio knew that Anastasi had received an Ineffective Summative Evaluation at the end of 2015-2016. Since he participated in a goal-setting conference with Anastasi in September 2016 he, like Anastasi, had to know that a CAP had to be created for Anastasi for the 2016-2017 school year and that said CAP had to be on file with DeAntonio by October 31, 2016. In his email to Anastasi on November 21, 2016, DeAntonio acknowledged that he and Anastasi had completed the wrong form. He wrote in pertinent part:

> I just learned today, Monday, November 21, 2016 that we completed the incorrect form in EdReflect (Bloom Board) back in September. (Don, Exhibit B).

I find that the above language in the Framework is consistent with the language in *N.J.A.C.* 6A:10-2.5(a), (b) and (d) which requires a teacher's supervisor to develop a CAP with the teacher.

Based upon the above Framework information, email and code language, it is apparent that DeAntonio, as the administrator, and not Anastasi, had the primary responsibility to see that the Respondent's CAP was created and in place by October 31, 2016. Consequently, I find that any failure by Anastasi to achieve that requirement is not a sufficient defense to the directive in *N.J.A.C.* 6A:10-2.5 (a) and (b) that the CAP be in place by October 31.

Second, the District seems to argue that because DeAntonio and Anastasi participated in a goal-setting conference for Anastasi in September 2016 when an IPDP was "mistakenly" created; and because, according to the District, that IPDP was "identical in substance" to the CAP that was eventually completed on December 5, 2016; the District effectively complied with the requirement in *N.J.A.C.* 6A:10-2.5 (b) to have Anastasi's CAP in place by October 31, 2016.

I find that argument lacks merit. The IPDP and CAP are not identical nor is all the information on each form identical to the other. The CAPS definition in the Framework guidelines explains that while:

> The content of the CAP related goals closely resembles the content of the IPDP . . .

the CAP:

> is more robust to ensure struggling teachers receive the necessary support for their growth.
> (Don, Exhibit E p.16).

Additionally, DeAntonio, in his November 21, 2016 email to Anastasi (Don, Exhibit B), noted that although most of the information from the IPDP could be transferred to the CAP, additional questions needed to be answered.

The point here is that since the CAP plays such a pivotal role in the process leading to a teacher's summative evaluation it should not be one constructed almost as an afterthought. This goes to the heart of Arbitrator Denenberg's point, that is, the arbitrator has the authority to determine whether the steps of the evaluation process were properly followed. I find that here they were not. It is critical to the effectiveness of that process that a CAP be properly prepared and implemented by October 31 as required. Noting that the facts here show there are differences between an IPDP and a CAP, I find that the IPDP prepared for Anastasi in September 2016 could not substitute for the CAP which was not finalized until December 5, 2016.

Third, the District argues that even though Anastasi's CAP was not implemented by October 31, she still received robust and necessary support referring to the September goal-setting conference, the October 25th pre-observation conference, and the two post-observation conferences on October 28 and November 23, 2016, respectively. I recognize that Anastasi's September 2016 goal-setting conference may have been the same even if she and DeAntonio had been preparing a CAP form, but otherwise the District's argument is not persuasive.

Even assuming that the IPDP created in September 2016 was sufficient to substitute for the eventual CAP, once the District was aware on November 21, 2016 that the Respondent's CAP had not, in fact, been finalized and implemented by October 31, 2016, then, pursuant to *N.J.A.C.* 6A:10-4.4 (c) (5), it should not have relied upon the October 27 and November 15, 2016 observations in reaching Anastasi's 2016-2017 Summative Evaluation.

N.J.A.C. 6A:10-4.4 (c) (5) clearly provides that any remaining required observations not be conducted until the CAP was finalized. The reason for holding off on doing observations until after the CAP is properly in place is because it is designed to assist a teacher in improving her/his skills. Anastasi's CAP was not finalized until December 5, 2016, thus, the 2016-2017 observations conducted prior thereto cannot be considered in reaching the summative evaluation. To consider those observations would essentially negate the purpose of the CAP and puts the teacher, in this case Anastasi, on the defensive before she has had the full benefit of a completed CAP.

Fourth, the District contends that if errors were made in the evaluation process a hearing is needed to determine whether such errors materially affected the outcome of the Summative Evaluation. I have already determined above that serious errors were made in the steps of the evaluation process. They include the failure to implement a CAP by October 31, and more particularly, the District's reliance on observations conducted prior to the December 5 implementation of the CAP.

A hearing is not necessary to find that those observations constituted at least part of the District's thought process leading to the Summative Evaluation. To suggest otherwise is like trying to put the genie back in the bottle. The District in its papers did not even suggest that it did not consider the results of those observations. Rather, it argued that it effectively complied with the creation of a CAP and that the Respondent received an Ineffective rating on all four of the observations that were conducted of her in 2016-2017 which included the two observations that were conducted before her CAP was finalized. The reliance on those observations, are clear without the need for a hearing.

Thus, I find the District violated *N.J.A.C.* 6A:10-4.4 (c) (5) and that those observations materially affected the Respondent's 2016-2017 Summative Evaluation.

Fifth, certainly the facts of this case are different from those in the *Hannah* case. The District argued that in *Hannah* it had admitted to denying Hannah several entitlements, but that it made no such admission in this case. But my reliance on *Hannah* was not primarily because Arbitrator Denenberg sustained a motion to dismiss on the merits. Rather, as I previously explained, she found that an arbitrator on the TEACHNJ panel has the authority to consider and decide a motion to dismiss regarding the correctness of the steps of the evaluation process and may do so prior to an evidentiary hearing.

Finally, the District's argument that it complied with *N.J.A.C.* 6A:10-2.5 (b) (1) by implementing the Respondent's CAP in less than 25 days from when it discovered that a CAP had not been created as a defense to not implementing the CAP by October 31, 2016 lacks merit. That provision in *N.J.A.C.* 6A:10-2.5 (b) (1) applies when a teacher's summative evaluation is received after October 1, in which case a district needs to have a CAP in place within 25 teaching staff member working days following the district's receipt of the teacher's summative rating. Here, Anastasi received her 2015-2016 Summative Evaluation by June 13, 2016. Consequently, the 25 day requirement in that provision does not apply in this case and is not a viable defense to the district's failure to have implemented the CAP by October 31, 2016.

Having considered the parties' submissions, arguments and positions, and based upon my findings and Discussion above I grant the Respondent's Motion to Dismiss

Charge One – the Inefficiency Charge – and that part of Charge Three making the same Inefficiency allegations.

Accordingly, I issue the following:

AWARD

The Respondent's Motion to Dismiss Charge One and to the extent the same inefficiency allegations are repeated in Charge Three is granted.

Absent some agreement between the parties regarding the remaining allegations, we will proceed to hearing on the remaining Charges as previously scheduled.

Arnold H. Zudick
Arbitrator

Dated: January 10, 2018
Morrisville, Pennsylvania

Commonwealth of Pennsylvania}
County of Bucks }

On this 10th day of January 2018, before me personally came and appeared Arnold H. Zudick to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Susan M. Zudick
Notary Public

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
SUSAN M. ZUDICK, Notary Public
Falls Twp., Bucks County
My Commission Expires September 2, 2018

82-18

ADAMS GUTIERREZ & LATTIBOUDERE, LLC.
The Legal Center
1037 Raymond Boulevard, Suite 900
Newark, New Jersey 07102
(973) 735-2742
Attorneys for the Netcong Board of Education

In the matter of the Tenure Charges	:	
GINA CINOTTI	:	AGENCY REFERENCE NO.: 254-11/17
NETCONG BOARD OF EDUCATION	:	**STIPULATION OF SETTLEMENT**

The Netcong Board of Education (the "Board"), whose principal office is located 26 College Road, Netcong, New Jersey, 07857 and its successors, assigns, officers, employees, agents and representatives (collectively, "School Board"), and Dr. Gina Cinotti, residing at 41 College Road, Netcong, New Jersey 07857 ("Respondent") (collectively, the "Parties") have voluntarily resolved the pending tenure charges and enter into the following Stipulation of Settlement. The effect of this stipulation of settlement is limited only to the tenure charges at issue in this matter and shall not serve as a bar to or release of any claims that may be raised in a subsequent lawsuit for damages in the Superior Court of New Jersey.

WHEREAS Respondent is a employed by the Board as a Chief School Administrator ("CSA") pursuant to an employment contract in effect from July 1, 2015 through June 30, 2020; and

WHEREAS Respondent serves in a dual role of Superintendent and Principal of the Netcong Elementary School; and

WHEREAS the Board certified tenure charges to the Commissioner of Education of the State of New Jersey, captioned *In the Matter of Tenure Charges Against Gina Cinotti, Netcong Board of Education* ("Tenure Charges"), under Agency Reference Number 254-11/17; and

WHEREAS, Respondent filed an answer opposing the charges; and

WHEREAS the Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator Ira Cure ("Arbitrator") for a hearing; and

WHEREAS, Respondent has denied the allegations set forth in the tenure charges; and

WHEREAS, the Parties are aware of the uncertainty of the outcome of arbitration; and

WHEREAS, the Board with stringent budget limitations and due to the expenditure of resources due to multiple days of hearings with numerous witnesses, the concern that school personnel will be removed from their educational duties and responsibilities during that time, and whereby Respondent has accepted a position with another school district, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

WHEREAS the proposed Stipulation of Settlement is in the best interest of the Parties and the public because Respondent voluntarily resigns from her employment and avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Concurrent with the execution of this Stipulation, Respondent shall submit a voluntary and irrevocable letter of resignation to the Board, which shall provide for her resignation from the

Board effective June 30, 2018 ("Effective Date"). (See Exhibit "A," to the Stipulation, a copy of Respondent's signed letter of resignation).

2. Upon final approval of the signed Stipulation by the Arbitrator, the Board shall and hereby does withdraw the instant Tenure Charges. The Board agrees to not pursue the subject Tenure Charges against Respondent as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the Stipulation is voided, the Board retains the right to file and consider for certification, tenure charges against Respondent, including those tenure charges which have been previously filed against her by the Board, and Respondent reserves the right to defend same.

3. Upon final approval of the signed Stipulation by the Arbitrator, Respondent will be returned to the payroll retroactively to March 1, 2018 and will remain on the payroll through June 30, 2018, pursuant to the salary set forth in Paragraph 4. Respondent will be placed on an administrative leave with pay for the period of March 1, 2018 through June 30, 2018. Additionally, Respondent will be deemed to have been on an unpaid leave of absence between October 31, 2017 and February 28, 2018.

4. Respondent's gross monthly salary during the period of March 1, 2018 through June 30, 2018 shall be $2,200.00. All salary paid for said four (4) month period shall be subject to all applicable and mandatory salary withholdings and deductions, including pension and health insurance premium contributions.

5. The District shall keep Respondent enrolled in her current health benefit plan through June 30, 2018.

6. Respondent shall not be entitled to any contractual payment under this Agreement for accrued but unused days at the time of her resignation.

7. This Stipulation is based upon the understanding that Respondent's separation from employment with the Board, effective June 30, 2018, will be deemed a voluntary resignation-in good standing. Upon inquiry from any third party to authorized employees or representatives of the Board, those employees or representatives will provide no information other than to confirm Respondent's employment, position, salary and dates of employment, and state that the reason for her separation from employment was her voluntary resignation.

8. The Board expressly reserves the right to oppose any application by Respondent for unemployment benefits.

9. In accordance with N.J.A.C. 6A:3-5.6(a)6, Respondent has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners. Additionally, pursuant to N.J.A.C. 6A:9B-4.3(a)1, Respondent has been advised of the Board's duty to notify the State Board of Examiners she has resigned. The Board is legally required to participate in proceedings initiated against Respondent's license by the State Board of Examiners resulting from the Commissioner's referral. Aside from such requirements, pursuant to the above-referenced regulation, the Board agrees to not independently seek the suspension or revocation of Respondent's teaching certification or license or seek to prevent her from applying for or receiving pension benefits on any grounds related to the Tenure Charges or her resignation pursuant to this Stipulation of Settlement.

10. As of the Effective Date, all of Respondent's rights of employment with the Board, including but not limited to accrued salary, benefits, tenure and seniority in any and all positions, will voluntarily and permanently end.

11. Respondent will not apply for reemployment with the Board at any time.

12. The Board makes no representations as to the consequences that the payment referred to herein or that this settlement agreement may have on Respondent's pension. Respondent assumes full responsibility for any impact upon her pension, pension status, pension credits and pension payments.

13. This Stipulation and all of its terms, are and will remain confidential to the maximum extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et al. Respondent is expressly forbidden from discussing this Stipulation with any person, other than her accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Stipulation or to which she is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Respondent agrees that she will inform the person to whom she is making the permitted disclosure that the existence and substance of this Stipulation, the settlement giving rise to this Stipulation and the sum of money paid pursuant to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. Respondent specifically agrees not to discuss the nature, terms, conditions of this Stipulation with others, any representative of the media, or any past, present, or prospective employee of the Board, or its agents or attorneys. Respondent understands that this provision is not a simple recital but is an important, integral part of this Stipulation. The Board agrees that it will keep this Stipulation confidential to the extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA"). In the event that the Board receives an OPRA request, for which this Stipulation would be responsive, the Respondent understands that the Board is legally obligated to disclose same under OPRA and that such disclosure would not be a breach of this Stipulation.

14. This agreement shall not constitute a precedent in any matters involving other Board employees.

15. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

16. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties as to the tenure charges only and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

17. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

18. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

19. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

20. Each party acknowledges that this is the entire agreement of the Parties concerning the pending tenure charges, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

21. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

22. This Stipulation is subject to formal approval by the Netcong Board of Education.

23. Additionally, this Stipulation is subject to final approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

Dated: 3/6/18

Dr. Gina Cinotti
DR. GINA CINOTTI

NETCONG BOARD OF EDUCATION

Dated: MARCH 6th 2018

Bernadette
By: BERNADETTE DALESANDRO
Board President

CERTIFICATION

I, Dr. Gina Cinotti, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this 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: 3/6/18

Dr. Gina Cinotti
DR. GINA CINOTTI

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):

Dated: 3/6/18

Derlys M. Gutierrez, Esq.

ADAMS GUTIERREZ & LATTIBOUDERE
Attorneys for the Netcong Board of Education

APPROVED:

Dated: 3/6/18

Ira Cure, Arbitrator

EXHIBIT "A"

February 13, 2018

Dear Netcong Board of Education,

Please accept this letter as notification of my voluntary and irrevocable resignation from employment with the Netcong Board of Education, effective June 30, 2018.

Sincerely,

Dr. Gina Cinotti

Dr. Gina Cinotti
Chief School Administrator

83-18L

83-18

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Acting Commissioner

March 12, 2018

Benjamin B. Brenner, Esq.
Carroll Law Firm
#1 No. New York Road
Suite 39
Galloway, New Jersey 08205

Geoffrey N. Stark, DAG
Office of the Attorney General
Department of Law and Public Safety
Division of Law
25 Market Street
PO Box 112
Trenton, New Jersey 08625-0112

Re: *Board of Education of the City of Pleasantville, Atlantic County v. State of New Jersey, Office of the State Monitor. Agency Dkt. No. 308-10/17.*

Dear Counsel:

I have reviewed the materials filed by the Pleasantville Board of Education and the Office of the State Monitor (OSM) in the above-captioned matter. In its petition, the Board is seeking an Order requiring the OSM to reimburse the Board for all legal costs and damages associated with litigation that stemmed from the decision of Constance Bauer, State-appointed fiscal monitor (State Monitor), overturning the District's appointment of Clarence Alston as the District Superintendent. After Dr. Alston was not selected as the District's Superintendent, he filed an Order to Show Cause in New Jersey Superior Court alleging that the action of the State Monitor was improper and exceeded her authority. The Honorable Julio L. Mendez, A.J.S.C., ruled that the State Monitor exceeded her statutory authority in overriding the Board and installing an individual as an interim superintendent. That decision is currently on appeal to the Appellate Division.

Upon receipt of the petition of appeal, the Office of Controversies and Disputes directed the Board to advise the Office of the legal authority that provides the Commissioner of Education with the power to award the Board with the relief it is seeking. The Board maintains

that I have jurisdiction over this matter because it requires an interpretation of *N.J.S.A.* 18A:7A-55f., which states in relevant part that:

> [t]he salary of the State Monitor shall be fixed by the commissioner and adjusted from time to time as the commissioner deems appropriate. The school district shall assume the total cost of the State monitor and necessary additional staff appointed pursuant to section a. of this section. The State monitor shall have the authority to appoint legal counsel if legal action is taken against him while acting in his official duties as a State monitor or as needed upon approval of the commissioner.

The Board contends that the plain language of the statute refers only to the State Monitor's salary and any necessary additional staff; it does not require the Board to pay any damages or legal fees incurred as a direct result of the unauthorized action taken by the State Monitor that resulted in litigation. Additionally, the statute entitles the State Monitor to legal counsel if action is taken against her, but there is no language in the statute stating that the Board must pay for those costs.

The Board also stressed that it is not actually seeking an award of counsel fees or damages. Instead – because the statute provides that the Board is only responsible for the "salary" of the State Monitor and "necessary additional appointed staff" – the Board is seeking an interpretation of *N.J.S.A.* 18A:7A-55f; more specifically, a ruling that *N.J.S.A.* 18A:7A-55f does not impose the costs of the State Monitor upon the Board when said costs result from actions that far exceeded the State Monitor's statutory authority.

In reply, the OSM agrees that this matter arises under school law and is within the Commissioner of Education's jurisdiction. The OSM further argues that there is no legal authority that gives the Commissioner of Education the power to order the relief sought by the Board. The OSM points out that under the School District Fiscal Accountability Act, *N.J.S.A.* 18A:7A-54 – 59 (SDFAA), a State Monitor is an employee of the local board of education and the local board, not OSM, is responsible for the total cost of the State Monitor, not the salary alone. *N.J.S.A* 18A:7A-55f. Furthermore, the SDFAA expressly defines the State Monitor as a district employee in all instances except under the Tort Claims Act, *N.J.S.A.* 18A:7A-55d. Therefore, OSM cannot be held vicariously liable for the acts of the State Monitor because, while appointed by the Commissioner of Education, the State Monitor is the employee of the Board – not the OSM.

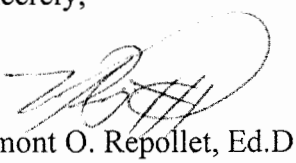
Upon review and consideration of the submissions, I find that this matter is properly before me because the Board is seeking reimbursement of legal costs and damages from the OSM under *N.J.S.A* 18A:7A-55f. It is undisputed that the Commissioner of Education's jurisdiction extends to controversies and disputes arising under New Jersey school law. *N.J.S.A.* 18A:6-9. I further find that under the SDFAA, the State Monitor is an employee of the Board and the clear language of *N.J.S.A* 18A:7A-55f states that the local board of education is responsible for the total cost of the State Monitor. Those costs include any legal fees and damages associated with decisions made by the State Monitor.

Moreover, despite the Board's contention to the contrary, it is in fact seeking counsel fees. The Supreme Court has found that the Commissioner of Education does not have the authority to order legal expenses in the absence of "express authorization by statute, court rule

or contract." *Elizabeth Balsley v. North Hunterdon Regional School District Board of Education, et al.*, 117 *N.J.* 434, 443 (1990) (citations omitted). There is no statutory provision or governing case law that has afforded the Commissioner of Education that power. Therefore, I do not have the authority to grant the Board the relief that it is seeking in this matter.

Accordingly, the petition of appeal is hereby dismissed.[1]

Sincerely,



Lamont O. Repollet, Ed.D
Acting Commissioner

c: County Superintendent
State Law Library

LOR/SLP/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).

84-18

K.O., on behalf of minor child, Y.T.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of his daughter in February 2016, seeking a determination that Y.T. is entitled to a free public education in the West Orange School District. The matter was transmitted to the Office of Administrative Law as a contested case. Subsequently, a meeting was held between District personnel, counsel for the Board and the petitioner; based upon the explanation of Y.T.'s residency presented at the meeting, the petitioner was notified by letter dated December 20, 2016 that the District would no longer seek to assess tuition for the 2015-2016 school year. Petitioner agreed to submit a letter withdrawing his appeal, but failed to do so.

The ALJ concluded that this matter is no longer a contested case before the Office of Administrative Law. Accordingly, the ALJ issued an Initial Decision in which she ordered the matter dismissed.

Upon review of the record in this matter, the Commissioner concurred with the ALJ's conclusion and adopted the Initial Decision as the final decision in this matter. Accordingly, the petition was dismissed.

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

March 19, 2018

84-18

OAL DKT. NO. EDU 03166-16
AGENCY DKT. NO. 49-2/16

K.O., on behalf of minor child, Y.T.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner adopts the Administrative Law Judge's recommended decision for the reasons expressed therein. Accordingly, the petition is hereby dismissed as withdrawn.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/19/18
Date of Mailing: 3/19/18

*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
DISMISSAL
OAL DKT. NO. EDU 03166-16
AGENCY DKT. NO. 49-2/16

K.O., ON BEHALF OF MINOR CHILD, Y.T.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

K.O., petitioner, pro se

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

Record Closed: February 1, 2018 Decided: February 1, 2018

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenged the school district's residency determination. Petitioner's request for a hearing was granted and the matter was transmitted to the Office of Administrative Law (OAL) on March 1, 2016, for hearing as a contested case.

Thereafter, District personnel and counsel for the Board met with petitioner and received a detailed and lengthy explanation as to where Y.T., the petitioner's daughter resides. Based upon that meeting, the counsel for the Board notified petitioner by letter dated December 20, 2016, that the District was satisfied with his clarification and would no longer seek to assess tuition against petitioner for the 2015-2016 school year.

Petitioner agreed to submit a letter withdrawing his appeal to the Office of Administrative Law however, nothing has been received to date. Based upon all of the foregoing, I **FIND** that this matter should be and is hereby **DISMISSED**.

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

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

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

February 1, 2018
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 2-1-18

Date Mailed to Parties: FEB 2 2018

dr

~~DIRECTOR AND~~
CHIEF ADMINISTRATIVE LAW JUDGE

OAL DKT. NO. EDU 9816-17
AGENCY DKT. NO. 109-6/17

WBEIMAR PUERTA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION 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 payment amount was due within thirty (30) days after the execution of the Agreement. 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: 3/19/18
Date of Mailing: 3/19/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09816-17

AGENCY DKT. NO. 109-6/17

WBEIMAR PUERTA,

Petitioner,

v.

CITY OF ELIZABETH BOARD OF EDUCATION, UNION COUNTY,

Respondent.

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

Christina M. DiPalo, Esq., for respondent (LaCorte, Bundy, Varady & Kinsella, attorneys)

Record Closed: January 29, 2018 Decided: January 30, 2018

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

On June 5, 2017, petitioner Wbeimar Puerta filed a Petition with the Commissioner of Education seeking, among other relief, reimbursement of salary withheld during the period of his suspension by the respondent City of Elizabeth Board of Education (the Board). On or about July 7, 2017, the Board filed an Answer to the Petition and the Department of Education transmitted the matter to the Office of

Administrative Law, where it was filed on July 11, 2017, for determination as a contested case. Following telephone conferences with counsel, counsel for the Board submitted the attached Settlement Agreement and Release under letter dated January 25, 2018, along with a Resolution of the Board approving the Settlement Agreement.

I have reviewed the record and the terms of the consent order and I **FIND**:

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

2. The consent order 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 30, 2018
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: FEB 1 2018

2-1-18
Laura Sanders
~~DIRECTOR AND~~
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:

jb

SETTLEMENT AGREEMENT & RELEASE

RECEIVED
2018 JAN 29 P 4:21
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

This Settlement Agreement and Release (hereinafter referred to as "Agreement") is made this 25th day of January 2018, by and between the Elizabeth Board of Education and its agents, past and present members, employees, attorneys, successors, heirs and assigns (collectively "the Board"), and Wbeimar Puerta and his agents, attorneys, successors, heirs and assigns (collectively "Puerta"). (Puerta and the Board will hereinafter be collectively referred to as the "Parties").

WHEREAS, Puerta was employed with the Board as a mathematics teacher from on or about December 19, 2016 through on or about April 13, 2017; and

WHEREAS, Puerta filed a Petition for Relief with the Commissioner of Education to challenge the Board's alleged improper suspension without pay from March 13, 2017 through his termination on April 13, 2017 [OAL Dkt. No.: EDU 09816-2017N; Agency Ref. No.: 109-6/17]; and

WHEREAS, the Board filed an Answer to Puerta's Petition for Relief, disputing his entitlement to the reimbursement of the salary withheld during the period of unpaid suspension; and

WHEREAS, the matter was transferred to the Office of Administrative Law and assigned to the Honorable Margaret Monaco, A.L.J., for adjudication; and

WHEREAS, the Parties are desirous to amicably resolve this matter in lieu of proceeding with litigation; and

NOW, THEREFORE, in consideration of the agreements contained herein, the Parties agree as follows:

1. In exchange for the below consideration, Puerta will immediately dismiss with prejudice the Petition for Relief currently pending against the Board [OAL Dkt. No.: EDU 09816-2017N; Agency Ref. No.: 109-6/17]. Puerta further irrevocably and unconditionally waives, releases and forever discharges any claims or rights, whether known or unknown, for any and all claims that have or could have arisen prior to Puerta's execution of this Agreement, which he has or may have against the Board and its past and present members, officers, administrators, agents, employees, attorneys, successors, heirs and assigns, including, but not limited to, any claims for attorneys' fees, and back pay or front pay.

2. The Board will pay Puerta the amount of $8,179.26, subject to deductions, within thirty (30) days of the execution of this Agreement.

3. The signatures of the parties below indicate that they have had an opportunity to review this Agreement with their respective Counsel, that they have read and understood the provisions, and that they have executed it voluntarily with full knowledge of the significance of all provisions.

4. This Agreement is executed and all consideration is given in final settlement of disputed claims and shall not be construed as an admission of any allegation or of liability by the Board, and any such liability is expressly denied.

5. This Agreement shall not be modified or amended except by writing duly executed and signed by the parties to this Agreement.

IN WITNESS WHEREOF, the Parties hereto have duly executed this Agreement as of the date first written above.

By: _____
Wbeimar Puerta

STATE OF NEW JERSEY:

: ss

COUNTY OF ~~UNION~~ Essex DL :

I certify that on January 8, 2018, Wbeimar Puerta personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in this Agreement, and that he personally signed this document, and signed, sealed, and delivered this document as his act and deed.

DILENIA D LOPEZ
ID # 50013928
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires April 13, 2020

_____ 1/9/18

Nicholas Poberezhsky, Esq.
Attorney for Petitioner

Dated:

_____ 1/25/18

Christina M. DiPalo, Esq.
Attorney for the Elizabeth Board of Education

Dated:

C
O
P
Y

10s

RECEIVED

2018 JAN 29 P 4:21

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education has discussed a resolution of Wbeimar Puerta v. Elizabeth Board of Education, OAL Docket No. EDU 09816-2017N; 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 Settlement Agreement on file in the Office of the School Business Administrator/Board Secretary, provided that it is fully signed by all parties.

Elizabeth, New Jersey
October 19, 2017

17-127

86-18

A.T., on behalf of minor children, E.T. and J.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In February 2015, petitioner A.T. appealed the determination of the respondent Board that her minor children were ineligible for a free public education in respondent's school district; petitioner further appealed the associated assessment of tuition due to the Board. Petitioner contended that she resided in Ramsey from September 1, 2014 through March 1, 2015. The Board asserted that a residency investigation had revealed that petitioner and the children reside in Mahwah. A.T. and S.T. are the parents of E.T. and J.T.; in January 2014, A.T. and S.T. entered into a Consent Order in Family Court that provided for S.T. to be the parent of primary residence in Ramsey, for purposes of determining the school district for the children. A.T. resided in Mahwah, New Jersey.

The ALJ found, *inter alia*, that: although it is undisputed that a Consent Order was entered on January 30, 2014 which designated S.T. to be the parent of primary residence for the purpose of determining the school district for E.T. and J.T., the Board's residency officer only observed the children at their mother's house in Mahwah; further, S.T. testified that the children were mostly residing with the petitioner in Mahwah from September 2014 through March 2015. Based on the foregoing, the ALJ concluded that: the children's domicile was their mother's home in Mahwah, despite the consent order; they were therefore not entitled to a free public education in Ramsey schools; petitioner was not a domiciliary in the Ramsey School District for the specified time period, and the respondent Board is therefore entitled to reimbursement for the costs of tuition for E.T. and J.T. from September 1, 2014 through March 1, 2015. The ALJ ordered petitioner to pay tuition reimbursement in the total amount of $18,301.

The Commissioner rejected the Initial Decision finding, *inter alia*, that when there exists a court order or written agreement between separately domiciled parents as to where the children will attend school, domicile – for the purposes of schooling – is dictated by said order or agreement; therefore, consistent with the intent and purpose of *N.J.A.C.* 6A:22-3.1, E.T. and J.T. are eligible to attend school in the Ramsey School District. Respondent is not entitled to tuition costs for the period between September 2014 and March 2015, as the children were legally eligible to attend Ramsey schools. The petition was dismissed.

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

March 19, 2019

OAL DKT. NO. EDU 03301-15
AGENCY DKT. NO. 24-2/15

A.T., on behalf of minor children, E.T. and J.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the Corrected Initial Decision have been reviewed,[1] as have petitioner's exceptions and respondent's reply thereto, filed pursuant to *N.J.A.C.* 1:1-18.4.[2]

The Administrative Law Judge (ALJ) found that despite the existence of a Consent Order between the parents – A.T. and S.T. – designating S.T. as the parent of primary residence for the purposes of the children's education, E.T. and J.T. were not entitled to attend school in the Ramsey School District because they either "mostly resided" with A.T. in Mahwah or were "not residing" with S.T. in Ramsey.[3] The ALJ, therefore, concluded that the children's domicile was with A.T. for the purposes of their schooling.

[1] The Commissioner was not provided with a transcript of the hearings at the OAL.

[2] The Commissioner has also reviewed respondent's correspondence of January 2, 2018, as well as the additional correspondence submitted by petitioner and respondent on January 29, 2018 and January 30, 2018, respectively.

[3] In the absence of a full transcript of the hearings, it is unclear whether S.T. testified that the children "mostly resided with A.T." or that the children "were not residing with him" at all. Page 5 of the Initial Decision states that "S.T. confirmed that the children mostly resided with A.T. at her home" between September 2014 and March 2015, while Page 6 of the Initial Decision states that "S.T. testified that the children were not residing with him" from September 2014 through March 2015 (emphasis added). Although this discrepancy has no bearing on the ultimate outcome of this matter, the Commissioner deems it necessary to note such inconsistencies for the purposes of clarifying any ambiguity in the record.

Petitioner's exceptions take issue with the ALJ's consideration of the facts and the legal conclusions. Specifically, petitioner argues that the ALJ – to whom this matter was reassigned following the conclusion of the hearing conducted by another ALJ – did not include petitioner's exhibits and testimonial facts of several witnesses. Petitioner also argues that *N.J.A.C.* 6A:22-3.1(a)(1)(i) does not require determination of the time the children spent with each parent, and that the existence of an agreement between the parents – coupled with S.T.'s residence in Ramsey – permits E.T. and J.T. to attend the District's schools. In reply, the Board argues that petitioner's exhibits were properly omitted as she did not offer them into evidence. Respondent also argues that the ALJ was within her discretion in making credibility determinations of the witnesses and the testimony, and that a full recitation of facts and testimony is not required. Lastly, respondent submits that the ALJ's determination of this case was correct based on her application of *N.J.S.A.* 18A:38-1 and *N.J.A.C.* 6A:22-3.1.

Upon such review, the Commissioner rejects – for the reasons set forth herein – the ALJ's decision finding that E.T. and J.T. were domiciled with A.T. in Mahwah, and therefore, not entitled to a free public education in the Ramsey School District.

As a preliminary matter, the Commissioner notes that despite the relaxation of the rules of evidence in administrative hearings, litigants must, nonetheless, offer into evidence any relevant documents and exhibits that they wish to be considered in support of their case. *See N.J.S.A.* 52:14B-10, *N.J.A.C.* 1:1-15.1, *N.J.A.C.* 1:1-15.7. Furthermore, while ALJs are certainly within their discretion to make credibility determinations of witnesses pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-15.8, it is axiomatic that the Commissioner considers the factual findings and determinations of the ALJ material – and relies on the ALJ's credibility determinations of witness testimony – in rendering a final agency decision. As such, in cases

where the adjudication of the issue is fact-specific, it is vital that the factual findings and discussion in the Initial Decision provide thorough consideration of the evidence in the record, including witness testimony and credibility determinations. Residency matters indubitably require fact-specific analysis. In this case, however, the Commissioner finds that the issue can be decided as a matter of law; therefore, the Commissioner is able to make a determination without the benefit of a factually-detailed Initial Decision.

The governing regulation in this matter – *N.J.A.C.* 6A:22-3.1(a)(1)(i) – provides in pertinent part:

> 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.
>
> (emphasis added)

In other words, when there exists a court order or written agreement between separately domiciled parents as to where the children will attend school, domicile – for the purposes of schooling – is dictated by said order or agreement. *See K.H., on behalf of minor children, A.H. and V.H. v. Bd. of Educ. of the Boro of Butler, Morris County*, OAL Dkt. No. EDU 14258-16 (Jan. 19, 2017), Comm. Dec. No. 70-17 (March 2, 2017) (finding when there is a Consent Order or written agreement between the parents that designates the school district of attendance, the amount of time spent with either parent does not dictate where the children must attend school); *see e.g., Bd. of Educ. of the Boro of Westville, Gloucester County v. Bd. of Educ. of the Boro of Oaklyn, Camden County*, OAL Dkt. No. EDU 10144-05 (Aug. 19, 2009), Comm. Dec. No. 316-09 (Sept. 29, 2009) (finding there was no designation of school district of attendance

until the February 2005 addendum to the court-sanctioned agreement; thus, Westville was responsible for the cost of educating the child for the 2004-2005 school year),[4] *and R.A.R., on behalf of minor child, R.D.R. v. Bd. of Educ. of the Black Horse Reg'l. High Schl. Dist., Camden County*, OAL Dkt. No. 8849-07 (Jan. 25, 2008), Comm. Dec. No.102-08 (Mar. 5, 2008) (the child, who lived with her father permanently, was domiciled with her father where the mother had primary physical custody and there was no written agreement between the parents pertaining to the child's education).[5] Significantly, a review of the Comments and Responses to the Rule Proposals from 2009 clarifies the regulation's intent to allow "separated parents domiciled in different school districts to decide between themselves as to the district in which their child(ren) will attend school" to maintain educational continuity. *See* 42 *N.J.R.* 179(b).

The parties are reminded that the fundamental purpose of the regulatory scheme is to ensure that students' access to education is not disrupted by reason of disputes between parents and/or school districts. In this matter, the parents entered into a Consent Order on January 30, 2014, wherein S.T. – who is domiciled in Ramsey – was designated as the "parent of primary residence" of the minor children "**for purposes of schooling**" (emphasis added). The Commissioner acknowledges that the Consent Order does not specifically state the "Ramsey School District;" however, the language of the Order is sufficient for the purposes of *N.J.A.C.* 6A:22-3.1(a)(1)(i) because it reflects the parents' agreement and intent for E.T. and J.T.

---

[4] The Commissioner notes that although the *Westville* matter implicates *N.J.A.C.* 6A:22-3.1(a)(1)(ii), it is consistent with the understanding that a court order or written agreement pertaining to school district takes precedence in matters involving separately domiciled parents.

[5] The Commissioner has considered the legal authority cited by both parties and finds that the Board's reliance on *P.B. on behalf of minor child, Y.S. v. Bd. of Educ. of the Twp. of Ewing, Mercer County*, OAL Dkt. No. 10545-10 (Feb. 15, 2011), Comm. Dec. No. 128-11 (Mar. 24, 2011) and *R.C.P., on behalf of minor children, J.P. and J.P. v. Bd. of Educ. of the Twp. of Hillside, Union County*, OAL Dkt. No. 06127-14 (Nov. 21, 2014), Comm. Dec. No. 494-14 (Dec. 23, 2014), is misguided. In *P.B.*, the parents had a "Joint Residential Custody Order" and there was no specification as to the school district. In *R.C.P.*, there was a custody order, and pursuant to the subject regulation, custody alone was not dispositive of domicile for purposes of the children's education.

to attend school where S.T. is domiciled. Therefore, consistent with the purpose and intent of *N.J.A.C.* 6A:22-3.1, the children are eligible to attend school in Ramsey.

Accordingly, the Initial Decision of the OAL is rejected. Respondent is not entitled to tuition costs incurred between September 2014 and March 2015, as E.T. and J.T. were eligible to attend school in Ramsey. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[6]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/19/18

Date of Mailing: 3/19/18

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 03301-15

AGENCY DKT. NO. 24-2/15

A.T. ON BEHALF OF MINOR CHILDREN E.T. & J.T.,

Petitioner,

v.

BOROUGH OF RAMSEY BOARD OF EDUCATION,

Respondent.

Kevin D. Clark, Esq. for petitioner (Guston & Guston, LLP)

Robert M. Jacobs, Esq. for respondent, (Winne Banta Basralian & Kahn, PC)

Record Closed: December 18, 2017 Decided: December 19, 2017

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

STATEMENT OF THE CASE

On February 5, 2015, A.T., on behalf of her minor children, E.T. and J.T., filed a residency appeal of the residency determination and tuition due associated with same, of the Board of Education of the Township of the Borough of Ramsey (respondent,

Board) decision of January 12, 2015, disallowing her minor children from attending public school within the respondent's school district. The Board sought to remove E.T. and J.T., from its schools pursuant to N.J.S.A. 18A:8-1(a), and demands tuition reimbursement. A.T. In support of her appeal, A.T. contends that she resided in Ramsey from September 1, 2014 through March 1, 2015.

PROCEDURAL HISTORY

A.T. filed a pro se residency appeal with the Department of Education, Bureau of Controversies and Disputes, appealing respondent's determination that A.P. did not reside in the District, and lived in Mahwah, New Jersey. On March 9, 2015, the Board filed an answer. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on March 10, 2015, for determination as a contested case pursuant to N.J..A.C. 6A:3-1et seq. and N.J.S.A. 52:14B-1 to –15. Hearings were held by former Administrative Law Judge Joan Bedrin-Murray, who has resigned. The matter was reassigned to me on December 18, 2017, on which date the record closed.

ISSUE

The issue in this matter is whether minor children E.T. and J.T. are eligible to attend respondent's public schools free of charge during the period from September 1, 2014 through March 1, 2015 and, if not, whether respondent's requests for tuition reimbursement for that time period should be granted.

STATEMENT OF FACTS

I **FIND** the following facts according to the pleadings submitted by the parties:

1. A.T. and S.T. are the parents of E.T. and J.T.

2. A.T. and S.T. entered a Consent Order in Family Court on January 30, 2014, providing for S.T. to be the parent of primary residence in Ramsey

for purposes of determining school districts. R-3 A.T. resided in Mahwah, New Jersey.

3. On February 10, 2014, the Board acknowledged the Consent Order and requested S.T. to keep the District advised of any change in residency of the two children and the District will also be monitoring the residency to ensure compliance with the applicable statute and regulation. R-4

4. On September 1, 2014, A.T. submitted to Ramsey School District a "Free and Reduced School Meals Household Application" listing her Mahwah address and claiming that the two children resided with her. R-5

5. Because of the school meals application, Dr. Matthew Murphy, Ramsey Superintendent of Schools, requested Residency Officer Steven Thompson to investigate the residency of E.T. and J.T.

6. On November 15, 2014, Steven Thompson issued his findings. Thompson investigated both the Mahwah address of A.T. and the Ramsey address of S.T. He conducted his investigations in the morning hours. The landlord at the Mahwah address confirmed to Thompson that A.T. resided there. He observed A.T. and the two children on four occasions in a three week period leaving her residence in Mahwah and driving the children to school in Ramsey. Thompson did not investigate during the afternoon or evening hours and did not investigate S.T.'s home.

7. S.T. confirmed that the children mostly resided with A.T. at her home during the months of September 2014 through March 2015.

8. E.T. and J.T. resided with A.T. in Mahwah from September 1, 2014 through March 15, 2015.

Public schools are required to provide a free education to individuals between the ages of five and twenty years in certain circumstances, including individuals who are

domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is the domicile of the parent, custodian or guardian. P.B.K. ex rel. minor child E.Y. v. Bd. of Educ. of Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001). Thus, a child would routinely attend school in the district where his or her parents live. N.J.A.C. 6A:22-3.1 provides:

> (a) A student is eligible to attend a school district if he or she is domiciled within the school district.
>
> 1. A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district.
>
> i. When a student's parents or guardians are domiciled within different school districts and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the school district of the parent or guardian with whom the student lives for the majority of the school year. This subparagraph shall apply regardless of which parent has legal custody.
>
> ii. When a student's physical custody is shared on an equal-time, alternating week/month or other similar basis so the student is not living with one parent or guardian for a majority of the school year and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the present domicile of the parent or guardian with whom the student resided on the last school day prior to the October 16 preceding the application date.

It is undisputed that a Consent Order was entered on January 30, 2014 designating S.T. to be the parent of primary residence in Ramsey for purposes of determining the Ramsey School District. Thompson only observed the children at their mother's house in Ramsey four times during a three week period, and only in the

morning. S.T. testified that the children were not residing with him from September 2014 through March 2015 despite entering into the Consent Order.

Considering the foregoing, I am constrained to **CONCLUDE** that despite the entry of the Consent Order in January 2014, the children's domicile was their mother's home in Mahwah. I further **CONCLUDE** that they were therefore not entitled to a free public education in the Ramsey Township schools.

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that petitioner was not a domiciliary in the Clifton School District for the days sought and that respondent is entitled to reimbursement for the costs of audited tuition in the amount of $9,228.00 for E.T. and $9,073.00 for J.T.

DECISION AND ORDER

It is therefore, **ORDERED** that the Board's determination be **AFFIRMED** and that petitioner pay respondent tuition in the total amount of $18,301.00 for unauthorized attendance in the District schools for the periods stated above. 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.

December 19, 2017
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

Date Mailed to Parties: December 22, 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

WITNESSES:

Matthew Murphy

Stephen Thompson

S.T. (father of children)

Benjamin Tseytlin

A.T.

Lucy Butterfield

Maria Kulijanova

EXHIBITS

R-1 Letter from Superintendent of Schools dated December 6, 2013

R-2 Notice of Final Ineligibility dated December 19, 2013

R-3 Letter from A.T. dated February 3, 2014

R-4 Letter from Superintendent of Schools dated February 10, 2014

R-5 E-mail to Jennifer Roberts from A.T. and Email from Jennifer Roberts to A.T.

R-6 Steven Thompson report dated November 15, 2014

R-7 Notice of Final Ineligibility dated January 12, 2015

R-8 Letter from Superintendent of Schools dated March 25, 2015

R-9 Letter from Superintendent of Schools dated April 30, 2015

R-10 Letter from Jacobs to A.T. dated 5-15-15

R-11 calculation sheet

87-18

OAL DKT. NO. EDU 14252-17
AGENCY DKT. NO. 210-9/17

L.B., ON BEHALF OF MINOR CHILDREN, A.B., L.B., AND A.B.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER 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, it is noted that the settlement makes reference to a monthly payment schedule, intended to begin on February 1, 2018. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the proposed terms. Further, the Commissioner notes that – to the extent that Paragraph 14 of the settlement agreement provides for confidentiality – the parties are reminded that the settlement agreement may be subject to disclosure pursuant to the Open Public Records Act, *N.J.S.A.* 47:1A-1, *et seq.*

Subject to the foregoing, 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 – provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/20/18
Date of Mailing: 3/20/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 14252-17

AGENCY DKT. NO. 210-9/17

L.B. ON BEHALF OF MINOR CHILDREN,
A.B., L.B., AND A.B,
Petitioner,

v.

BOARD OF EDUCATION OF THE
TOWNSHIP OF HAMILTON,
MERCER COUNTY,
Respondent.

Lester Bracero, petitioner, pro se

Patrick F. Carrigg, Esq., for respondent (Lenox Socey Formidoni Giordano Cooley Lang and Casey, attorneys)

Record Closed: February 5, 2018 Decided: February 6, 2018

BEFORE **JUDITH LIEBERMAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 28, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

February 6, 2018
DATE

Judith Lieberman
JUDITH LIEBERMAN, ALJ

Date Received at Agency: 2/7/18

Date Mailed to Parties: 2/7/18

/vj

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*MEMBER OF NJ & PA BAR
**MEMBER OF NJ & NY BAR
***MEMBER OF NJ, NY & MA BAR
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ROBERT F. CASEY, P.C.
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CASEY P. ACKER***
CHRISTINA M. MATTEO*

SAMUEL D. LENOX
1922-1975

February 2, 2018

Office of Administrative Law
Judge Lieberman, A.L.J.
P.O.Box 049
Trenton, New Jersey 08625

RECEIVED
2018 FEB -5 A 9:53
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Re: AB/LB v Hamilton Township
OAL Docket: EDU 14252-2017S

Dear Judge Lieberman:

Enclosed please find an original of the executed Board Resolution for the above referenced matter.

Please contact me should you need anything further.

Very truly yours,

Patrick F. Carrigg
For the Firm

PFC/ddk
Enc.

HAMILTON TOWNSHIP, MERCER COUNTY, BOARD OF EDUCATION

RESOLUTION AUTHORIZING SETTLEMENT WITH L.B. PURSUANT TO N.J.A.C. 6A;3-1.13(d)

WHEREAS, N.J.A.C. 6A:3–1.13(d) requires that a Board of Education provide a resolution authorizing settlement indicating that the district board of education has consented to the terms of the settlement;

BE IT RESOLVED, that the Board hereby consents to settlement with L.B. pursuant to the terms of the Release and Settlement Agreement attached hereto and authorizes the Board of Education President, Pamela A. Kelly, to execute the Agreement on behalf of the Board.

Resolution passed by vote of:

6 Aye

3 Nay

0 Abstain

Katherine Athcoord

Business Administrator\Board Secretary

RECEIVED
2018 FEB -5 A 9:53
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

RECEIVED
2018 JAN 29 A 10:03
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT & MUTUAL RELEASE AGREEMENT

This Settlement and Mutual Release Agreement ("Agreement" is made on this day of December ___1___, 2017 by and among and the HAMILTON TOWNSHIP BOARD OF EDUCATION (hereinafter "Board") and LESTER BRACERO (hereinafter "Respondent") on behalf of the minors, A.B., L.B., and A.B., in reference to OAL Docket. No.: EDU 14252-2017S and Agency Reference No.: 210-9/17.

NOW THEREFORE the undersigned parties hereby agree as follows:

1. This agreement and release of claims relates to the Board's determination that the Petitioner's minor children, A.B., L.B., and A.B., were ineligible to attend Hamilton Township School District free of charge between March 23, 2017 and June 21, 2017.

2. As fully set forth in the Answer and Counter-Petition filed before the New Jersey Office of Administrative Law, OAL Docket. No.: EDU 14252-2017S and Agency Reference No. 210-9/17, tuition is owed from March 23, 2017 through June 21, 2017, the time that A.B., L.B., and A.B attended Hamilton Township schools while ineligible.

3. The Board has agreed to accept the amount of $3000.00 (Three thousand dollars) to resolve the claim.

4. The Petitioner has agreed to pay the sum of $3,000.00 (Three thousand dollars), over 30 months through equal $100.00 payments beginning on February 1, 2018 and ending on August 1, 2020.

5. The Petitioner agrees that the payment will be received by the Board by the 1st of each month and no later than the 15th of each month

6. The payment will be made by check or cash to: Hamilton Township Board of Education, c/o Kathrine Attwood, Business Administrator, 90 Park Avenue, Hamilton, New Jersey 08690.

7. The Petitioner acknowledges that the full amount sought in the Counter Petition before the New Jersey Office of Administrative Law is Thirteen Thousand Two Hundred Twenty-Two Dollars and Twenty-six cents ($13,222.26). The Board is accepting a reduced amount based upon the Petitioner's agreement to strict adherence to the terms of payment as set forth herein.

8. If Petitioner defaults on the payment obligations set forth in paragraphs 4-5, and does not cure default within 10 days of written notice of default to Petitioner, Petitioner consents

to the entry of judgment for the entire amount of $13,222.26 less any payments made, and to include all attorney's fees expended in connection with the collection efforts necessitated by the default plus statutory prejudgment and post judgment interest.

9. Notice of default shall be provided by Certified and Regular Mail from Respondent to Petitioner.

10. Petitioner acknowledges that the District, through requests for further investigation or periodic requests for revalidation of eligibility, may identify students, including A.B., L.B., and A.B., in the school district who may be ineligible for continued attendance due to error in initial assessment, changed circumstances, or newly discovered information.

11. In consideration of the mutual promises set forth above, and subject to the default provisions set forth in Paragraphs 7-9, the Board waives any and all rights to seek back tuition or any other payments from Respondent arising from his minor children's attendance in the District through the date of Board Approval of this Settlement Agreement and Release.

12. This Agreement constitutes the full and complete agreement of the parties and may not be changed or modified absent mutual agreement of the parties in writing. This Agreement is binding upon the parties and their respective heirs, assigns or successors in interest.

13. This Agreement shall be governed by and construed in accordance with New Jersey law.

14. 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.

15. The parties hereby verify, affirm and represent that they understand the contents of this Agreement and are entering into it voluntarily and with a full understanding of its meaning.

THIS SPACE INTENTIONALLY LEFT BLANK

88-18

OAL DKT. NO. EDU 14610-16
AGENCY DKT. NO. 215-8/16

E.C., ON BEHALF OF MINOR CHILD, A.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN 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: 3/19/18

Date of Mailing: 3/20/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 14610-16
AGENCY DKT. NO. 215-8/16

E.C. ON BEHALF OF MINOR CHILD A.C.,
Petitioner,
v.
TOMS RIVER REGIONAL SCHOOL DISTRICT, BOARD OF EDUCATION, OCEAN COUNTY,
Respondent.

Francis J. Campbell, Esq., for petitioner (Campbell & Pruchnik, LLC, attorneys)

Peter M. Draper, Esq., for respondent (Ccarluccio, Leone, Dimon, Doyle & Sacks, LLC, attorneys)

Record Closed: January 31, 2018 Decided: February 5, 2018

BEFORE **MARY ANN BOGAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 29, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

February 5, 2018
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: 2/8/18

Date Mailed to Parties: 2/8/18

MAB/cb

CARLUCCIO, LEONE, DIMON, DOYLE & SACKS, L.L.C.

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Of Counsel
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Howard Butensky
Melanie Szuba Appleby
Gary Ahladianakis©±

In Memoriam

Richard K. Sacks
Daniel J. Carluccio

©Also admitted in NY
† Also admitted in MA
± Also admitted in DC
□ Also admitted in PA
¤*Rule* 1:40 qualified Mediator
⊕Member of NAELA, National Academy of Elder Law Attorneys
ΔCertified Elder Law Attorney
#Member of NJAPM, New Jersey Association of Professional Mediators
ØMember, American Arbitration Association

January 31, 2018



BY 609-689-4100 and regular mail
Honorable Mary Ann Bogan, J.O.A.L.
Office of Administrative Law
Quakerbridge Plaza, Building 9
PO Box 049
Trenton, New Jersey 08625

Re: E.C. on behalf of A.C. v. Toms River Regional Schools Board of Education
OAL DOCKET NO. EDU-14610-2016S
NJ DEPT. OF EDUCATION AGENCY DOCKET NO. 215-8/16
Our File No. 5876-070

Dear Judge Bogan:

Kindly recall that this firm represents the Toms River Regional Schools Board of Education ("TRRSBOE") in regard to this matter.

Enclosed please find the TRRSBOE's certified resolution from November 21, 2017 Regular Session Meeting approving the settlement of this matter as discussed in executive session on October 18, 2017. Please note that the student was referenced by his Student ID Number, #57459, so as to prevent against the unwarranted and inappropriate disclosure of any personal identifying information.

By copy of this correspondence, I am serving same upon Petitioner's counsel. If you have any questions or concerns, please do not hesitate to contact my office.

Respectfully submitted,

PETER M. DRAPER

PMD/nn
Enclosure
Cc: Francis J. Campbell, Esq. (via regular mail & email w/enclosure)

TOMS RIVER REGIONAL SCHOOLS

WENDY SAXTON

Board Secretary/Director of Accounting

1144 Hooper Avenue, Toms River, NJ 08753
(732) 505-5611 • Fax: (732) 914-1607
E-mail: wsaxton@trschools.com

The following is a true excerpt taken from the minutes of a Regular Session Meeting of the Board of Education of the Toms River Regional Schools held on November 21, 2017:

A motion was made by Mrs. Bell, seconded by Mrs. Esparza and carried that the Approval of Executive Session Minutes from October 18, 2017 (attached) be approved:

Ms. Appleby reviewed with the Board the Legal/Litigation-Residency Matter #57459. In this case the parents are separated with one parent domicile in Toms River. The State Commissioner of Education has a new ruling/law where with one legal guardian of the student living in Toms River; it is permissible for the student to attend our schools. There is no basis to seek recourse against the parents, even if the student remains only with that legal guardian in Toms River one day per week. Any claims for tuition from parents are dismissed in this case.

On roll call the following vote:

Ayes: Bell, Corby, Esparza, Leonard, Nardini, Onofrietti, Raimann, Torrone, Giovine
Noes: None
Abstained: None
Absent: None

Certification

I, Wendy L. Saxton, Board Secretary to the Toms River Regional Schools, hereby certify the foregoing is a true excerpt taken from the minutes of the Board of Education of the Toms River Regional Schools held on November 21, 2017.

Wendy L. Saxton

Wendy L. Saxton, Board Secretary

RECEIVED
2018 FEB -2 P 4:04
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

FILED

2018 JAN 17 A 10:44

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

CARLUCCIO, LEONE, DIMON, DOYLE & SACKS, LLC
Peter M. Draper, Esq. Attorney ID No. 012112012
9 Robbins Street
Toms River, New Jersey 08753
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Fax: 732-797-1690
Attorneys for Respondent, Toms River Regional Schools Board of Education
Our File No. 5876-070

E.C., o/b/o minor child, A.C., Petitioner, v. TOMS RIVER REGIONAL SCHOOLS BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DOCKET NO. EDU-14610-2016S AGENCY DOCKET NO. 215-8/16 Civil Action **STIPULATION OF DISMISSAL WITH PREJUDICE**

The matter in difference in the above entitled action having been amicably adjusted by the parties, it is hereby stipulated and agreed that the same be and is hereby dismissed as to the school years of 2014-2015, 2015-2016 and 2016-2017 involving A.C., with prejudice and without costs against any party.

Dated: Jan. 5, 2018

CARLUCCIO, LEONE, DIMON, DOYLE & SACKS, LLC
Attorneys for Respondent, Toms River Regional Schools Board of Education

By: _____
PETER M. DRAPER, ESQ.

CAMPBELL and PRUCHNIK, LLC
Attorneys for Petitioner, E.C. o/b/o minor child, A.C., and Yolanda Milligan, Mother of A.C.

By: _____
FRANCIS J. CAMPBELL, ESQ.

CARLUCCIO, LEONE, DIMON, DOYLE & SACKS, LLC
Peter M. Draper, Esq. Attorney ID No. 012112012
9 Robbins Street
Toms River, New Jersey 08753
Ph: 732-797-1600, Ext. 247
Fax: 732-797-1690
Attorneys for Respondent, Toms River Regional Schools Board of Education
Our File No. 5876-070

FILED

2018 JAN 17 A 10:44

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

E.C., o/b/o minor child, A.C., Petitioner, v. TOMS RIVER REGIONAL SCHOOLS BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DOCKET NO. EDU-14610-2016S AGENCY DOCKET NO. 215-8/16 Civil Action

SETTLEMENT AGREEMENT & GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE (hereinafter "Agreement") is made by and between E.C. (hereinafter "Petitioner"), Ms. Yolanda Milligan, the mother of A.C. (hereinafter "Yolanda Milligan"), and the Toms River Regional Schools Board of Education (hereinafter "Respondent"). The signatories may be collectively referred to as "the Parties."

RECITALS

WHEREAS, the Petitioner filed a residency petition against the Respondent in the Office of Administrative Law under OAL Docket No. EDU-14610-2016S, Agency Docket No. 215-8/16 (hereinafter "Action"). The Petitioner is the father of A.C.; and

WHEREAS, the Respondent filed an answer to the Petitioner's petition denying the allegations and filing a counterclaim for tuition for the school years of 2014-2015, 2015-2016, and 2016-2017, and

WHEREAS, the Parties have agreed to settle the case which is the basis for the Action, in accordance with the terms and conditions set forth in this Agreement and without any admissions of liability as to the allegations in the Action, and to fully and finally settle all of their claims against each other, including those asserted and not asserted in the Action, and all other actions and claims, which the Parties, have, had, or may have against each other up to the date of this Agreement; and

NOW, IN CONSIDERATION of the mutual promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereto agree as follows:

1. Dismissal With Prejudice. The Parties agree to dismiss their respective claims against one another with prejudice and any and all charges, complaints, claims, claims for attorney's fees, applications and appeals relating to the Action entitled "E.C. o/b/o A.C. (a minor) v. Toms River Regional Schools Board of Education", OAL Docket No. EDU-14610-2016S, Agency Docket No. 215-8/16. The Parties acknowledge that the settlement of the Action is contingent upon forgoing the continuation of this, or any litigation of any and all pending claims between these Parties, which arise out of events which have transpired before and up to and including the date of the execution of this Agreement.

In connection with this provision, as a material term of the Agreement herein, the Parties agree to take whatever steps that shall be necessary in order to have the claims against each other in the Action dismissed with prejudice including executing and filing with the Court the Stipulation of Dismissal With Prejudice, a form of which is attached hereto as "Exhibit A."

2. Breach. Any party found in breach of this Agreement agrees to pay all reasonable expenses of the other party actually incurred (including reasonable and actual fees and disbursements of counsel) as a result of such breach.

3. Release. It is hereby understood and agreed that the Parties do hereby irrevocably and unconditionally release and forever discharge for themselves, their representatives, and assigns, each party and any related entities, and any and all of their predecessors, successors, assigns, agents, employees, members, and representatives and each of their employees, attorneys, agents, and all persons acting by, though, under or in concert with them, and all of their executors, administrators, successors, assigns, agents, and representatives, of and from all manner of actions, causes of action, and suits, including, but not limited to, any claims for medical expenses, claims for attorney's fees, interest, expenses and costs, which the Partics ever had, now have, or assert, or may assert, for, upon or by reason of as to all matters, claims and controversies which were asserted or at issue or could have been asserted against each other in the Action.

4. No Additional Claims. The Parties do hereby covenant and promise that they will not hereafter file or cause to be filed on behalf of minor child A.C. or the Respondent, respectively, any charge, complaint, legal or administrative action of any nature before any court or administrative agency to assert any claim against each other arising out of the claims asserted in this Action, except as may be necessary to enforce this agreement.

5. No Admissions. This Agreement does not constitute an admission by the Respondent of any wrongful action or violation of any Federal or State statute, rule, regulation, policy, procedure, or common law rights, or of any other possible or claimed violation of law or rights. The Respondent specifically denies any wrongful action or conduct.

6. No Assignment. Petitioner and Yolanda Milligan represent that they have not assigned to any third party any claim that they have, may have, or believe they may have against the Respondent.

7. Non-Disparagement. In further consideration of the above, the Parties agree and promise that they shall not, in any manner whatsoever, make any disparaging remarks or comments whatsoever about each other and/or any of their current or former employees, officers, and/or directors, and/or board members, and/or their work, services, or otherwise take any action that would adversely affect their personal or professional reputations.

8. Confidentiality. This Agreement, all of the terms and information contained herein, all of the negotiations leading to it, all of the communications generated pursuant to it, and any and all communications either written, oral, or electronic, concerning the subject matter of this Action or related to the facts and circumstances of the Action, whether made during the Action or prior to the filing of the Action, shall be kept strictly confidential by Petitioner and Respondent, and shall not be disclosed to any person, corporation or other entity not a party to this Agreement, except as follows:

A. As permissible or allowable under Federal or State law;

B. In response to a judicial Order (including a subpoena) compelling disclosure, or upon mutual agreement of the Parties hereto;

C. In response to a valid Open Public Records Act request served upon the Toms River Regional Schools Board of Education;

D. To parent, subsidiary, affiliate, associate, or parent companies of the Parties and their counsel who shall be bound by the terms and conditions hereof;

E. To insurers of any party, who shall be bound by the terms and conditions hereof;

F. To auditors of or accountants or counsel to any party upon their request, who shall be bound by the terms and conditions hereof; and

G. As to Petitioner, to members of his immediate family, who shall be first advised of and be bound by the confidentiality provision of this Agreement.

The Parties further agree that the confidentiality of this Agreement and confidentiality of any and all communications related to the subject Action and the released claims constitutes good and valuable consideration for the Agreement. The Parties shall cooperate to protect the confidentiality of this Agreement and the confidentiality of any and all communications related to the Action and the released claims. Petitioner acknowledge and agree that they shall not in any way disclose or disseminate the terms and conditions of this Agreement on any social media platforms or applications, including but not limited to, Facebook, MySpace, YouTube, Twitter, Instagram, and/or SnapChat. The Parties understand and agree that this is an important and material part of the Agreement. If asked about the Action, the Parties shall respond that it has been either "concluded," or "settled" or "resolved to the satisfaction of all Parties." The Parties shall not provide any further information.

9. Binding on the Parties. This Agreement shall be binding upon and inure to the benefit of the Parties only, including Yolanda Milligan, and any of their respective heirs, legal or personal representatives, employees, officers, directors, successors, and assigns.

10. Binding Law. This Agreement shall be construed in accordance with the laws of the State of New Jersey.

11. No Third-Party Beneficiaries. This Agreement is intended to confer rights and benefits only on the Parties and to Yolanda Milligan. Nothing in this Agreement is intended to give rights and benefits to anyone who is not named as Party to this Agreement.

12. Entire Agreement. The terms and conditions contained herein constitute the entire understanding and Agreement between the Petitioner and Respondent with respect to the settlement of the Action. The Parties acknowledge and agree that in executing this document, they have not relied upon any statement, promise or representation, oral or written, not set forth herein. This Agreement contains the entire Agreement between the Parties as to settlement of their Actions. No amendment, modification, or addendum to this Agreement shall be effective unless in writing and dated subsequent to the date hereof and executed by the individuals and the duly authorized officers of the respective Parties. The requirement for such a writing shall apply to any waivers of the requirement of a written modification pursuant to this Paragraph and this shall be deemed an essential term of the Agreement.

13. Severability. Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid, or unenforceable, the legality, validity and enforceability or the remaining parts, terms or provisions shall not be affected thereby and said illegal, unenforceable, or invalid part, term, or provisions shall be deemed not to be part of this agreement.

14. Notices. All notices and other communications required or permitted to be given under this Agreement shall be in writing and delivery shall be deemed to have been made (i) three (3) business days following the date when such notice is deposited in first-class U.S. Mail, postage prepaid and simultaneously sent by Certified U.S. Mail, postage prepaid, return

receipt requested; or (ii) the business day following the date when such notice is deposited with any nationally-recognized overnight courier service to the Party and his/her/its counsel.

15. Inadmissibility of Agreement. This Agreement has been entered into in reliance upon the provisions of Rule 408 of the New Jersey Rules of Evidence, which precludes the introduction of evidence regarding settlement negotiations in any legal proceeding. Evidence relating to the negotiation, terms, or facts of this Agreement shall not be admissible by Petitioner or Respondent in any legal proceeding except to enforce the terms of this Agreement.

16. Authorization to Execute. The signatories of this Agreement represent that they are fully authorized to execute this Agreement and that all formalities attendant to the execution of this Agreement have been satisfied.

17. Voluntary Execution. The signatories of this Agreement acknowledge that they have carefully read and fully understand all of the terms of this Agreement, including the general release contained herein, and that the Parties have had a reasonable amount of time to consider the terms of this Agreement, and they enter into this Agreement knowingly and voluntarily and with the advice of counsel.

18. Captions. Any captions to paragraphs or subparagraphs of this Agreement are provided solely for the convenience of the Parties. They do not constitute and shall not be construed to constitute part of this Agreement and shall not be used as an aid in the interpretation of the Agreement or the contracting intent of the Petitioner and Respondent.

19. Counterparts. The Parties may execute this Agreement in separate counterparts, each of which as so executed and delivered shall be deemed an original, but all of which taken together shall constitute one and the same Agreement.

20. Strict Adherence. The failure of the Parties to insist upon strict adherence to any of the terms of this Agreement on any occasion shall not be considered a waiver thereof or deprive that party of the right thereafter to insist upon strict adherence to that term or another term of this Agreement.

21. No Waiver of Breach. The waiver of any provision of this Agreement shall not be construed to operate as a waiver of any subsequent breach.

22. Further Documents. The Parties agree to execute and deliver any and all further documents which may be required to effectuate this Agreement.

23. Effective Date. This Agreement will become effective on the date on which the Parties have executed this Agreement, and delivered a copy of the same to counsel for the adverse party.

DATE: 12/11/17

ELVING COURNIER, Petitioner

YOLANDA MILLIGAN, mother of A.C.

DATE:

SUPERINTENDENT DAVID HEALY, for
TOMS RIVER REGIONAL SCHOOLS
BOARD OF EDUCATION, Respondent

90-18

S.J., ON BEHALF OF MINOR CHILD, S.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Pro se petitioner appealed the determination of the respondent Board that S.W. did not reside within the South Orange-Maplewood School District during the 2015-2016 school year. The Board alleged that S.W. was not residing at the address provided by the petitioner, and sought payment of tuition for the period of S.W.'s ineligible attendance. Petitioner contended that S.W. resided with her at an apartment on Tiffany Place in Maplewood which she rented from the owner's daughter. The matter was transmitted to the Office of Administrative Law as a contested case.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(b)(2), petitioner has the burden of proof in a determination of residency; the residency investigation in this case was initially triggered when a District official received a telephone call from the owner of the house where petitioner claimed to rent an apartment, stating that no one by petitioner's name lived at her property; multiple items of mail sent by the District to petitioner were returned with a notation that petitioner did not reside at the property address she had provided; petitioner claimed that she and her family leave the Maplewood address each morning between 5:00 and 5:30 to attend to petitioner's elderly grandfather in Irvington; however, multiple attempts by residency investigators to confirm this claim were unsuccessful; and based on the evidence submitted by the petitioner in support of her residency claim, S.W. was not domiciled in the District while attending school there during the 2015-2016 school year. The ALJ concluded that S.W. was not entitled to receive a free public education in the South Orange-Maplewood School District; accordingly, the respondent Board is entitled to reimbursement for tuition costs in the amount of $13,041 for the 2015-2016 school year.

Upon review of the record in this matter, the Commissioner concurred with the ALJ's findings and conclusion. The Initial Decision was adopted as the final decision in this matter, and the petitioner was ordered to reimburse the Board for tuition in the amount of $13,041; the petition was dismissed.

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

March 23, 2018

OAL DKT. NO. EDU 00020-16
AGENCY DKT. NO. 365-12/15

S.J., ON BEHALF OF MINOR CHILD, S.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND 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.[1] The parties did not file exceptions.

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain her burden of establishing that she was domiciled within the South Orange and Maplewood School District for the 2015-2016 school year. The Commissioner further concurs with the ALJ's conclusion that the minor child was, therefore, not entitled to a free public education in the District's schools during that time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in the South Orange and Maplewood School District. Therefore, the Board is entitled to tuition reimbursement in the amount of $13,041.00 for the entire 2015-2016 school year, during which time petitioner's minor child was ineligible to attend.

[1] The Commissioner was not provided with transcripts of the July 8, 2016 or November 27, 2017 hearings at the OAL.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $13,041.00 for tuition costs incurred during the time period in which S.W. was ineligible to attend school in the South Orange and Maplewood School District. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/23/18

Date of Mailing: 3/23/18

[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 00020-16
AGENCY DKT. NO. 365-12/15

S.J., ON BEHALF OF MINOR CHILD, S.W.,
Petitioner,
v.
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,
Respondent

S.J., petitioner, pro se

John P. Allen, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: December 26, 2017 Decided: February 7, 2018

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner S.J., the mother of minor child S.W., appeals the determination of the Board of Education of the South Orange and Maplewood School District (the "Board") that S.W. did not reside within the South Orange-Maplewood school district in the 2015–2016 school year and that tuition reimbursement is required. The Board alleges that the

minor child S.W. was not residing at the address provided by the petitioner and seeks repayment of tuition. At issue is whether S.W. was entitled to be enrolled in the district for purposes of receiving a thorough and efficient public education free of charge for the 2015–2016 school year, pursuant to N.J.S.A. 18A:38-1.

On November 17, 2015, the Board notified S.J. that the child was ineligible to continue to attend school within the district. The petitioner filed a notice of appeal on or about December 7, 2015, and the Board filed an answer on December 15, 2015. On December 23, 2015, 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 first date of hearing was July 8, 2016, at which time counsel for the Board indicated that the individual petitioner claimed was her landlord would be interviewed, and if needed subpoenaed, and that the record should remain open until that was accomplished and a determination made as to whether any additional hearing days needed to be scheduled.

On December 13, 2016, the undersigned corresponded with counsel who had appeared for the Board on the initial hearing date, inquiring as to the status of this matter, and learned that new counsel was representing the Board. Based upon the availability of the parties and at the request of the district, the matter was scheduled for a second date of hearing on November 27, 2017. On that date there was no appearance on the part of petitioner. The District represented that the landlord had not been interviewed, and would be not subpoenaed, and declined to call any additional witnesses. Following receipt of copies of all exhibits that had been previously accepted into evidence on July 8, 2016, the record was closed.

Testimony on July 8, 2016

S.J.

S.J. testified that she brought all of her documentation and utility bills to the Board hearing on November 12, 2015, and thereafter received a letter indicating that there was "unclear evidence" as to whether she resided in the district. She learned that an

investigator had gone to her home and no one was there. She was asked to provide a copy of her lease reflecting the landlord's signature, and indicates that the Board also asked for the landlord's bank statements to show the deposits of rent, which she testified the landlord would not agree to provide. The landlord did agree to give her copies of her rent receipts, but not the bank statements.

S.J. testified that she works two jobs and her husband works overnight. Her grandparents are very sick and they reside at the Irvington/Maplewood border, and she takes care of them. She only has one vehicle so she has to stay over at their home at times, and "is at both places." She also testified that on August 1, 2016, she would be moving to P. Avenue in Maplewood and that her grandparents would be moving in with her. Her husband coaches Pop Warner in Maplewood, and she has lived there her whole life. She believes she is being singled out by the District.

S.W. began attending the District's school in mid to late September 2015. Prior to that S.J. resided in Irvington on F. Terrace but had problems with the landlord, and so moved to T. Street in Maplewood, and the landlord's daughter agreed to rent them her mother's house, and so they moved there. She testified that she can walk to her grandparents' house in Irvington.

S.J. testified that her daughter had an individualized education program in Irvington since fourth grade and has attention deficit hyperactivity disorder. She indicated that the Irvington child study team never kept in touch with her and she had to reach out to them, but that now in Maplewood her daughter has been doing better.

S.J. stated that at the hearing in district, she was told that mail sent to the Maplewood address she provided had been returned. She indicates, however, that she received all school mail at that address.

S.J. agreed that the medical-history form she completed on September 9, 2015, for S.W. lists her husband as a contact with an R. Avenue, Irvington, address. (R-10.) The student emergency-information form completed on the same date lists her husband at the Maplewood address. (R-11.) The registration checklist (R-29) indicates an address

at S. Place, South Orange, for S.W.'s father, who S.J. testified was living with his mother for a time at that address.

Adam Roselli

Adam Roselli is a licensed private investigator and has conducted residency and truancy investigations for the District since August 2014. Prior to becoming a private investigator, he was a police office for twenty-eight years. He commenced handling the investigation in this matter on October 2, 2015, when asked to verify the Maplewood residency information provided. On that date, he rang all three doorbells and the first-floor resident, Ms. M.J., emerged and advised him that no one lived at that address by the name of S.J. or S.W. She also handed him mail that had arrived and said that the addressees did not live there. There were two letters in the mail he was given that had been sent from the District to petitioner that the first-floor resident had written on, indicating "Does not leave [sic] here, return to sender." (R-18.)

Mr. Roselli testified that he also returned to the property on October 7, 2015, at 7:50 a.m. (R-24) and rang all three doorbells again and knocked. A man emerged from the address who did not speak English. Mr. Roselli returned again on October 12, 2015, at 7:30 a.m. and once again there was no answer on any of the three floors, and he left an orange card in the mailbox with his contact information. Finally, he returned to the property on October 14, 2015, at 7:05 a.m. with the same result. Investigator Roselli testified that he spoke to S.W.'s stepfather on the telephone, who told him that petitioner, her husband, S.W., and S.J.'s other children, ages one, two, and fourteen, all leave the house between 5:00 and 5:30 a.m., and that S.J. leaves her children with their grandmother at R. Avenue while she is at work. He also indicated that petitioner takes care of her grandfather different hours of the day.

Also involved in this investigation was Investigator Morrison, who completed a residency-check form on November 23, 2015 (R-24) indicating that a residency check was conducted at 5:00 a.m. based on the information received from the stepfather and that there was no answer at any of the residences. Investigator Roselli returned again to the property at 7:10 a.m. on December 11, 2015, and there was no activity at the house.

He returned again on December 18, 2015, at 7:15 a.m. and there was no activity in or out of the house. On that occasion, he waited until 8:00 a.m.

Additional residency checks were conducted by Investigator Martin, who works with the witness, and noted that on February 25, 2016, at 6:50 a.m. the claimed residence at T. Place in Maplewood was surveilled and no one was there. Investigator Martin called and awakened S.J., who said she was at her grandfather's house at R. Terrace, Maplewood; however, at 7:05 a.m. there was no answer at that location and a subsequent call to S.J. went to voice mail. He also returned to the Maplewood address on March 3, 2016, at 6:00 a.m. and the house was dark, and there was no answer at the door or on S.J.'s telephone, and his call went to voice mail. Similarly, on March 8, 2016, there was no answer and the entire house was dark, and once again a voice-mail message was left.

Tiffani Barnes

Tiffani Barnes has been the registrar at the South Orange-Maplewood school district for fifteen years. Her responsibilities include enrolling new and returning students, maintaining a database, and handling residency issues. Prior to that she was an assistant to the superintendent. As the registrar, she has dealt with this case since soon after the start of the 2015 school year. Included in her duties is preparation of an activity list (R-17), which is prepared for the Board when there are residency issues. In this case, at the end of September she received a phone call from a Ms. M.J., who indicated that she owns the property at T. Place, Maplewood, and is receiving mail from the District for people who do not live there. An investigator went to the property and Ms. M.J. gave him the mail that the District had sent to petitioner, who Ms. M.J. reiterated did not live at the property. (R-18.) An investigator was sent to the house on multiple occasions to check, which is their standard operating procedure. She testified that if three residency checks do not confirm residency it may go before the Board or they may try one or more times to verify the address provided. She stated that she called the tax office to verify if the apartment is registered with the town and was advised that it was not registered because it is indicated as family-occupied. The town informed her that when an apartment is occupied by family it does not need to be registered because there is no intent to rent it. The tax records confirmed that the property is owned by Ms. M.J. Petitioner provided a

lease purportedly signed by R.J., who was the twenty-three-year-old daughter of the homeowner; however, a check with the building department revealed that the daughter is not the owner of the property, rather her mother is.

Ms. Barnes provided a residency-check form (R-24) to Investigator Morrison and he checked the house at 5:00 a.m. on November 23, 2015, and nobody was there. He also had S.J.'s phone number and called it, but received no answer. She indicated that they never did receive an accurate lease for any property. The Board hearing was scheduled for October because there was no concrete evidence of petitioner's residency. It was later moved to November. The family was notified regarding the hearing (R-19) and again regarding the new hearing date (R-20). Petitioner had indicated at the residency hearing (R-22) that she deposited cash or money orders directly into the landlord's bank account, and as a result the Board asked for statements to confirm those deposits, which were never provided. Thereafter a removal letter was sent (R-21), as the Board had never received the information it asked petitioner to provide. Petitioner was also advised that S.W. could remain in school pending the appeal. (R-23.)

Ms. Barnes testified that often residency investigations are triggered by attendance issues or something a student might say. The District uses the PowerSchool Program, and S.W.'s attendance record raised issues. (R-25.) Those records indicate that S.W. had fifty-seven unexcused late arrivals—nearly one-third of the 180-day school year—as well as ten unverified absences, according to the PowerSchool printout dated July 5, 2016.

FINDINGS OF FACT

Based upon the credible testimonial and documentary evidence I **FIND** the following as **FACTS** in this matter:

1. The Board had good cause to question the residency of S.W. At the end of September 2015, the District registrar received a telephone call from Ms. M.J., the owner of the property where S.J. claimed to reside, T. Place, Maplewood, New Jersey. Ms. M.J. informed the registrar that petitioner did not live at that address.

2. S.J. was provided notice of the Board's challenge to residency in November 2015.

3. Petitioner initially provided what purported to be a lease between herself and R.J., daughter of Ms. M.J., dated August 26, 2015. Subsequent to the Board hearing on November 12, 2015, petitioner supplied a different lease purporting to be between herself and Ms. M.J., dated November 17, 2015. Petitioner stated at the Board hearing that she lives on the second floor at that address, and that she leased the apartment from R.J.

4. Surveillance conducted over several days at T. Place, Maplewood, New Jersey, revealed that neither S.J. nor S.W. resided there.

5. Multiple items of correspondence mailed to petitioner and delivered to the Maplewood address were returned with the notification, "Does not leave [sic] here, return to sender."

6. Residency investigators for the District attempted to make contact with petitioner at the address she provided but were unable to do so. No proof of residency at the address in question was provided.

7. Petitioner provided a Comcast cable bill for the period of June 26, 2016, through July 25, 2016, which listed numerous reactivation charges. She also provided a vehicle registration valid through March 2017; a Motor Vehicle Commission restoration-of-license form dated March 6, 2016; and a New Jersey Turnpike toll and fee payment request for an unpaid toll from March 22, 2016.

LEGAL ANALYSIS AND CONCLUSIONS

The issue in this appeal is whether S.W. had been a domiciled student in the South Orange and Maplewood school district during the 2015–2016 school year.

Public schools are required to provide a free education to individuals between the ages of five and twenty years in certain circumstances, including individuals who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is the domicile of the parent, custodian, or guardian. P.B.K. ex rel. minor child E.Y. v. Bd. of Educ. of Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001). Thus, a child would routinely attend school in the district where his or her parents live. The petitioner has the burden of proof in a determination of residency eligibility. N.J.S.A. 18A:38-1(b)(2).

From the evidence submitted, it is clear that S.W. has not been domiciled in the district while attending school there. The District registrar received a telephone call from the owner of the property that petitioner claimed to reside at, indicating that no one by that name lived at her property. Multiple items of mail were returned to the District with a notation thereon that petitioner did not reside at the property address she provided.

The petitioner had indicated at the Board hearing on November 12, 2015, that she and her family leave the Maplewood address each morning between 5:00 and 5:30 a.m. and go to petitioner's grandfather's house in Irvington to care for him. However, multiple attempts by residency investigators to locate anyone at the Maplewood property, even at 5:00 in the morning, were unsuccessful. Conflicting leases were submitted purporting to show that petitioner was leasing the Maplewood property; however, no proof of payment of rent was provided.

N.J.A.C. 6A:22-3.1(a)(1) provides as follows:

> A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district.

I **FIND** that S.W. was not domiciled in the district during the 2015–2016 school year. Accordingly, I **CONCLUDE** that S.W. was not entitled to attend school in the district

and receive a free public education there during that time frame pursuant to N.J.S.A. 18A:38-1(a).

A school board is entitled to recover tuition from a parent or guardian of a child found ineligible to attend a school in its district. N.J.S.A. 18A:38-1(b)(2). S.W. was not entitled to a free public education in the South Orange-Maplewood district based upon the above. Tuition for school year 2015–2016 was $13,041. Accordingly, respondent is entitled to reimbursement from S.J. for the cost of providing an education to S.W. in the sum of $13,041 for the 2015–2016 school year.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the petition of petitioner, S.J., be and is hereby **DISMISSED WITH PREJUDICE**. It is further **ORDERED** that S.J. reimburse respondent the total sum of $13,041 for tuition costs associated with the attendance of S.W. in the South Orange and Maplewood school district for the entire 2015–2016 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.

February 7, 2018
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 2-7-18

Date Mailed to Parties: February 12, 2018
dr

LISA JAMES-BEAVERS
ACTING DIRECTOR AND CHIEF
ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Petitioner:

S.J.

For Respondent:

Adam Roselli

Tiffani Barnes

Exhibits

For Petitioner:

P-1 Copy of Vehicle Registration and Insurance Card

P-2 Comcast bill

P-3 MVC Restoration Notice

P-4 NJ Turnpike Authority First Notice of Enforcement Action dated April 1, 2016

P-5 Residential Lease

For Respondent:

R-1 Not in Evidence

R-2 Not in Evidence

R-3 Registration Form, September 9, 2015

R-4 Home Language Survey, September 9, 2015

R-5 Not in Evidence

R-6 Statement of Domicile

R-7 Official Records Request Form, September 9, 2015

R-8 Not in Evidence

R-9 Not in Evidence

R-10 Medical History Form, September 9, 2015

R-11 Student Emergency Information, September 9, 2015

R-12 Not in Evidence

R-13 Letter from Dr. John J. Ramos to Ms. J.

R-14 Lease, August 26, 2015

R-15 Not in Evidence

R-16 Not in Evidence

R-17 Activity List

R-18 Copies of returned mail

R-19 Residency Hearing Notice, October 23, 2015

R-20 Residency Hearing Notice, November 2, 2015

R-21 Residency Hearing Determination, November 17, 2015

R-22 Notes from Residency Hearing

R-23 Letter to Ms. J. from Dr. Ramos, December 8, 2015

R-24 Residency Verifications Performed by Officers

R-25 Attendance List View, July 5, 2016

R-26 Not in Evidence

R-27 Demographics/Contacts, T.J., July 5, 2016

R-28 Demographics/Contacts, T.J., December 2, 2014

R-29 Registration Materials, T.J., December 2014

R-30 Not in Evidence

R-31 2015–16 Tuition Rates

91-18

M.L. AND T.L., on behalf of minor child, J.L.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioners filed the within appeal in August 2017, seeking to have the respondent Board provide bus transportation to the Yavneh Academy – a private school – for their son, J.L., who was four years old at the time. J.L. began kindergarten at Yavneh Academy during the 2017-2018 school year, in advance of his fifth birthday on October 17, 2017. Petitioners alleged that the respondent Board's denial of bus transportation for J.L. was based on a discriminatory policy. The Board asserted that J.L. did not meet the eligibility requirements to qualify for bus transportation; specifically, J.L. did not meet the age requirement for starting kindergarten in the Teaneck School District. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; the eligibility requirements for a non-public school student to receive transportation from the public school district of residence are set forth in *N.J.A.C.* 6A:27-2.2(d), and include the requirement that non-public school students must meet the same entrance age requirement as public school students in their resident district board of education, in accordance with *N.J.S.A.* 18A:38-5 and *N.J.S.A.* 18A:44-2, in order to receive transportation services; further, Teaneck Board Policy 5112 states that "[o]nly those pupils who will be five years of age on or before October 1 of the year they will enter school will be permitted to enroll in the Teaneck Public Schools Kindergarten," and the only exception to this rule is when a student transfers from a public or private kindergarten in which they have been registered for at least three months during the course of the school year; in the instant case, J.L. did not turn five until October 17, 2017, and thus did not meet the District's entrance age requirement; J.L. is not currently eligible to enroll in the District's kindergarten program, and is therefore not eligible for transportation in accordance with *N.J.A.C.* 6A:27-2.2. The ALJ concluded that the District is not required to provide a non-public school student with transportation unless that student first meets the District's entrance age requirements; further, petitioners' allegations of discrimination based on their faith are without merit. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision as the final decision in this matter, for the reasons expressed therein. The petition was dismissed.

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

March 23, 2018

OAL DKT. NO. EDU 13260-17
AGENCY DKT. NO. 193-8/17

M.L. AND T.L., on behalf of minor child, J.L.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge – for the reasons set forth in the Initial Decision – that the Teaneck Board of Education is 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.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/23/18
Date of Mailing: 3/23/18

* 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 13260-17
AGENCY DKT. NO. 193-8/17

M.L. AND T.L. ON BEHALF OF J.L.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,
Respondents.

Jason F. Lowe, Esq., for petitioners (Law Offices of Jason Lowe, attorneys)

Isabel Machado, Esq., for respondent (Machado Law Group, attorneys)

Record Closed: January 9, 2018 Decided: February 9, 2018

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE

On August 30, 2017, M.L. and T.L. on behalf of J.L. (petitioners/parents) filed for due process seeking transportation (busing) as a related service for the school year 2017-2018. Petitioners assert that their son, J.L., who was four years old at the time,

requires transportation to the Yavneh Academy, a non-public school in New Jersey. J.L. will be attending kindergarten in the present school year. Petitioners also alleged that the denial of such transportation is based on a discriminatory policy.

PROCEDURAL HISTORY

On June 16, 2017, petitioners contacted a member of the Teaneck Board of Education (Board) and requested transportation. On June 19, 2017, Superintendent Vincent McHale informed the petitioners that J.L. did not meet the eligibility requirements to qualify for such transportation. Petitioners' legal counsel requested a redetermination of the decision because the child is attending a private kindergarten program in the 2017-2018 school year and thus alleged that the student is entitled to busing. The exact basis for the respondent's decision is that the District policy provides for transportation to kindergarten students only if they meet the age requirements to participate in the District's program.

The Department of Education, Bureau of Controversies and Disputes transmitted the matter to the Office of Administrative Law (OAL), where it was filed on September 11, 2017.

After review of the submissions filed by the parties, oral argument was held via telephone on January 9, 2018, at which time the record closed.

FACTUAL DISCUSSION

Based upon a review of the pleadings, and the parties' written submissions and attached exhibits, and drawing all reasonable inferences in favor of each respective non-moving party, for purposes of summary decision only, I **FIND** as **FACT** the following:

J.L., at the time, a four-year-old student, who began the 2017-2018 school year attending kindergarten in a private school at the Yavneh Academy. The student/child did not turn five years old until October 17, 2017.

Based on this attendance, the parents applied to the Board for the District to provide transportation for J.L. The Superintendent denied the parents' request. On July 3, 2017, the attorney for the petitioners submitted a letter for purposes of clarification of their position, factually and legally. This letter was responded to on July 5, 2017, by the respondent's attorney again denying the petitioners' request. On July 12, 2017, the attorney representing the petitioners wrote a letter to the Board appealing the Superintendent's decision. On July 20, 2017, the petitioners were informed that the Board would consider the appeal in closed session at the August 23, 2017, Board meeting. At this closed session, the Board declined to overturn the decision of Superintendent McHale.

LEGAL ANALYSIS AND CONCLUSION

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." N.J.A.C. 1:1-12.5(b). The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 540 (1995) (citation omitted):

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. 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."

By way of further guidance,

> An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom

> favoring the non-moving party, would require submission of the issues to the trier of fact.
>
> [R. 4:46-2.]

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. While it is true that a judge is not to "weigh evidence and determine the truth of the matter," Brill, 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. "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.'" Id. at 541.

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 Cnty. Welfare Bd. v. Stanley, 214 N.J. Super. 615 (App. Div. 1987). Failure of the opponent to make such a showing entitles the moving party to summary judgment. Brill, 142 N.J. at 529. The 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." Id. at 539 (citation omitted).

In this case, there is no genuine issue of material fact. There is no dispute as to the age of the child, where he is going to school as of fall 2017, what type of school the placement school is, and the type of services requested by the parents. As such, this matter is ripe for a summary decision.

As set forth in N.J.A.C. 6A:27-2.2(d), the eligibility requirements for a non-public school student to receive transportation from the District are as follows: a student shall only be eligible for transportation if they are "enrolled in grades kindergarten through grade 12." This requirement is further clarified as providing "[n]on-public school students shall meet the entrance age requirement for the public-school students of their resident district board of education in accordance with N.J.S.A. 18A:38-5 and N.J.S.A. 18A:44-2" in order to receive transportation services. N.J.A.C. 6A:27-2.2(d).

"[N]o child under the age of five years shall be admitted to any public school, except such as may be provided pursuant to law for children of his age." N.J.S.A. 18A:38-5. This statute goes on to state that "[n]o board of education shall be required to accept by transfer from public or private school any pupil who was not eligible by reason of age for admission on October 1 of that school year." Ibid.

Based on the complete reading of the applicable regulations and statutes, I **FIND** that the District is not required to provide a non-public school student with transportation, unless that student first meets the District's entrance age requirements. It is conceded by the petitioners that J.L. did not turn five until October 17, 2017, and thus is not eligible for the District's kindergarten program for the 2017-2018 school year. The regulations do not dictate that the transportation services provided to non-public school students must be equivalent to those provided to public school students. The guidance provided in the New Jersey Department of Education Nonpublic Transportation Procedures does not indicate that the eligibility requirements for non-public school students must mirror the eligibility requirements for public school students.

Furthermore, Teaneck Board Policy 5112 states that "[o]nly those pupils who will be five years of age on or before October 1 of the year they will enter school will be permitted to enroll in the Teaneck Public Schools Kindergarten." The only exception to this rule is when a student transfers from a public or private kindergarten in which they have been registered for at least three months during the course of the school year. In this case, J.L. did not turn five until October 17, 2017, and thus does not meet the District's entrance age requirement, is not eligible to enroll in the District's kindergarten

program at this time, and thus is not eligible for transportation in accordance with N.J.A.C. 6A:27-2.2.

Petitioners argue that Teaneck Board Policy 8600 required the District to provide transportation to J.L. Teaneck Board Policy states in part:

> The Board will also transport resident children enrolled in kindergarten through grade twelve who attend a non-public school in the State of New Jersey, in accordance with New Jersey statute and code, not more than twenty miles from their residence, but not a lesser distance from their residence than that required for the transportation of pupils enrolled in the schools of this district . . . .

The clear interpretation of the above policy must be read in accordance with other Board policies and New Jersey statutes and regulations. New Jersey code holds that a non-public school shall meet the District's entrance age requirements prior to being provided with transportation services from a public entity. The Board Policy, as set forth herein above, requires the student to turn five prior to October 1 in order to enroll in the District's kindergarten program. That has not occurred in this case

Discriminatory Intent

Petitioners allege that the Teaneck Board of Education's decision was made based on discriminatory intent. As argued by the petitioners, they state that a "policy which provides service for public school students and not for non-public school students **seems** to be a policy that has a discriminatory purpose." Petitioners go on to argue that the policy has a discriminatory purpose for a protected class of people, "namely this **may** be really a disguise for discrimination based on religion." Two issues become apparent here. One, the leap from providing services to public students and then not providing same to non-public students to the allegation of religious discrimination which is not fully explained by the petitioners. Two, the allegation of religious discrimination is based on speculation through the use of such words "seems" and "may" and not based on any concrete facts. In fact, petitioners' counsel in the petition calls the policy as "possibly discriminatory." The policies followed by the Teaneck Board (N.J.A.C. 6A:27-

2.1 through N.J.A.C. 6A:27-2.6) have certain regulations which only apply to the transportation of all non-public school students.

In the respondent's reply submission, they point out that the New Jersey Department of Education Nonpublic Transportation Procedures suggests that so long as a District provides non-public students with access to busing in compliance with the minimum requirements of N.J.A.C. 6A:27-2.2, a District is free to decide for itself whether or not to provide non-public school students with additional courtesy busing. Respondent, in addressing the allegations of discriminatory intent, stated that the limitation on the busing of non-public students was due to recent budgetary constraints and not on any discriminatory intent. There is much support for this position that the policy applies to all non-public school students, both sectarian and secular. N.J.A.C. 6A:27-2.2 mandates that transportation for non-public school students who meet certain eligibility requirements. The District points out that in order to be eligible for mandatory transportation, the student must reside more than two miles from their non-public school; attend a non-profit, non-public school within twenty miles of their home; be enrolled in "kindergarten through grade 12" and "meet the district's entrance age requirements for the public-school students of their resident district."

Respondent counters that the petitioners are unable to provide any factual support for the position that the District's decision to deny the petitioners' request for transportation is the result of the District or the Board having any discriminatory intent toward the petitioners because of their Jewish faith. I support this position.

I further **FIND** that respondent is entitled to summary decision because petitioners have not sufficiently demonstrated a genuine issue of material fact regarding any requirement or necessity that J.L. receive transportation to the student's private school.

I, therefore, **CONCLUDE** that respondent is entitled to summary decision on the issue of whether the District has to provide transportation for J.L. to the private school placement.

ORDER

Accordingly, I hereby **ORDER** that respondent's motion for summary decision is **GRANTED** and that the due-process petition is hereby **DISMISSED**.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, 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.

2/9/18
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency:

2/9/18
LISA JAMES-BEAVERS
ACTING DIRECTOR AND CHIEF
ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: February 13, 2018

jb

92-18
OAL DKT. NO. EDU 12543-16
AGENCY DKT. NO. 193-7/16

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
D.S. and W.S., on behalf of minor children, T.S., D.S., W.S., and K.S.,	:	
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 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: 3/23/18

Date of Mailing: 3/23/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12543-16
AGENCY DKT. NO. 193-7/16

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,
Petitioner,
v.
D.S. AND W.S., ON BEHALF OF MINOR CHILDREN, T.S., D.S., W.S. AND K.S.,
RespondentS.

Danielle Wilson, Esq., for petitioner (Machado Law Group, attorneys)

D.S. and **W.S.**, respondents, pro se

Record Closed: February 8, 2018 Decided: February 9, 2018

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

This matter was transmitted to the Office of Administrative Law (OAL) on August 19, 2016, 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 was submitted on February 7, 2018, indicating the terms of agreement which are incorporated herein by reference.

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

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

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

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

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

February 9, 2018
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: February 14, 2018

Date Mailed to Parties: February 14, 2018

LISA JAMES-BEAVERS
ACTING DIRECTOR AND CHIEF
ADMINISTRATIVE LAW JUDGE

dr

DAVID M. SERLIN, ESQUIRE ID No. 020231976
Blason II, Suite 120
505 South Lenola Road
Moorestown, New Jersey 08057
(856) 222-9460
DMSerlin@AOL.com
Attorney for Respondent Burlington Township Board of Education

2018 FEB -7 P 2:21

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY Petitioner, v. D.S. and W.S., ON BEHALF OF MINOR CHILDREN, T.S., D.S., W.S. AND K.S. AND BURLINGTON TOWNSHIP BOARD OF EDUCATION Respondents.	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **AGENCY REF. NO.: 193-7/16** **OAL DOCKET NO.: EDU 12543-2016 N** **SETTLEMENT AGREEMENT**

WHEREAS, Dyane Stone and Willie Stone on August 28, 2015, owned property in the Township of Hillside known as 315 Winans Avenue, which property was in foreclosure; and

WHEREAS, on August 28, 2015, Dyane Stone enrolled her four children in the Burlington Township School District ("Burlington") where they were classified as homeless students; and

WHEREAS, prior to enrolling in Burlington the four children had been enrolled in the Hillside Township School District ("Hillside"); and

WHEREAS, on January 21, 2016, Burlington billed Hillside tuition in the amount of $24,840.78 for the four children, which amount Hillside refused to pay; and

WHEREAS, Hillside refused to pay tuition to Burlington as it maintained that the family was not homeless because of Dyane and Willie Stone's ownership of 315 Winans Avenue property; and

WHEREAS, Burlington appealed to Burlington County Interim Executive County Superintendent Todd C. Flora who determined on April 18, 2016, that Hillside was "responsible for the tuition and transportation costs incurred by the Burlington Township School District from September 2, 2015 through March 23, 2016;" and

WHEREAS, on July 14, 2016, Hillside appealed the decision of the Burlington County Interim Executive County Superintendent of Schools to the Commissioner of Education naming Dyane and Willie Stone respondents; and

WHEREAS, Dyane Stone filed an answer and Willie Stone has not entered an appearance or filed a pleading in this matter; and

WHEREAS, Hillside filed a motion to amend the petition of appeal to add Burlington as a respondent, which relief was granted, and Burlington filed its answer on February 7, 2017; and

WHEREAS, Burlington filed a motion to amend its answer to reflect that in accordance with the Burlington County Interim Executive County Superintendent's decision it is owed tuition through March 23, 2016, in the amount of $34,890.18; and

WHEREAS, Hillside and Burlington, wishing to resolve this matter amicably, have agreed that Hillside will pay Burlington tuition in the amount of $24,840.78 and Burlington will dismiss with prejudice its claim for additional

93-18
OAL DKT. NO. EDU 15131-17
AGENCY DKT. NO. 223-9/17

JOY CIOFFI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release, 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.

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: 3/23/18

Date of Mailing: 3/23/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 15131-17

AGENCY DKT. NO. 223-9/17

JOY M. CIOFFI,

Petitioner,

v.

BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,

Respondent.

Alfred F. Maurice, Esq., for petitioner (Springstead & Maurice, attorneys)

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

Record Closed: February 2, 2018 Decided: February 7, 2018

BEFORE **SUSANA E. GUERRERO**, ALJ:

On or about September 22, 2017, petitioner Joy Cioffi filed a Petition of Appeal with the Commissioner of Education seeking restoration of employment and adjustment of increment from the respondent Northern Valley Regional High School. The

Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on October 13, 2017, for hearing as a contested case. A telephone prehearing conference was held on November 20, 2017, and a hearing scheduled for February 28, 2018. Prior to the hearing, the parties reached an amicable resolution and counsel for respondent submitted the attached Settlement Agreement, along with correspondence from the Board approving the settlement.

I have reviewed the record and the terms of the consent order and I **FIND**:

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

2. The consent order 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.

2/7/18
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: February 13, 2018

Date Mailed to Parties: February 13, 2018
jb

LISA JAMES-BEAVERS
ACTING DIRECTOR AND CHIEF
ADMINISTRATIVE LAW JUDGE

Northern Valley
Regional High School District

Joanette Femia
School Business Administrator/Board Secretary

Administrative Offices • 162 Knickerbocker Road • P.O. Box 270 • Demarest, New Jersey 07627
Telephone: 201-768-2200 x12100 • Fax: 201-768-7356 • e-mail: femia@nvnet.org

RECEIVED
2018 FEB -2 P 5:02
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

January 24, 2018

Frances Febres, Esq.
Cleary Giacobbe Alfieri Jacobs, LLC
169 Ramapo Valley Road
Upper Level 105
Oakland, New Jersey 07436

Re: OAL DKT. NO. EDU15131-2017 N

Dear Ms. Febres:

At the Combined Meeting of January 22, 2018, the Northern Valley Regional High School District Board of Education approved and executed the enclosed Settlement Agreement.

Very truly yours,

Joanette Femia
Joanette Femia
School Business Administrator/
Board Secretary

JF/sp

Frances L. Febres, Esq. (ID No. 018542012)
CLEARY GIACOBBE ALFIERI JACOBS, LLC
169 Ramapo Valley Road – Upper Level Suite 105
Oakland, New Jersey 07436
Telephone: (973) 845-6700
Facsimile: (201) 644-7601
Attorneys for Respondent

RECEIVED
2018 FEB -2 P 5:02
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

JOY M. CIOFFI., Petitioner, v. NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL DKT. NO. EDU15131-2017 N Agency No. 223-9/17 **SETTLEMENT AGREEMENT**

WHEREAS, Joy M. Cioffi, the Petitioner in the above-captioned matter ("Petitioner"), is a tenured clerical employee with the Northern Valley Regional High School District Board of Education ("Board") and filed the subject Petition of Appeal to challenge the withholding of her annual and adjustment increment for the 2017-2018 school year; and

WHEREAS, the parties are desirous of resolving the issues raised by the Petition of Appeal, and have reached an amicable resolution thereby avoiding the time and expense associated with further litigation.

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

1. The Board agrees to restore the Petitioner's salary and adjustment increment for the 2017-2018 school year in the 2018-2019 school year so that she will be placed on the step of the guide she would ordinarily be placed but for the increment withholding. Petitioner will not be paid the 2017-2018 increment for the 2017-2018 school year. This settlement will be

implemented upon the satisfaction of the following conditions:

a. Petitioner must receive a "satisfactory" evaluation for the 2017-2018 school year by demonstrating consistent, improved performance in all areas where she was previously found to be deficient;

b. Petitioner undergoes and completes the professional development plan developed by Leslie Van Slooten and Joanette Femia by June 30, 2018; and

2. In exchange for the benefits set forth in Paragraph 1, the Petitioner agrees to withdraw the instant Verified Petition of Appeal, with prejudice.

3. The parties agree that this Agreement may not be altered, amended or terminated except by an express written agreement duly executed by all of the parties or their representatives.

4. Neither party shall be considered a "prevailing party," in this litigation and each party shall bear their own attorney's fees and legal costs.

5. The terms of this Agreement represent the compromise of disputed claims between the parties. This Agreement shall not be treated as an admission by any party of any wrongdoing or noncompliance with law.

6. This Agreement shall not be offered in any grievance or other administrative or legal proceeding as establishing any past practice or policy adopted by the parties.

7. The parties recognize that they sign this Agreement as their own voluntary act and deed, and that they fully understand the duties, obligations, requirements and limitations enumerated herein. The drafting and negotiation of this Agreement 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 hereby acknowledge that they have been represented by

counsel throughout the proceeding above-referenced and through the negotiation and execution of this agreement. The Parties acknowledge that they are satisfied with their legal representation in this matter.

8. This Agreement shall be governed by the laws of the State of New Jersey. and constitutes a complete legal release and waiver of any and all claims, known or unknown, that were or could have been raised by Petitioner against the Board from the beginning of time until execution and/or entry of this Agreement, as well as any and all claims that were or could have been raised by the Board against Petitioner.

9. This Agreement is subject to ratification by the Northern Valley Regional High School District Board of Education.

10. This Agreement contains the entire agreement between the parties respecting the subject matter of the referenced Petition of Appeal. The undersigned represent that they have the requisite authority to sign this Agreement on behalf of the respective party. This Agreement may be signed by the parties in counterparts on separate copies of the Agreement, and all signature pages shall be incorporated into the Agreement as if all the signatures are affixed on one (1) page.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth below.

NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

DATED: 1/22/18

WITNESS

DATED: 1/22/18

PETITIONER

Joy M. Cioffi

Joy M. Cioffi

DATED: 1/12/18

WITNESS

Joanne Spadaccini

JOANNE SPADACCINI
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 12/23/2019

DATED: 1/12/18

94-18
OAL DKT. NOS. EDU 12653-10 AND 4029-11
AGENCY DKT. NOS. 633-11/10 AND 242-9/09

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

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

Upon the review of the record, the Commissioner is in accord with the ALJ's conclusion – for the reasons set forth in the Initial Decision – that the issues raised by the petitioner are moot. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is hereby dismissed as moot.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/23/18
Date of Mailing: 3/23/18

[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
DISMISSAL
OAL DKT. NOS. EDU 12653-10
AND EDU 04029-11
AGENCY DKT. NOS. 633-11/10
AND 242-9/09
(CONSOLIDATED)

IN THE MATTER OF THE TENURE HEARING OF CHARLOTTE ROBINSON, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.

Perry L. Lattiboudere, Esq., for petitioner (Adams Gutierrez and Lattiboudere, LLC, attorneys)

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

Record Closed: January 29, 2017 Decided: February 14, 2018

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter concerns a teacher tenure case filed against Charlotte Robinson (Robinson) by the Board of Education of the City of Trenton (Trenton) with a complicated procedural history and a series of remands from the transmitting agency to the Administrative Law Judge (ALJ) then assigned to the matter. Although the issues were settled between the parties, the remands resulted from the need to fulfill the requirements of N.J.A.C. 6A:3-5.6 governing the approval of settlements in tenure

charge matters. Due to the fact that the settlement had been implemented by the parties and the subsequent death of Robinson, the parties have requested that the matter be dismissed on the grounds of mootness.

The above captioned matter bearing Office of Administrative Law (OAL) Docket Number EDU 12653-2010 is a teacher tenure matter filed with the OAL in November 2010. It was assigned to ALJ Schuster in early 2011 for a hearing in conjunction with a related employment action filed by Robinson (OAL Docket No. 06760-2009). The matters were consolidated and the parties reached a settlement of the tenure matter and the related employment action filed by Robinson. The matters were returned to the Department of Education (Department) by ALJ Schuster as settled.

EDU 12653-2010 then was remanded to the OAL for the filing of an Initial Decision (ID) satisfying the then applicable standards of N.J.A.C. 6A:3-5.6. The companion employment action (on remand OAL Docket No. 04029-11) was deemed by the Department to be appropriate for withdrawal by petitioner as set forth in correspondence from the Department on December 6, 2011.

In response to the remand the parties transmitted the Settlement Agreement and ALJ Schuster submitted an ID Settlement to the Department. That ID however was the subject of another remand for failure to fulfill the requirements of N.J.A.C. 6A:3.5.6.[i] Another ID was not submitted by ALJ Schuster prior to his retirement in 2017 and in the spring of 2017 the undersigned was assigned the case.

After a series of telephone status conferences, the parties submitted request in January 2018 that the matters be dismissed on the grounds of mootness.

FACTUAL AND LEGAL DISCUSSION

There are no disputed facts in this matter. The parties reached a settlement and implemented the provisions of that settlement in 2011. Subsequently Robinson passed

[i] From the records, it does not appear that a new docket number was given to EDU 12653-1010 on remand, while employment action bore the new number EDU 04029-2011.

away. As a result of those facts, as well as the passage of time, the parties have requested that these consolidated matters be dismissed on the grounds of mootness.

Generally, the Commissioner of Education has jurisdiction to hear and determine all disputes and controversies arising under the school laws. N.J.S.A. 18A:6-9. However, the Commissioner does not decide moot cases. Weehawken Educ. Ass'n Bd. Of Educ. Of the Twp. Of Weehawken, 1978 S.L.D. 924, 925. A case is moot if, for example, "the issue is hypothetical, a judgement cannot grant effective relief, or the parties do not have concrete adversity of interest.' Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976). A case may become moot "by intervening events which include actual changes in the law, administrative actions, and settlement between the parties." Coviello v. Fair Lawn Bor. Bd. Of Educ., 94 N.J.A.R.2d (EDU) 486, 491. The mootness doctrine "as a general rule requires that legal opinions, via adjudication, not be given concerning issues which are no longer in existence because of changes in facts and circumstances surrounding a case." Ibid.

In these consolidated matters three factors are relevant to a decision on mootness. First, the parties settled the matters a number of years ago and the settlements were fully implemented. As a practical matter these matters ended on a de facto basis but were not finalized administratively. Secondly, a significant amount of time has passed since the parties agreed upon and implemented the settlements. Thirdly, the party at issue Charlotte Robinson has passed away during the course of time it has taken to resolve the administrative closure of these consolidated and remanded matters. Given the facts and circumstances of these cases the parties request to have them dismissed on the grounds of mootness is appropriate and will be **GRANTED**.

ORDER

The above captioned matters are hereby **DISMISSED** on the grounds of mootness.

I **CONCLUDE** that these matters are no longer a contested cases before the Office of Administrative Law. It is therefore **ORDERED** that these matters be and are 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.

2/14/18
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: February 14, 2018 (emailed)

Date Mailed to Parties: February 14, 2018 (emailed)

/mel

DOCUMENTS RELIED ON

- Letter from Perry L. Lattiboudere, Esq. requesting the matter to be dismissed

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHRISTOPHER D. CERF
Acting Commissioner

December 6, 2011

Sandy Hlatky, Deputy Clerk
Office of Administrative Law
Quakerbridge Plaza, Bldg. 9
Quakerbridge Road
P.O. Box 049
Trenton, NJ 08625-049

IN THE MATTER OF THE **TENURE** HEARING OF CHARLOTTE ROBINSON, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY, AGENCY DKT. NO. 633-11/10, OAL DKT. NO. EDU 12653-10

CHARLOTTE ROBINSON V. BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, AGENCY DKT. NO. 242-9/09, OAL DKT. NO. EDU 4029-11

Dear Ms. Hlatky:

I am returning to you herewith the two above-captioned files because they were sent back to us marked "withdrawn". Once it has been certified to the Commissioner, the only way a tenure matter may be resolved without an adjudication on the merits is by an initial decision wherein the administrative law judge determines that the agreement satisfies the standards set forth in *N.J.A.C.* 6A:3-5.6. Although there is a letter in the tenure file from Mr. Barrett, Ms. Robinson's attorney, advising Judge Schuster that the cases have been resolved by settlement, there is no settlement agreement in the file, and no initial decision has been issued. Although EDU 4029-11 could be resolved as a withdrawal, I assume that the parties intended their agreement to resolve both cases at once, so I am returning both files to you for appropriate disposition.

Very truly yours,

M. Kathleen Duncan, Director
Bureau of Controversies & Disputes

Enclosures
c: Michael T. Barrett, Esq.
Kenneth A. Skroumbelos, Esq.

BERGMAN & BARRETT

ATTORNEYS AT LAW

9 TAMARACK CIRCLE
MONTGOMERY KNOLL
U. S. HIGHWAY 206 NORTH
SKILLMAN, NEW JERSEY 08558

EDWARD J. BERGMAN
MICHAEL T. BARRETT (NJ & PA BARS)

(609) 921-1502

MAILING ADDRESS:
P.O. BOX 1273
PRINCETON, NEW JERSEY 08542

TELECOPIER # 609-683-0288
EBerg56542@aol.com
MBar97@aol.com

March 27, 2012

The Honorable John Schuster III
Administrative Law Judge
Office of Administrative Law
9 Quakerbridge Plaza
P.O .Box 049
Mercerville, NJ 08625-0049

Re: Charlotte Robinson v City of Trenton Bd of Ed
OAL Docket No.: EDU 12653-2010S
EDU 04029-2011

Dear Judge Schuster:

I enclose a copy of the fully executed Settlement Agreement in the above matter.

Respectfully yours,

BERGMAN & BARRETT

Michael T. Barrett

MTB/sd
Enclosure
cc: Kenneth A. Skroumbelos, Esq. w/o enc.

HILL WALLACK LLP
202 Carnegie Center
Princeton, New Jersey 08543-5226
(609) 924-0808
Attorneys for Trenton Board of Education

IN THE CONSOLIDATED MATTERS OF THE PETITION OF CHARLOTTE ROBINSON AGAINST THE TRENTON BOARD OF EDUCATION AND THE TENURE CHARGES AGAINST CHARLOTTE ROBINSON BY THE TRENTON BOARD OF EDUCATION.	BEFORE THE COMMISSIONER OF EDUCATION, THE STATE OF NEW JERSEY OAL Docket No. EDU 12653-2010S Agency Docket No. 633-10/11 OAL Docket No. EDU 04029-2011 Agency Docket No. 242-09/09

SETTLEMENT AGREEMENT

WHEREAS, Charlotte Robinson (or "Ms. Robinson") filed a petition against the Trenton Board of Education (or "TBOE") challenging her termination of employment under Docket No: EDU 12653-2010S and the TBOE brought tenure charges against Charlotte Robinson under Docket No. EDU 04029-2011; and

WHEREAS, a hearing was scheduled to take place before the Hon. Judge John Schuster III on September 2, 2011; and

WHEREAS, the parties entered into settlement discussions regarding both Ms. Robinson's petition and the tenure matter; and

WHEREAS, both Ms. Robinson and the TBOE were able to reach an agreement that would serve the best interests of both parties; and

WHEREAS, the agreement shall serve the public interest in that it will remove the uncertainty caused by both cases and reduce the potential legal fees that would have been incurred;

NOW, THEREFORE, Ms. Robinson and the TBOE agree to settle this matter on the following basis:

1. Ms. Robinson agrees not to contest her termination of employment as a secretary with the TBOE.

2. Ms. Robinson agrees to withdraw the petition she filed against the TBOE under Docket No: EDU 12653-2010S and the TBOE agrees to withdraw the tenure charges filed against Ms. Robinson under Docket No: EDU 04029-2011.

3. In consideration therefore, the TBOE agrees to pay Ms. Robinson the gross amount of $12,000.00 to be paid within 30 days of the execution of this agreement. This amount of $12,000.00 will be paid in one lump sum and represent a payment to Ms. Robinson for settlement in lieu of litigation. Said payment is in exchange for her agreement to surrender any legal claims that she has or may have against the TBOE, including the surrender of her tenure rights as otherwise outlined in this Agreement.

4. In consideration of the payment and other consideration provided for in this Agreement, Charlotte Robinson personally and for her estate and/or her heirs waives, releases and gives up any and all claims, demands, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that she

may have against the TBOE, their agents, representatives and employees (present and former), and their respective successors and assigns, heirs, executors and personal or legal representatives, based upon any act, event or omission occurring before the execution of this Agreement including, but not limited to, any events related to, arising from, or in connection with Charlotte Robinson's employment with the TBOE. Charlotte Robinson specifically and expressly waives, releases and gives up any and all claims arising from or relating to her relationship and/or association with the TBOE, based upon any act, event or omission occurring before the effective date of this release, including but not limited to, any claim that was asserted or could have been asserted under any Federal and/or state statute, regulation and/or common law, including, but not limited to any potential claim relating to the following (along with any amendments thereto):

(a) The National Labor Relations Act;

(b) Title VII of the Civil Rights Act of 1964;

(c) Sections 1981 through 1988 of Title 42 of the United States Code;

(d) The Employment Retirement Income Security Act of 1974;

(e) The Immigration Reform Control Act;

(f) The Americans with Disabilities' Act of 1990;

(g) The Age Discrimination & Employment Act of 1967;

(h) The Fair Labor Standards;

(i) The Occupational Safety & Health Act;

(j) The Family & Medical Leave Act of 1993;

(k) The Equal Pay Act;

(l) The New Jersey Law Against Discrimination;

(m) The New Jersey Minimum Wage Law;

(n) The Equal Pay Law for New Jersey;

(o) The New Jersey Worker Health & Safety Act;

(p) The New Jersey Family Leave Act;

(q) The New Jersey Conscientious Employee Protection Act;

(r) Any anti-retaliation provision of any statute or law;

(s) Any other federal, state or local, civil or human rights law or any other local, state or federal law, regulation or ordinance, any provision of any federal state constitution, any public policy, contract, tort or common law, or any losses, injuries or damages (including back pay, front pay, liquidated, compensatory or punitive damages, attorneys' fees and litigation costs);

(t) The Federal or New Jersey Constitution;

(u) Breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, infliction of emotional distress, assault, battery, violation of public policy, discharge without just cause, or other wrongful or constructive discharge;

(v) Breach of express or implied contract, quantum meruit or any similar claim.

5 Ms. Robinson hereby accepts her termination and agrees that she will not apply for, nor in any other way, seek future employment with the Trenton Board of Education. Ms. Robinson further agrees that she will not be placed on, or seek placement on, any seniority list within the Trenton School District.

6. Charlotte Robinson understands and agrees that as to any check(s) made payable to her and/or her law firm, an IRS Form 1099 designating the settlement amount as "other income" may be issued. Charlotte Robinson agrees to assume full liability for applicable state, federal and local taxes that may be required by law to be paid with respect to any settlement payment described herein. This does not mean that

the parties agree that any taxes are due, only that Charlotte Robinson assumes full liability for any taxes which may be due. Charlotte Robinson further agrees that if the Internal Revenue Service or any other taxing authority deems any tax, interest, penalties or other amounts are due from her, she, and not the TBOE, will assume full responsibility for any such taxes, penalties or amounts. Such responsibility includes an obligation to indemnify the TBOE for any sums that the Board of Education of the City of Trenton may be required to pay to any taxing authority regarding Charlotte Robinson's obligations discussed above.

7. Settlement of this matter is in the public interest as it avoids the financial, legal and administrative burden which will result from continued litigation.

8. This agreement does not constitute an admission of any kind by either party. It does not speak to the merits of either Ms. Robinson's petition against the TBOE or the TBOE's tenure charges against Ms. Robinson.

9. By this agreement, both actions, Ms. Robinson's petition against the TBOE, and the tenure charges filed against Ms. Robinson by the TBOE, will be dismissed with prejudice.

10. The Board President has been duly authorized by the Board to execute this Agreement on behalf of the TBOE.

11. Both parties hereby acknowledge having entered into this Agreement with a full understanding of their rights and having been fully informed of the implications of same by legal counsel. Neither party enters into this Agreement under duress. Both

parties enter this Agreement by their free will and volition. Both parties were given the opportunity to fully consider the terms and conditions of this Agreement. Either party may revoke their consent to this Agreement within seven (7) days from the execution thereof by delivering written notification of revocation to the other party. It is understood that if this Agreement is revoked by either party, it will not be effective or enforceable.

12. This Agreement represents the entire understanding of the parties as to the agreed upon terms of settlement and may be modified only in a subsequent written instrument, duly executed by the parties. No other representations of any kind shall be binding upon the parties.

13. In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, the remaining portions of the Agreement shall remain in full force and effect.

14. This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties have knowingly and voluntarily executed and delivered this Settlement Agreement and General Release on the dates set forth below.

Charlotte Robinson 9/9/11
Charlotte Robinson, Date

Rev. Toby Sanders
Rev. Toby Sanders, Date
Board President

Jayne S. Howard
Jayne S. Howard Date
Business Administrator/Board Secretary

I, Charlotte Robinson, on this 3rd day of November 2001 acknowledge receipt of Check # 157143 in the amount of $12,000.00, representing full payment on the settlement agreement and release entered into between myself and the Trenton Board of Education on September 9, 2011.

Charlotte Robinson

Dated: November 3, 2011

(F:\WDOX\DOCS\014700\00085\02503814; 1)

RESOLUTION AUTHORIZING APPROVAL OF SETTLEMENT AGREEMENT WITH CHARLOTTE ROBINSON

WHEREAS, the Trenton Board of Education has reviewed the Settlement Agreement between Charlotte Robinson and the Board of Education in regard to OAL Docket Nos. EDU 12653-2010S and EDU 04029-2011; and

WHEREAS, the Board has voted on this date to approve the Settlement Agreement; and

WHEREAS, the Board designates and authorizes the Board President to execute the Settlement Agreement on the Board's behalf; now therefore be it

RESOLVED that the Trenton Board of Education approves Settlement Agreement between Charlotte Robinson and the Board of Education

Toby D. Sanders
Board President

Jayne S. Howard
School Business Administrator/Board Secretary

August 22, 2011
ADOPTED

Jayne S. HOward, Board Secretary,certifies that this is a true copy offthe original Board Resolution on file with the Trenton Board of Education.

Jayne S. Howard Date

95-18

STATE OF NEW JERSEY – DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Arbitration Between:

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

"Petitioner

and

VA'LORIE JAMES

"Respondent"

DECISION APPROVING SETTLEMENT AGREEMENT

Agency Docket No. 181-6/16
[Va'Lorie James]

BEFORE
ARNOLD H. ZUDICK
ARBITRATOR

Appearances:

For the Petitioner
Robert Tosti, Esq.
Purcell, Mulcahy, Hawkins,
Flanagan & Lawless, LLC

For the Respondent
Nicholas Poberezhsky, Esq.
Caruso Smith Picini, P.C.

BACKGROUND

On April 17, 2017, I issued a Decision, *IMO Tenure Hearing of Va'Lorie James, and State Operated School District of the City of Newark,* Docket No. 181-6/16, dismissing most of the absenteeism and tardiness allegations filed by the State Operated School District of the City of Newark [Petitioner] against Va'Lorie James [Respondent] that had originally been filed by the Petitioner against the Respondent in 2016. The remaining allegations against the Respondent after dismissing most charges included unauthorized time punches, the alleged failure to perform proctor duties and an allegation the Respondent was tardy 20 times during the 2015-2016 school year. In addition to several conference calls I held with the parties after issuing the above Decision, representatives of the Petitioner and Respondent met with me [the Arbitrator] in an effort to agree upon the terms to settle the remaining allegations in the above matter. By January 2018 the parties reached and finalized a Stipulation of Settlement agreeing to settle and resolve the remaining tenure charges filed by the Petitioner. The settlement terms were approved by the Respondent on January 29, 2018 and by the Petitioner School District on March 19, 2018. The District's attorney and the Arbitrator approved the Agreement on March 23, 2018.

Prior to entering into the Stipulation of Settlement, James had already returned to work for the 2017-2018 school year and was assigned to a location other than East Side High School. The Stipulation of Settlement provided in pertinent part that: the Petitioner was withdrawing the tenure charges; the Respondent accepted a 15 workday suspension without pay; the Petitioner would pay back the Respondent for the remaining salary that was withheld from her during her 120 day unpaid suspension minus the 15 workday

suspension without pay; the Petitioner agreed it would not bring any future disciplinary action against the Respondent for incidents that led to the tenure charges in this matter; Respondent agreed to a specific waiver provision; both parties acknowledged they were advised by counsel and that they voluntarily signed the Stipulation of Settlement with full understanding of its terms; and the parties agreed that the Stipulation was subject to the State Superintendent's approval and the Arbitrator's approval in accordance with *N.J.A.C.* 6A:3-5.6(c).

Pursuant to *N.J.A.C.* 6A:3-5.6, arbitrators are required to issue brief decisions approving the settlement of tenure charges explaining why the terms are being approved. I have approved the terms of the settlement in this case for the following reasons.

As a result of my earlier Decision in this matter wherein I dismissed most of the absenteeism and tardiness allegations that lead to the original tenure charges, the conduct leading to the Stipulation of Settlement was primarily limited to tardiness in 2015-2016. In view of the Respondent's acceptance of a 15 workday suspension without pay I am convinced that the remaining tardiness issue has been fully reviewed and discussed by the parties and that said issue has been satisfactorily addressed by the Stipulation. Those terms reflect an appropriate resolution of the remaining charges in this case, and the Stipulation also avoids the need to use class and educational time to conduct a hearing in this matter. Consequently, I find that the Stipulation of Settlement complies with *N.J.A.C.* 6A:3-5.6, and appropriately balances the interests of both parties and is in the public interest because it satisfactorily concludes what has been protracted litigation at least in part at public expense.

I also note that the Respondent acknowledged that she has read the Stipulation of Settlement, and understands and agrees with its terms, and has signed the Stipulation.

Accordingly, based upon all of the above I approve the parties' Stipulation of Settlement in this matter.

Arnold H. Zudick
Arbitrator

Dated: March 26, 2018
Morrisville, PA

Commonwealth of Pennsylvania}
County of Bucks }

On this 26th day of March 2018, before me personally came and appeared Arnold H. Zudick to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Susan M. Zudick
Notary Public

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
SUSAN M. ZUDICK, Notary Public
Falls Twp, Bucks County
My Commission Expires November 2, 2018

PURCELL MULCAHY & FLANAGAN, LLC
One Pluckemin Way
Bedminster, NJ 07921
908-658-3800
Attorneys for the State Operated
School District of the City of Newark
File No. 650-10192

IN THE MATTER OF TENURE CHARGES OF VA'LORIE JAMES and the STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK	AGENCY REF. NO. 181-6/16 **STIPULATION OF SETTLEMENT**

The State-Operated School District of the City of Newark (the "District"), whose principal office is located at 2 Cedar Street, Newark, New Jersey 07102, and its successors, assigns, officers, employees, agents and representatives (collectively, "School District"), and Va'Lorie James, residing at 202 North 11th Street, New Jersey 07107 ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

WHEREAS the proposed Stipulation of Settlement is in the best interest of the Parties and the public because it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Upon final approval of the signed Stipulation by the District, the District shall and hereby does withdraw the instant Tenure Charges. This stipulation settles the case.

2. Upon final approval by the Arbitrator of the signed Stipulation by the District, Respondent agrees to:

3. Accept a 15-workday suspension without pay for the incident that occurred. The District agrees to pay Respondent back the remaining salary that was withheld during her 120 day unpaid suspension period, minus the 15 workdays which represent the suspension without pay. The withheld monies returned will have all mandatory tax and salary deductions taken therefrom. Respondent will otherwise remain on the District's payroll and benefits plan.

4. Discipline – The District agrees that it will not bring any future disciplinary action against Ms. James for the incidents that formed the basis of the tenure charges in # 181-6/16. The District reserves the right to bring future disciplinary action against Ms. James for any unknown criminal or potentially criminal misconduct.

5. In exchange for the consideration set forth in paragraph 3 above, the sufficiency of which is hereby acknowledged, Respondent hereby waives, releases and discharges any and all claims or rights that he has or may have against the District, the State District Superintendent, its Advisory Board of Education and its Advisory Board members, and any and all other District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the District up to the date of this Agreement, except for worker's compensation claims.

6. It is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor,

the Equal Employment Opportunity Commissioner, or any other federal, state or local law agency. However, should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 9, Respondent agrees not to seek or accept any resulting relief whatsoever.

7. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that he: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives her right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has 7 days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that he may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the 7 day period.

8. This Agreement shall not constitute a precedent in any matters involving other District employees.

9. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

10. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended,

modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

11. This Stipulation shall be construed and enforced in accordance with New Jersey law.

12. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

13. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

14. This Stipulation of Settlement is subject to the final approval of the State District Superintendent of the State-operated School District of the City of Newark and will only become effective upon the final approval of the Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter.

15. Additionally, this Stipulation is subject to approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

Dated: 1/29/18

VALORIE JAMES

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK

Dated: 3-19-18

By: Marques-Aguil Lewis
Board Chairperson

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):

Dated: 3-22-18

Robert M. Iosil
Attorney for State-operated School District
of the City of Newark

APPROVED

Dated: 3-22-18

Arnold Zudick, Arbitrator

CERTIFICATION

I, Va'Lorie James, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this 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: 1/29/18

Va'Lorie James

97-18SEC

AGENCY DKT. NO. 6-10/17A
SCHOOL ETHICS DKT. NO. T30-16

IN THE MATTER OF OBDULIA GONZALEZ,	:	
BOARD OF EDUCATION OF THE CITY OF	:	COMMISSIONER OF EDUCATION
PERTH AMBOY, MIDDLESEX COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission (Commission) have been reviewed. This matter involves an appeal of the Commission's July 25, 2017 decision finding that the respondent-appellant Obdulia Gonzalez (respondent) violated the School Ethics Act for failure to timely complete training in accordance with *N.J.S.A.* 18A:12-33. 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).

On appeal, the respondent argues that the extenuating circumstances in this matter would render a penalty in this case unjust and unwarranted. Even if the Commissioner finds that there was a technical violation of the statute, equitable considerations mandate that the Commissioner decline to impose a penalty against the respondent. The respondent believed that she did in fact complete her training prior to the December 31, 2016 deadline, and when she was finally apprised of the fact that the training was incomplete, she immediately rectified the situation on May 5, 2017. Prior to May 2017, neither the respondent nor the Perth Amboy School District received any notification indicating that there were deficiencies in her training requirements. Had the respondent been properly advised of the training deficiencies in a timely manner, she would have promptly re-taken the training that she believed she completed on December 16, 2016. Finally, the respondent has been a school board member for eight years; she has always completed her training on time; and she completed her training in May 2017 despite undergoing surgery and

radiation treatments for cancer between February and April 2017. Therefore, the respondent contends that the Commissioner should reject the Commission's recommendation and determine that no penalty should be imposed on the Respondent.

In reply the Commission states that it is undisputed that the respondent did not timely complete the required training by December 31, 2016 and before the Commission's April 26, 2017 Order to Show Cause. Therefore, it is clear that the respondent violated the School Ethics Act. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Moreover, precedent exists for the Commissioner to impose a penalty of a reprimand resulting from a school board member's failure to timely complete a required training program. The Commission contends that the respondent's argument that she made a mistake or committed excusable negligence in failing to timely complete the training is not convincing because the respondent has been a board member for eight years and she should know how to complete the training. Further, the respondent was provided notice from both the Commission and the New Jersey School Boards Association after the December 31, 2016 deadline informing her that she had not completed the required training. Therefore, the Commission's decision finding a violation of the School Ethics Act and recommending the penalty of a reprimand should be adopted.

Upon a comprehensive review of the record, the Commissioner finds that the decision of the Commission finding a violation of *N.J.S.A.* 18A:12-33 is supported by sufficient credible evidence. The evidence in the record fully supports the Commission's determination that the respondent did not timely complete the training before December 31, 2016. As a result, the Commissioner finds that the Commission's determination that the respondent violated *N.J.S.A.* 18A:12-33 was not arbitrary, capricious or contrary to law. *N.J.A.C.* 6A:4-4.1(a).

However, the Commissioner does not accept the Commission's recommendation of a reprimand, and instead remands this matter to the Commission for further determination of

the appropriate penalty. In so ruling, the Commissioner is not satisfied that the Commission fully considered the nature of the offense and weighed the effects of the aggravating and mitigating circumstances. In the July 25, 2017 decision, the Commission states that the respondent did not respond to the April 26, 2017 Order to Show Cause. A review of the record indicates that the respondent did in fact respond to the Order to Show Cause. By letter dated May 4, 2017, which was received by the Commission on May 12, 2017, the respondent outlined the reasons why she did not complete her training by December 31, 2016. The information provided by the respondent in response to the Order to Show Cause should have been considered by the Commission when it was evaluating the appropriate penalty to recommend in this case.

Accordingly, this matter is hereby remanded to the Commission for a determination of the appropriate penalty in light of the mitigating circumstances that exist in this matter.

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: 3/28/18
Date of Mailing: 3/29/18

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

IN THE MATTER OF OBDULA GONZALEZ	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	
	:	**DECISION FOR FAILURE TO**
PERTH AMBOY	:	**COMPLETE MANDATORY**
BOARD OF EDUCATION,	:	**TRAINING REQUIREMENT IN A**
MIDDLSEX COUNTY	:	**TIMELY MANNER**
	:	
	:	**DOCKET NO.: T30-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on April 25, 2017, and mailed on April 26, 2017 via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1.

In the OTSC mailed on April 26, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, and N.J.A.C. 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of a board of education located in the City of Perth Amboy, County of Middlesex. As a result of her position as a board of education member, and in accordance with the statute and regulation cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 4 training program by December 31, 2016.

On February 28, 2017, NJSBA provided the Commission with the names of those board members who failed to complete mandated training by December 31, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA. More specifically, an e-mail was sent to all board members, including Respondent, on October 13, 2016, and to all business administrators on October 14, 2016, reminding them of the annual training requirement and the December 31, 2016, deadline. On

January 25, 2017, a notice was sent to the Perth Amboy School District business administrator advising that, as of that date, Respondent had not completed training. Finally, on January 30, 2017, NJSBA sent a letter to Respondent advising her that she still had not completed Governance 4. In addition to these communications, multiple communications about mandated training were sent to NJSBA's members through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, on March 6, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by December 31, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Business Administrator, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated April 5, 2017, via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions for completing the training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on April 26, 2017.

To date, there is no dispute that Respondent did not complete her required training by December 31, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by December 31, 2016.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on June 27, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, 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 Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a

violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

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

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: July 26, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on July 25, 2017.

Kathryn A. Whalen, Director

98-18

L.P. and H.P., on behalf of minor child, L.P,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WEST MORRIS REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Pro se petitioners challenged the determination of the respondent Board that L.P. was not the victim of harassment, intimidation or bullying (HIB) under the provisions of the New Jersey Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 *et seq.* (the Act). Petitioners alleged that their daughter, L.P., has suffered HIB and retaliation at the hands of her fencing coach and teammates, as well as her classmates and the administration, numerous times since she joined the fencing team during the 2014-2015 school year. Two separate petitions – consolidated herein – were filed in August 2016, the first alleging that the head coach of the fencing team committed HIB by retaliating against L.P. during the 2015-2016 school year after L.P., in a previously filed complaint, had reported the coach absent from practice when one of the other team members was injured. The second petition alleged that a fellow student had said unkind things to L.P. in March 2016, in violation of the Act. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: no genuine issue of material fact exists in this case, and the matter is ripe for summary decision; the only issue for determination in this consolidated case – after dismissal of other issues raised in the petition – was whether the head coach of the fencing team changed her criteria for strip assignments for the 2015-2016 school year in order to keep L.P. off "A Strip" in retaliation for L.P.'s filing of an HIB complaint against team captain, B.S., and if so, whether this conduct violated the Act; the coach's sworn affidavit in this matter makes clear that strip assignments are based on a multitude of factors, including, among other things, the skill and experience of individual fencers, the team as a whole, and consideration of the skills of the opposing team; the coach has the discretion to change strip assignments and no specific criteria for strip selection exist; rather, the coach makes strip selections based on each individual competition; imputing a retaliatory motive to any strip assignment that did not place L.P. on the "A Strip" is conjecture; and this case reflects petitioners' displeasure that L.P. was not assigned to "A Strip" and made captain of the team at the beginning of the 2015-2016 season. The ALJ concluded that the respondent did not retaliate against L.P. in violation of the Act, and accordingly, the Board is entitled to summary decision as a matter of law. The petition was dismissed.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, 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.

March 29, 2018

OAL DKT. NO. EDU 14255-16 & 14256-16 (CONSOLIDATED)
AGENCY DKT. NO. 213-8/16 & 236-8/16

L.P. and H.P., on behalf of minor child, L.P,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WEST MORRIS REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions, and respondent's reply thereto, have also been reviewed and considered by the Commissioner.[1]

Upon such review, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that respondent did not retaliate against L.P. in violation of the Anti-Bullying Bill of Rights Act, and the Board is entitled to summary decision.[2]

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.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 3/29/18
Date of Mailing: 3/29/18

[1] The exceptions – while reflecting petitioner's obvious disagreement with the findings and conclusions contained within the Initial Decision – are unpersuasive, and substantially recast and reiterate the arguments made below, which have been exhaustively addressed by the Administrative Law Judge (ALJ) during the course of the case.

[2] The Commissioner notes his concurrence with the ALJ's interim orders and further clarifies that the interim orders are adopted herein as part of the Commissioner's review of this matter, and in the issuance of a final agency decision.

[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 14255-16 &
EDU 14256-16
AGENCY REF. NO. 236-8/16 &
213-8/16
(CONSOLIDATED)

L.P. AND H.P. ON BEHALF OF MINOR CHILD, L.P.,

Petitioners,

v.

WEST MORRIS REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, MORRIS COUNTY,

Respondent.

L.P. and **H.P.**, petitioners, pro se

Jodi S. Howlett, Esq., for respondent (Cleary, Giacobbe, Alfieri & Jacobs, attorneys)

Record Closed: February 5, 2018 Decided: February 12, 2018

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

In the second petition, which petitioners also filed with the Department of Education on August 15, 2016, petitioners allege that S.M., then a junior at West Morris Central High School, said unkind things to L.P. on three separate occasions in March 2016 in violation of the ABRA, namely, "I hate you; I hate you with a burning passion!"; "[You have no partner because] nobody likes you!"; and "You're disgusting; who would like you?"

On September 19, 2016, the Bureau of Controversies and Disputes transmitted these two cases to the Office of Administrative Law as contested cases 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.

On December 7, 2016, the parties appeared for a settlement conference but could not reach an agreement; on December 21, 2016, I consolidated the cases for hearing; and on March 9, 2017, respondent filed a motion to dismiss the petitions for failure to state a claim upon which relief can be granted. At the same time, petitioners filed a motion to amend the petitions. On May 25, 2017, I denied the motion to amend the petitions, and on June 28, 2017, I granted in part and denied in part the motion to dismiss the petitions for failure to state a claim upon which relief could be granted. More specifically, I dismissed all the issues in the first petition, except for one, and all the issues in the second petition. As a result, the only issue that remains in this consolidated case is the following:

> Whether the head coach of the fencing team, Gladys Berardi, changed her criteria for strip assignments for the 2015–16 school year to keep L.P. off A Strip because L.P. had filed a complaint for harassment, intimidation, or bullying against the team captain, B.S., the year before, and if so, whether this conduct is a violation of the ABRA.

On October 31, 2017, respondent filed this motion for summary decision; on November 20, 2017, petitioners filed their opposition and a cross-motion for summary decision; and on December 1, 2017, respondent filed its response.

On December 6, 2017, petitioners filed a sur-reply, and on January 16, 2018, respondent filed its sur-reply. On January 22, 2018, petitioners moved to strike respondent's sur-reply, which contained a second affidavit from Berardi in response to petitioners' sur-reply, and on February 5, 2018, I denied the motion to strike. As a result, all affidavits, which have been filed, have been considered.

FINDINGS OF FACT

Based on the papers and discovery, which have been filed, together with the affidavits, which have also been filed, and giving petitioners the benefit of all legitimate inferences, as if only respondent had filed a motion for summary decision, I **FIND** the following as **FACT**:

Gladys Berardi

Gladys Berardi is the head coach of the girls' varsity fencing team at West Morris Central High School and has been practicing and competing in fencing for over forty years. Berardi has earned classifications in all three fencing weapons (foil, epee, and sabre), is a lifetime member of the United States Fencing Association (USFA), and has represented New Jersey in domestic and the United States in international competitions. Berardi has also coached fencing at both the collegiate (New Jersey City University, Caldwell University, and Montclair State University) and high-school (Wayne Hills High School, Teaneck High School, and West Morris Central High School) levels.

Berardi helped create the boys' and girls' fencing programs at West Morris Central High School during the 1995–96 school year, was named the head coach of both teams for their inaugural seasons the following school year, and coached the boys' and girls'

fencing teams for their first two seasons. Berardi left West Morris Central High School as the head coach of the boys' and girls' fencing teams after the 1998–99 fencing season, only to return to West Morris Central High School as the head coach of the girls' fencing team before the 2014–15 fencing season. Berardi has remained the head coach of the girls' fencing team ever since.

The 2014–15 fencing season is also when Berardi first met L.P.

Strip Assignments—Part I

As the head coach of the girls' fencing team, Berardi is responsible for, among other things, coordinating and holding practices, teaching skills to the student-athletes, and representing West Morris Central High School at interscholastic competitions.

Berardi is also responsible for deciding which team members compete at which competitions, which team members compete at which events, and which team members compete on which strips—namely "A Strip," "B Strip," or "C Strip."

When making strip assignments, Berardi has no specific formula or quantitative criteria for making them. She considers tangible and intangible factors, such as record in competition and performance in practice, as well as team leadership and experience, but she does not consider USFA membership or classification because she cannot require fencers to join the USFA. Ultimately, Berardi uses her discretion in the best interest of the team—which is why strip assignments are not permanent but subject to change.

In her affidavit dated October 31, 2017, Berardi was explicit about the way she makes strip assignments:

> 8. When making strip assignments, I do not have a formula or set of quantitative criteria. I consider a multitude of factors that take into account the skills and experience of the individual fencers, the team as a whole, and the particular

opponent. Additionally, I consider a fencer's win-to-loss record, past performance in high school competitions, and performance at practices.

9. I also consider intangible factors such as a fencer's character, ability to perform under pressure, attitude, and ability to recover after being hit or losing a bout. It is important that a fencer does not give up or quit easily.

10. In my experience, fencing is a mental sport as well as a physical one. It is not solely determinative that if one fencer beats another fencer that the victorious fencer will be assigned a more preferable strip.

11. I do not generally consider a fencer's USFA membership or classification when making strip assignments. It is my understanding of the New Jersey State Interscholastic Athletic Association ("NJSIAA") rules and guidelines that I cannot mandate a fencer joint the USFA.

12. Thus, I do not believe it fair to base my assigning of strips for high school competitions based upon USFA classifications.

13. As head coach, I am unaware of any obligations that I must consider a particular skill, ranking, or any other factor in making determinations of which fencer competes. I have complete discretion in making decisions in the best interest of the fencing team, including determining strip assignments.

14. I use practices not only to train the student-athletes to become better fencers, but also to make strip assignments. Strip assignments are not permanent and may change for each competition depending on an individual fencer's performance, fencer eligibility, and the opponent, among other factors. As strip assignments may change for each match, I need to be able to consistently evaluate each team member.

[Berardi Affidavit dated October 31, 2017.]

L.P.

L.P. was in ninth grade when Berardi returned as the head coach of the girls' fencing team. During that 2014–15 fencing season, petitioners regularly sent, and Berardi regularly received, communications about how L.P. fared in fencing outside of school in her private fencing program. Berardi was proud of L.P.'s accomplishments in her private fencing program and congratulated L.P. on those accomplishments. Berardi even noted that L.P. appeared to be a more confident fencer when she returned to the school team the following year. But Berardi also noted that L.P. seemed to be less committed to the school team, and wrote in her affidavit dated October 31, 2017, that "L.P. often skipped or left high school practices early to practice with her private fencing program [and] . . . just after the start of the 2015–16 season, [her mother] presented me with a calendar of the high school practices that L.P. was going to miss in favor of attending her private fencing sessions." (Berardi Affidavit dated October 31, 2017.) Although L.P. asserts in her affidavit dated November 19, 2017, that Berardi acknowledged or approved her leaving practices early or skipping practices altogether, the fact remains that L.P. did leave some practices early and did skip some team practices in favor of her private sessions.

HIB Complaint

In November 2015, L.P. filed a complaint against the captain of the school team, B.S., for harassment, intimidation, or bullying. Berardi understood that the complaint was determined to be unfounded, but met with school administrators to develop fencing guidelines so L.P. and B.S. could coexist on the team. Berardi agreed because she wanted both fencers to continue fencing on the team.

Personal Demands—Part I

On December 15, 2015, L.P. demanded that she be assigned to A Strip. In a meeting among Berardi, L.P., and the then-interim athletic director, Jeff DiLollo, Berardi

and DiLollo explained to L.P. that the athletic director does not mandate or dictate to any coach who plays at what position or fences on which strip. As Berardi wrote in her affidavit dated January 1, 2015, "The coaches have the knowledge and experience in the given sport and team dynamics and are in the best position to determine playing assignments." (Berardi Affidavit dated January 16, 2018.)

Berardi also explained to L.P. that the strip assignment could change match by match, and that L.P. could be assigned to a different strip in the future.

As a result, Berardi chose to assign the team captain, B.S., to A Strip and the underclassman, L.P., to B Strip for the first competition of the season, on December 19, 2015.

In short, Berardi did so because she thought B.S. was the more well-rounded fencer:

> 26. In my opinion, B.S. a twelfth (12th) grade student and captain of the team, was a more well-rounded fencer and had earned "A strip" for the first competition. In particular, during the previous fencing season, B.S. had won the District Championship and was undefeated in interscholastic competition up until that point in the season.
>
> [Berardi Affidavit dated October 31, 2017.]

After Berardi made the strip assignments, L.P. still demanded that she be assigned to A Strip.

Team Practice

Shortly after the meeting on December 15, 2015, Berardi received notice that L.P. may have been determined ineligible by the NJSIAA to compete in the upcoming competition on December 19, 2015, for having missed approximately two weeks from practice earlier in the season while respondent investigated the HIB complaint L.P. had

filed against B.S. In response, Berardi offered to hold additional practices for L.P. so she could satisfy the NJSIAA rules for competition. Ultimately, Berardi needed to hold only one additional practice for L.P. so she could become compliant with the NJSIAA.

Strip Assignments—Part II

L.P. asserts in her affidavit dated November 19, 2017, that Berardi had awarded strip assignments in the past based upon skill alone, and that Berardi later changed her criteria for strip assignments to keep L.P. off A Strip, but her assertions are belied by Berardi's sworn statements reproduced above, and by Berardi's email message to the assistant principal, Anne Meagher, dated January 8, 2016, reproduced below.

Indeed, a careful reading of Berardi's email to Meagher supports Berardi's explanation that she awarded (and continues to award) strip assignments based upon tangible and intangible factors, and that she did so (and continues to do so) in the best interest of the team—not to keep L.P. off A Strip.

More specifically, in her email to Meagher, Berardi explained that she had not changed her criteria, but that she had adjudged B.S. the better fencer, and that she had not added L.P. as a captain, because L.P. had not yet demonstrated any leadership potential:

> 1. I have placed the best most experienced WMC high school fencer in the "A" position (strip in fencing terms). [B.S.] is undefeated so far this season, is the reigning District Champion, [and is] the reigning Silver medalist of the Morris County HS Championships. She has also fenced with WMC girls team since her freshman year. L.P.'s contention that she is the highest-rated fencer in the county is based on her United States Fencing Association "C" classification. While I encourage the fencers to become members of the (USFA) (I have been a lifetime member for more than 20 years) it is against NJSIAA regulations to mandate a team member to join.

> 2. During our discussion on Tuesday, I reiterated to L.P. the same criteria for my placement of team members, the criteria I gave to her several weeks ago when she requested a meeting with AD DiLollo. The criteria was the season record up to our first major tournament. While I applaud L.P.'s USFA participation, accomplishments, and standing, I do not use USFA standings classifications or results as a base for my selection for Team member's placement on the team.
>
> 3. In my discussion with L.P., I explained [that] if she felt she was the better fencer, she could still win the county championships fencing from the "B" strip and prove on the HS level [that] she deserved the "A" strip. I pointed out that last year after reviewing the previous year's results, I placed our current A strip Epee fencer in the B spot for our first major tournament last year (Santelli Girls HS Championships). Her record up to that point had been equal to the fencer I placed on A strip. After the first round, based on the fact she won all her bouts on the "B" strip, and A strip fencer had lost all but one of her bouts, I switched their strip assignments for the second round and every major event after that.
> 4. As far as being Captain, I have the girls select with the assistance of the current captains who will be the next year's captains. It is subject to my approvals as not to be a popularity contest. [REDACTED] and [REDACTED] were captains last season, my first [year] back to coaching at WMC. They assisted in the selection (except [REDACTED], being a current captain, did not vote for her foil captain position.) While there were three captains selected for my approval, Sr. [REDACTED], Sr. [REDACTED], and Jr. [REDACTED], I added Sr. [REDACTED] in whom I saw leadership potential by the way she assisted me during my first year back. L.P. was not in consideration for becoming a Captain.
>
> [L.P. Affidavit dated November 17, 2017, Ex. E.]

In her affidavit dated January 16, 2018, Berardi restates that she has never had any formal criteria for determining strip assignments, that any claim that she has or had formal criteria for strip assignments is patently untrue, and that each match does indeed necessitate a reassessment of the team and the performance of its members.

Personal Demands—Part II

On January 5, 2016, the last practice before the first tournament of the season, the Morris County Championships, Berardi informed the team members of their strip assignments for that competition, and L.P. repeated that she deserved to be assigned to A Strip.

Whether Berardi told L.P. that if she won the tournament from the B Strip she would assign her to A Strip for the next competition does not matter because L.P. quit the team the next day and filed this complaint against Berardi for retaliation later that year—foreclosing any possibility of a change in strip assignments during the remainder of the season.

Berardi wrote in her affidavit dated October 31, 2017, that she was surprised by the response. The inference to be drawn is that she was also disappointed. Another inference to be drawn is that Berardi felt justified in her decision-making, as L.P. proved that she did not have the character to fence on the A Strip. If Berardi made assignments based on "ability to perform under pressure, attitude, and ability to recover after being hit or losing a bout," then L.P. did not measure up. As Berardi had explained, "It is important that a fencer does not give up or quit easily."

To be clear, Berardi asserted in her affidavit dated October 31, 2017, in no uncertain terms, that she did not treat L.P. differently than any other member of the team, and that she never changed the way she made strip assignments:

> 32. Later in 2016, I was notified that L.P. filed a complaint of HIB against me. I was surprised to learn that L.P. claimed that I treated her differently than other members of my team, especially because I went out of my way to ensure L.P. was eligible to compete.
>
> 33. I never changed the manner, factors, or criteria that I consider in order to determine strip assignments. Particularly, I did not change how strip assignments were determined.

> Additionally, as I advised L.P., strip assignments are not permanent and have the ability to change for each competition.
>
> 34. Strip assignments are based upon my observations of each individual fencer and in accordance with NJSIAA rules and regulations. As stated above, using USFA membership and classifications when determining strip assignments can be unfair. While I do encourage team members to join the USFA, I cannot solely use that membership or accolades earned as a member to help nor harm.
>
> 35. When determining to assign L.P. to the "B strip," I never considered L.P.'s filing of a[n] HIB complaint against B.S. My decision was based solely upon consideration of the tangible factors described above, such as record and performance in practice, as well as intangible factors, such as team leadership and experience.
>
> 36. I never treated L.P. differently than any other member of the girls' fencing team.
>
> 37. I never retaliated against L.P. in any manner. To the contrary, I considered L.P. to be strong member of the girls' fencing team and wanted her to succeed.
>
> [Berardi Affidavit dated October 31, 2017.]

In fact, Berardi had memorialized the fact that she did not treat L.P. differently than any other member of the team, and that she never changed the way she made strip assignments, in a letter to Meagher dated January 8, 2016, just after L.P. quit the team:

> As far as L.P.'s accusations of me being upset with her and holding her complaint of harassment against her, I have not done so. I have never witnessed nor allowed [REDACTED] or anyone else on the team to harass or "pick on" L.P. Nor did I allow other fencers to harass each other on the team.
>
> When I spoke with L.P., I could see she was taken back by not being assigned the A Strip. I explained my criteria which she did not agree with. Being involved with coaching on both the HS and College level, I have seen that before. I relayed to L.P. I thought she was a very good fencer and

> complimented her on her improvement and advancement. I ended by saying her feelings are real to her as are her opinions. I did not dismiss them. I told her [that] we have to agree to disagree. As a coach, I make the determination based on my criteria—not hers. I shook her hand and she went back into the cafeteria. She turned to me and asked me what my strip selection criteria was. I looked at her and stated, "What I just told you; the same as I told you several weeks ago." She began entering/typing on her cell phone. Once she was done, she joined in practicing and fencing. She did not appear distressed or very upset. She did not indicate she felt she was being "Robbed" of an opportunity to fence or to be a member of the team.
>
> [L.P. Affidavit dated November 17, 2017, Ex. E.]

Moreover, petitioners were aware during these proceedings that Berardi did not treat LP differently than any other member of the team, and that she never changed the way she made strip assignments, because petitioners were the party who submitted this letter to this tribunal for its consideration.

No Genuine Issue of Material Fact

To remove all doubt, Berardi restates in her affidavit dated January 16, 2018, that she told L.P. in January 2016, just before L.P. quit the team, about the myriad of factors, both tangible and intangible, that she considers in making strip assignments, and that she does so on a match-by-match basis, using her best judgment in the best interest of the team. "I repeated that there is no set formula or criteria in place that I use in determining strip assignments, and that I make such assignments by considering each individual fencer as a whole, including ability, experience, attitude and character." Moreover, Berardi restates in her affidavit dated January 16, 2018, that she considered these tangible and intangible factors when she assigned L.P. to B strip, and that she never treated L.P. differently than any other member of the team. Indeed, nothing contained in the other affidavits create a genuine issue of material fact concerning these issues.

As such, no genuine issue of material fact exists whether Berardi awarded strip assignments in the past based upon skill alone, whether Berardi changed her criteria for strip assignments to keep L.P. off A Strip, or whether Berardi did not make L.P. captain of the team in retaliation for the HIB complaint L.P. filed against the captain of the team the year before.

To repeat, Berardi awarded B.S. A Strip because she had adjudged B.S. the better fencer, and she had not added L.P. as a captain because L.P. had not yet demonstrated any leadership potential.

CONCLUSIONS OF LAW

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

In this case, no genuine issue of any material fact exists and respondent is entitled to prevail as a matter of law because Berardi did not change her criteria for strip assignments for the 2015–16 school year. In her affidavit, Berardi was explicit. She stated that when making strip assignments, she considers a multitude of factors, including "the skill and experience of the individual fencers, the team as a whole, and the particular opponent." More specifically, Berardi stated that she considers "a fencer's win-to-loss record, past performance in high school competitions, and performances at practices." She also stated that she considers intangible factors such as "a fencer's character, ability to perform under pressure, attitude, and ability to recover after being hit or losing a bout." More significantly, Berardi stated that strip assignments are not permanent and may change for each competition and could even change for every match.

Regarding L.P. and the specific allegation that she assigned B.S. to A Strip and L.P. to B Strip for the first competition of the 2015–16 fencing season because L.P. had filed an HIB complaint against B.S., Berardi stated that this allegation was not true and that she assigned B.S. to A Strip and L.P. to B Strip because B.S. was a senior, the captain of the team, and a "more well-rounded" fencer, who, in her opinion, had earned the assignment to A Strip for the first competition. Berardi further explained that B.S. had also won the District Championship and was undefeated in interscholastic competition at that time. Indeed, Berardi asserted that she never considered the filing of the HIB complaint against B.S. as the reason to assign L.P. to B Strip, and that she based her decision solely upon the tangible factors, such as record and performance in practice, as well as the intangible factors, such as team leadership and experience.

Implicit in her explanation is the consideration Berardi gave to the choice L.P. made to practice with her private club instead of the school team when private sessions conflicted with team practices. As Berardi noted, L.P. did skip team practices and did leave team practices early to practice with her private fencing program and even advised Berardi which team practices she was going to miss in favor of attending her private sessions. Indeed, L.P. admits as much. This failure to attend team practices notwithstanding, Berardi offered to hold additional practices so L.P. could satisfy the NJSIAA requirements to compete, and did in fact hold one such practice so L.P. could compete in the first competition. Though not dispositive, this is an indication that Berardi did not engage in any form of retaliation against L.P.

No matter how many times petitioners may swear that Berardi changed her criteria for strip assignments, no genuine issue of material fact exists that Berardi, as the coach of the team, has the discretion to change strip assignments and is not wedded to any criteria. Strip assignments are fluid, as Berardi attests, and imputing a retaliatory motive to any strip assignment that does not place L.P. on the A strip is pure conjecture. Petitioners are simply upset that L.P. was not assigned to A Strip and made captain of the team at the beginning of the 2015–16 season.

Having found that Berardi did not change her criteria for strip assignments for the 2015–16 school year, and that she did not keep L.P. off A Strip because L.P. had filed a complaint for harassment, intimidation, or bullying against the team captain, B.S., the year before, and having determined that no genuine issue of material fact exists, I **CONCLUDE** that respondent did not retaliate against L.P. during the 2015–16 school year in violation of the ABRA, and that respondent is entitled to summary decision as a matter of law.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that respondent's motion for summary decision is **GRANTED**, that petitioners' cross-motion for summary decision is **DENIED**, and that this consolidated case is **DISMISSED** in its entirety.

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

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

2/12/18
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 2/12/18

Date Mailed to Parties: 2/12/18

dr

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, Ed.D.
Acting Commissioner

March 30, 2018

Sabino Valdes, *pro se*
P.O. Box 463
Paramus, New Jersey 07653

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

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 submissions and the record in connection with Sabino Valdes' Motion for Reconsideration and Clarification of the Commissioner's January 11, 2018 decision, denying Mr. Valdes' motion to reopen the above-captioned matter.[1] Mr. Valdes argues that his present motion for reconsideration is based on newly discovered evidence. Mr. Valdes also seeks clarification of the Commissioner's January 11, 2018 decision.

With regard to his motion for reconsideration, Mr. Valdes asserts that newly discovered evidence in this matter – *i.e.*, his recent discovery of an "omission" of the agency docket

[1] In the motion to reopen, Mr. Valdes requested that the Commissioner reopen and reverse an "unsettled" interim order issued on August 9, 2001. The underlying motion to reopen is Mr. Valdes' fourth such motion – which was denied by the Commissioner on January 11, 2018, finding that Mr. Valdes' fourth request was a recitation of the same facts, legal authority, and arguments as his previous filings. The Commissioner concluded that Mr. Valdes failed to establish good cause to reopen the matter and review the Administrative Law Judge's (ALJ) Order, and that the arguments raised by him did not amount to new evidence or information.

By way of background, Mr. Valdes filed the initial motion to reopen in April 2014, which was denied by the Commissioner on June 14, 2014. Mr. Valdes subsequently filed a second motion to reopen in August 2016, which was denied by the Commissioner on November 3, 2016. Mr. Valdes then appealed the Commissioner's November 3, 2016 decision to the Superior Court of New Jersey, Appellate Division, and also filed a motion for reconsideration of the Commissioner's November 3, 2016 decision. The Commissioner denied the motion for reconsideration for lack of jurisdiction pursuant to *R.* 2:9-1(a). During the pendency of his appeal of the November 3, 2016 decision, Mr. Valdes filed a third motion to reopen, wherein he argued – in addition to the issues raised in his previous motions – that the ALJ's Order dated August 9, 2001 was void and should be reversed. On June 29, 2017, the Commissioner denied the third motion to reopen. Mr. Valdes then filed a motion for reconsideration of the Commissioner's denial of his third motion reopen, which the Commissioner denied on the merits.

number from the August 9, 2001 Order – is sufficient to "dramatically alter[] the contour[] of this case and compel[] reconsideration of the Commissioner's January 11, 2018 decision." Mr. Valdes argues that omission of the agency docket number was purposeful and was done in an attempt to conceal the fact that he had filed a motion to dismiss the tenure charges before the Office of Administrative Law. Mr. Valdes concludes that such omission "impaired the Commissioner's review of said order" and purportedly "served to impair [Valdes'] right to review the evidence the Commissioner relied upon to render his final decision."

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.

Mr. Valdes moves for reconsideration on the basis that the "newly discovered evidence" is likely to alter the outcome of this matter. Mr. Valdes has, however, ignored the fact that evidence that could have been previously discovered by due diligence – *e.g.*, a missing agency docket number on an order that has been in one's possession – is not newly discovered evidence. Notwithstanding, a missing docket number on an order does not render the order void, nor is such missing information fatal to the ultimate outcome of a case. Mr. Valdes' assertion that the missing agency docket number on the August 9, 2001 Order impaired the agency head's review of same, is purely speculative and unsubstantiated.[2]

With regard to Mr. Valdes' request for clarification, it appears that the ostensible *confusion* pertaining to the Commissioner's references to the August 9, 2001 Order, is gratuitous. A review of the January 11, 2018 decision reveals that the Commissioner initially identified and referenced the August 9, 2001 Order and subsequent references to the Order as "August 1, 2001 Order" were the result of a typographical error. The January 11, 2018 decision unequivocally discusses the August 9, 2001 Order; therefore, such typographical error is *de minimis*. Nevertheless, for the purposes of an accurate record, the Commissioner clarifies that in the January 11, 2018 decision, any reference to "the August 1, 2001 Order" relates to the August 9, 2001 Order.

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[2] Mr. Valdes' allegations and the reasons for the Commissioner's denial of his requests are thoroughly addressed in the Commissioner's June 29, 2017 and January 11, 2018 decisions. It bears noting that the issue to be addressed pertaining to the August 9, 2001 Order – Valdes' opposition to the alleged "unlawful" filing of tenure charges – has been exhaustively litigated and Mr. Valdes' arguments were effectively found meritless. In fact, in the Appellate Division's most recent determination of Mr. Valdes' appeal of the Commissioner's November 3, 2016 decision, the tribunal declared that it had considered this matter for the "fourth time" – specifically, "appellant's argument that he was improperly dismissed from his tenured position" – and found "[a]ppellant has not shown good cause to reconsider or reopen the matter."

Lastly, the Commissioner disagrees with Mr. Valdes' interpretation of case law that he is allowed to engage in his incessant pursuit of this matter without merit and when he has been afforded due process. As set forth in the January 11, 2018 decision, if Mr. Valdes fails to allege any additional facts or arguments that would constitute good cause – with reasonable time or diligence – to reopen this matter, the Commissioner will not open Mr. Valdes' subsequent submissions as a contested case.

Accordingly, the motion for reconsideration is hereby DISMISSED.[3]

Sincerely,



Lamont O. Repollet, Ed.D.
Acting Commissioner of Education

c: County Superintendent
State Law Library

LOR/SLP/ATA

VIA REGULAR MAIL

[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).

N.C., on behalf of minor child, J.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the respondent Board's decision to expel J.C. pursuant to *N.J.S.A.* 18A:37-2 for repeated violations of the Code of Student Conduct and failure to abide by Ocean City School District Policies. Specifically, J.C. was expelled by the Board following an incident wherein he brought several items to school, including two knives, a choke cord, drugs, and drug paraphernalia. Petitioner maintained that the Board's determination to expel petitioner was arbitrary, capricious, or unreasonable.

The ALJ found, *inter alia*, that: school board decisions are entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was arbitrary, capricious or unreasonable; where board actions are challenged, the challenger bears the burden of proving that such actions were unlawful, arbitrary, capricious or unreasonable; in matters involving the exercise of a local board of education's discretion, the Commissioner's role is not to substitute his judgment for that of the board, but to determine whether there was a reasonable basis for the board's conclusions; in the instant case, the Board's decision to expel J.C. was based upon the seriousness of an off-campus incident depicted on video and J.C.'s possession of weapons and drugs on school property, and cannot be considered to be arbitrary, capricious or unreasonable; however, J.C. is entitled to a free public education from Ocean City School District in accordance with the parameters set forth in *N.J.S.A.* 18A:38-1. Accordingly, the ALJ concluded that the Board's determination to expel J.C. must be affirmed, but that the Board must continue to provide J.C. with educational services pursuant to *N.J.S.A.* 18A:38-1.

Upon comprehensive review, the Commissioner modified the Initial Decision. In so doing, the Commissioner found, *inter alia*, that the Board's decision to remove J.C. from the general education program was not arbitrary, capricious or unreasonable, however the Board was not authorized to expel J.C., i.e. discontinue all educational services, as he had never served a long-term suspension for any other incident; it is well recognized that while school districts have the authority to expel and suspend students, that authority is not unlimited as the regulations provide for sufficient safeguards to protect a student's fundamental rights to an education. Accordingly, the Commissioner found that, although it may not be appropriate to ever return J.C. to the general education program, the Board must continue to provide him with educational services.

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 4/05/18

OAL DKT. NO. EDU 2346-17
AGENCY DKT. NO. 14-1/17

N.C., on behalf of minor child, J.C.,	:	
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, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Ocean City Board of Education (Board). This case involves a student, J.C., who was expelled by the Board following an incident on October 13, 2016, wherein he brought several items to school including: two knives; a choke cord; drugs; and drug paraphernalia.[1] The Administrative Law Judge (ALJ) found that the Board's decision to expel J.C. was not arbitrary, capricious or unreasonable. The ALJ, however, also found that the Board must continue to provide J.C. with educational services.

Upon a comprehensive review of the record in this matter, the Commissioner finds that the Board' decision to remove J.C. from the general education program was not arbitrary, capricious or unreasonable. However, the Board was not authorized to formerly expel J.C. from the School District. Although it may not be appropriate for J.C. to ever return to the general education program, the Board is still required to provide J.C. with educational services.

[1] The school administrators became concerned that J.C. might have brought unauthorized items to school based on an off-site incident that occurred the previous day.

It is well recognized that school districts have the authority to expel and suspend students. *N.J.S.A.* 18A:37-2. That authority, however, is not unlimited, as the regulations provide for sufficient safeguards to protect the student's fundamental right to an education. Under *N.J.A.C.* 6A:16-7.4(a)(1), "a district board of education may expel a general education student from school, pursuant to *N.J.S.A.* 18A:37-2, only after the district board of education has provided ... [t]he procedural due process rights set forth at *N.J.A.C.* 6A:16-7.1(c)3 and 7.3 [and] subsequent to a long-term suspension, pursuant to *N.J.A.C.* 6A:16-7.3 ..." Expulsion is not simply the removal of a student from school, but rather, it is defined as "the discontinuance of educational services or the discontinuance of payment of educational services for a student." *N.J.A.C.* 6A:16-1.3. In contrast, a long-term suspension is defined as the "removal of a student for more than 10 consecutive school days from the general education program, ... but not the cessation of the student's educational services." *N.J.A.C.* 6A:16-1.3. Additionally, prior to expelling a student, *N.J.A.C.* 6A:16-7.3(a)5iv requires the Board to provide written notification to the student's parents that further engagement by the student in conduct warranting expulsion shall amount to a knowing and voluntary waiver of the student's right to a free public education.

In this case, it is undisputed that J.C. has never served a long-term suspension for any other incident, thereby precluding the Board from expelling J.C. from the District.[2] *See, M.R., v. Board of Trustees of the Hoboken Charter School,* Commissioner Decision No. 89-10, decided March 22, 2010 (The Commissioner found that, under *N.J.A.C.* 6A:16-7.5, expulsion can only take place after a student has "engaged a second time in conduct warranting possible suspension or expulsion, after having first served a duly imposed long-term suspension for an earlier

[2] In February 2016, J.C. received a ten-day suspension stemming from an incident where he sent a threatening email to a teacher. J.C.'s discipline record also included a five-day suspension for possession of a knife in eighth grade, chronic absenteeism and tardiness, and infractions for smoking on school property and cutting class.

infraction."). Moreover, there is no evidence in the record indicating that – subsequent to his previous infractions – J.C. and his parents were ever provided notification, in accordance with *N.J.A.C.* 6A:16-7.3(a)5iv, that further engagement in conduct warranting expulsion would amount to a waiver of J.C.'s right to a free public education. See, *D.L.G. and B.B.-G., on behalf of minor child, O.G. v. Board of Education of the Township of Millburn, Essex County*, Commissioner Decision No. 489-10, decided November 12, 2010.

Although the Board's decision to expel J.C. – i.e. discontinue all educational services – was contrary to the law, the Commissioner finds that J.C. did have an opportunity to appear before the Board after the October 2016 incident, and he was afforded the requisite due process required by *N.J.A.C.* 6A:16-7.1(c)3 and 7.3. Moreover, there is no question that J.C.'s conduct in October 2016, coupled with his history of continued and willful defiance of school rules, was sufficiently serious to warrant a long-term suspension. Therefore, the appropriate discipline in this case would have been to remove J.C. from the general education program; impose a long-term suspension on J.C.[3]; and to provide him with the appropriate educational program or services consistent with *N.J.A.C.* 6A:16-7.3(a)9ii.[4] In light of the severity of J.C.'s conduct, the appropriate services are homebound instruction, which is consistent with the services that J.C. has received in the past.[5]

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[3] Local boards of education must follow the applicable regulatory provisions governing the process for determining whether long-term suspensions should continue and/or when a student should return to the general education program, i.e., *N.J.A.C.* 6A:16-7.3(d)-(f).

[4] Presumably the Board has been providing J.C. with educational services during the pendency of this appeal. *N.J.A.C.* 6A:16-7.4(b)1 provides that when there is an appeal of a school district's decision to expel a student, the school district shall continue to provide appropriate educational services until a final decision is reached by the Commissioner.

[5] J.C. was in a homebound program that consisted of an online instruction that was provided by an outside provider.

Accordingly, the Initial Decision is modified in so far as the Board's decision to expel J.C. was contrary to law. The Board must continue to provide J.C. with educational services, although it may never be appropriate to return J.C. to the general education program.

IT IS SO ORDERED.[6]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/05/18

Date of Mailing: 4/05/18

[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 02346-17
AGENCY DKT. NO. 14-1/17

N.C. ON BEHALF OF J.C.,
Petitioner,
v.
OCEAN CITY BOARD OF EDUCATION OF THE CITY OF OCEAN CITY,
Respondents.

Douglas K. Walker, Esq., for petitioner (Law Office of Douglas K. Walker, P.C., attorney)

Michael P. Stanton, Esq., for respondent (McCrosson & Stanton, P.C., attorneys)

Record Closed: November 28, 2017 Decided: January 12, 2018

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Petitioner N.C., on behalf of minor child J.C., appeals respondent Ocean City Board of Education's (Board's) decision to expel J.C. for good cause pursuant to N.J.S.A. 18A:37-2, for repeated violations to the Code of Student Conduct, and failure to abide by

Ocean City School District Policies. Petitioner maintains that the Board's determination to expel petitioner was arbitrary, capricious, or unreasonable.

PROCEDURAL HISTORY

By letter dated October 14, 2016, Matthew Jamison, Ed.D., principal of Ocean City High School, notified the parents of J.C. that due to the seriousness of the incident, J.C. was being suspended pending a formal Board disciplinary hearing. The hearing was originally scheduled for November 8, 2016. At the request of the petitioner, the next two hearing dates were adjourned and the hearing was held on December 12, 2016. At its December 19, 2016 meeting, the Board voted to expel J.C. By letter dated, December 22, 2016, the Board issued a written statement of its decision and notified petitioner of the right to appeal. On January 23, 2016, petitioner filed the appeal with the Department of Education's Bureau of Controversies and Disputes. On February 13, 2017, the Board filed its answer. The Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed for hearing as a contested case on February 16, 2017. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

The hearing was scheduled for July 28, 2017, but adjourned at the request of the petitioner so he could appear before the Board at its next meeting and request reconsideration due to his progress. Prior to the hearing date of October 2, 2017, the Board heard and considered petitioner's presentation and decided not to rescind the expulsion. I heard the case on October 2, 2017, and after allowing for post-hearing submissions, closed the record on November 28, 2017.

STATEMENT OF FACTS

At the hearing, the Board presented two witnesses: Principal Matthew Jamison, Ed.D., and Assistant Principal Michael Mattina. Petitioner offered testimony from J.C., his mother N.C., and father M.C. Certain facts regarding this matter are not disputed. Based upon a review of the testimony and the documentary evidence presented, I **FIND** the following preliminary **FACTS**:

On October 13, 2016, Assistant Principal Michael Mattina (Mattina) received an email and video attachment from an Ocean City High School student. I reviewed the video at the hearing. The scene showed four males. J.C. and an unidentified youth were faced-off, each holding a knife, and exchanging heated words. During that exchange, the unidentified youth is struck in the back of the head with a pole from behind by another male. The unidentified male on the video is an Ocean City High School student receiving homebound instruction. He was present at the high school on October 13, 2016 and spoke to Mattina about the incident. Mattina shared the video with the Ocean City Police Department as required by an open communication policy between the school and police. N.J.A.C. 6A:16-6.2.

J.C. was an eleventh grade student in the Ocean City High School Extension School. The school day for Extension students is from 2:00 p.m. until 6:00 p.m. When J.C. arrived on the afternoon of October 13, 2016, he was immediately escorted by the security aide, Mr. Macomb, to the Assistant Principal's office. Mattina told J.C. that he had seen the video and asked J.C. to open his backpack and empty his pockets. J.C. complied. Mattina photographed the items (R-5) and typed a contemporaneous statement listing the items (R-6). J.C. was in possession of a locking blade knife, short blade kitchen knife, choke/strangulation cord, drugs (believed to be marijuana), drug paraphernalia, and cigarettes. Mattina testified that he asked J.C. why he brought those items to school. J.C. testified that Mattina told him he was being suspended and that his parents would be notified. J.C. was then escorted from the building by a member of the Ocean City Police Department who also took custody of the contents of J.C.'s backpack. (R-4.)

Mattina discussed the particulars of the incident with the principal, Dr. Jamison, who immediately drafted a letter to J.C.'s parents. The letter dated October 14, 2016, listed the items confiscated from J.C.; identified the sections of the Code of Student Conduct that were violated; and advised them that J.C. was suspended pending a formal Board disciplinary hearing and evaluation by the Child Study Team (CST). (R-2.) Jamison sent a second letter dated October 19, 2016 to inform J.C.'s parents of the Board's hearing date and provide pertinent information about the nature of the hearing. (R-3.)

As part of the CST evaluation, J.C. was referred to Thomas O'Reilly, M.D. for a psychiatric evaluation on December 5, 2016.

The formal hearing was held on December 12, 2016, pursuant to N.J.S.A. 6A:17-7.3(a)(10), before a four-member Board committee. Two members of the committee recused themselves. The committee presented a report to the full Board in closed session. On December 19, 2016, the Board voted during public session to expel J.C. By letter dated December 22, 2016, the Board drafted a detailed letter to J.C.'s parents outlining the charges that the Board considered against J.C.; summarizing the evidence presented to the Board by both sides; and stating the reasons for the Board's determination to accept the administration's recommendation of expulsion.

In addition to the evidence that forms the foundation of the above findings of fact, a summary of pertinent testimony follows.

Testimony of Dr. Jamison, Principal

Dr. Jamison testified that he made the recommendation for expulsion based on the severity of the incident and many other factors. On October 13, 2016, there were clear violations of the Code of Conduct that occurred on school property, including Level B violations for possession of nicotine products and Level C violations, considered the most serious, for possession of weapons, including two knives and a strangulation cord, and possession of marijuana and drug paraphernalia. In addition, Jamison reviewed the video of the fight that occurred off premises. Although the incident occurred off school property, the student who had been victimized was present in the building on October 13, 2016, when the weapons were confiscated from J.C. In addition to the Code of Conduct, Jamison reviewed the statute that defines the causes for suspension and expulsion of pupils and felt that J.C.'s behavior fell within the parameters outlined therein. N.J.S.A. 18A:37-2.

Jamison expressed that there had been multiple interventions with J.C. He felt that past remediation and progressive disciplinary actions had no impact on changing behavior. Eight months earlier, in February 2016, the school administration made the

determination to have J.C. evaluated by the CST to determine if he was eligible for special services because of his behavior. The CST determined that he did not meet the criteria for special services. That incident involved a threatening email sent by J.C. to a teacher. Jamison found the email incident to be disturbing on two fronts. It was a threat against a teacher, but it also raised concerns that J.C. exhibited signs associated with domestic dating violence and violations of the school's dating violence policy. (R-1.) J.C. received a ten-day suspension and was placed in the Extension School upon his return to school in mid-February 2016 of his sophomore year. According to Jamison, the Extension School is not a structured environment. It is an alternative education setting where the children attend school from 2:00 p.m. to 6:00 p.m. each day and are given more freedom and movement. The students have an individualized program plan and the program is run by counselors. It is geared to students who struggle in the regular high school setting.

A review of J.C.'s discipline record by Jamison showed a five-day suspension for possession of a knife in eighth grade, chronic absenteeism and tardiness, and infractions for smoking on school property and cutting class. The issues with attendance and smoking continued after J.C. was placed in the Extension Program. Jamison testified that he did not make the recommendation for expulsion lightly. From what he saw on the video, J.C. exhibited a willingness to use a weapon against another student. This was compounded by the fact that J.C. was in possession of weapons on the same day that this particular student was in the building. Jamison stated that J.C. exhibited a continued progression of willful disobedience of the Code of Conduct despite multiple interventions.

On cross-examination, Jamison stated that from 2007 until the present date, he had not expelled any other student. He also stated that J.C.'s grades from his interim report for October 2016 had no bearing on his consideration of expulsion. In discussing the Code of Conduct, it was noted that a first offense for fighting is a three-day suspension. J.C. had no record of assaultive behavior on school property.

Testimony of Michael Mattina, Assistant Principal

Mr. Mattina testified that he received the video of the incident on October 13, 2016 by email and spoke to the student who was struck in the head prior to J.C. arriving for

school. He contacted Officer Elias from the Ocean City Police Department, who was assigned to the school, and they met in his office where he played the video of the fight for her. Mattina testified that due to his concern to create a safe environment, he asked the security aid, Mr. Macomb, to escort J.C. to his office as soon as he arrived.

After J.C. was brought to his office, Mattina stated that they had a conversation about the video footage. Afterward, Mattina asked J.C. to open his backpack and empty his pockets. Although Mattina stated that J.C. consented to the search, Mattina testified that he conducted the search to ensure the safety of the school population and because based on the presence of the knife in the video he had a reasonable suspicion to investigate. J.C.'s backpack contained two knives, a strangulation cord, cigarettes, a substance believed to be marijuana, and drug paraphernalia. Mattina documented the contents in J.C.'s possession. (R-5 and R-6.) When he asked J.C. why he had the weapons, he testified that J.C. forgot the knives were in his bag, but that he had no idea about the cord, claiming he had never seen it before. Mattina also stated that J.C. admitted that he was selling marijuana, but not to Ocean City students.

The Ocean City Police were summoned. They escorted J.C. from the premises and took possession of the contents from his backpack. As a result of the incident, Officer Elias prepared a police report. (R-4.)

Mattina testified that he called J.C.'s parents from school about the suspension. He stated that it is his practice to always call the parents and he believed that he reached one of J.C.'s parents by telephone that same day.

After the suspension, Mattina testified that homebound instruction was set up for J.C. Mattina was asked on cross-examination about the homebound program and stated that it was an on-line course provided by an outside provider known as "Educere." He admitted that the students receive no human contact, but performance is monitored. The reports generated for J.C. were not good and showed bad work attempt. J.C. performed poorly and was failing his course work mainly due to lack of effort.

On cross-examination, Mattina testified that the video was very disturbing. He admitted that J.C. had no prior disciplinary actions for assaultive behavior or contraband except the email against the teacher six months earlier. He also testified that J.C.'s grades were good while he was in the Extension Program. Mattina acknowledged that there were students attending Ocean City High School despite having been adjudicated delinquent. However, he felt that J.C.'s circumstances of bringing weapons to school was a unique circumstance.

Dr. Jamison was recalled to testify about the Educere homebound instruction program. He stated that Ocean City contracts with Educere, which is a state-approved program for homebound instruction.

Testimony of J.C.

J.C. testified on cross-examination that after having failed five drug tests while serving his Intensive Outpatient Program (IOP) as part of his juvenile probation, he went to Daytop.[1] J.C. started at Daytop in July 2016. As part of the program, J.C. was required to write a self-evaluation. J.C. wrote his on September 27, 2017. It is a heartfelt account of his journey, including his struggles with addiction, lying to his parents, and encounters with the law. (P-2.) J.C. admitted that he did not believe he had a problem with addiction, but after being in treatment, he is able to face life sober. He learned coping skills and is able to enjoy life without turning to drugs. He reported that his transition at Daytop was difficult at first, but now that he has accepted his problems, he is thriving both academically and personally.

At Daytop, J.C. was enrolled in a full schedule of core classes. (P-3.) Emails from his teachers contained glowing reports about his behavior, work effort, and progress. (P-5.) J.C. was awarded the Student of the Month certificate for October 2017 and he expressed his pride in that accomplishment. (P-4.) His monthly progress report for September 2017 was positive and showed that J.C. was on track to complete treatment

[1] Daytop Village of NJ, Inc. is a residential treatment facility in Pittsgrove, New Jersey that provides treatment to adolescents with addiction, substance use and co-occurring mental health disorders within a unique continuum of accredited programs and a recovery-based day school.

by the end of October 2017. (P-7.) On cross-examination, J.C. admitted that his progress was not as good in July and August. He had an infraction for a minor fight and was sanctioned. (R-7.) His refusal to participate in group activities was noted on his August report. (R-8.) However, it was clear that J.C. made progress as the program continued.

J.C. also testified about the incident that occurred in the parking garage. He stated that the other boy involved had his knife out so J.C. pulled his knife. J.C.'s friend hit the boy in the head with the pole. On cross-examination, J.C. stated that he had lured the boy to the garage under a false pretense arranged by J.C. and his friends.

After the incident, J.C., through a referral from the CST, received a psychiatric evaluation from Thomas O'Reilly, M.D. Dr. Reilly evaluated J.C. and prepared a written report for Ocean City School District, Office of Special Services dated December 5, 2016. (P-6.) During the evaluation, Dr. O'Reilly and J.C. discussed the incident and the events at school on October 13, 2016. In the report, Dr. O'Reilly wrote that he was concerned about the recent incidents, but that J.C. could return to the Extension Program because of its small size and structure. He stated that an alternative would be homebound instruction. (P-6.)

J.C. expressed his desire to go back to the Extension Program. He stated that he wanted to continue his supportive services through Cape Counseling and meetings to keep him in recovery.

With regard to the events that happened on October 13, 2016, J.C. stated that he never intended to harm anyone. He claimed that he uses the knives for whittling and he had no idea how the strangulation cord got into his backpack.

Testimony of N.C., J.C.'s mother

N.C. testified that the months at Daytop changed her son. She stated that she accompanied her son to Dr. O'Reilly's evaluation and agrees with his assessment that J.C. does not pose a danger and should be returned to the Extension Program. She stated that her son's grades improved in the program and he did very well.

On October 13, 2016, N.C. received a telephone call from the Ocean City Police Department about her son's arrest. She stated that no one from the high school called her. However, N.C. also could not recall whether she received the certified letter dated October 14, 2016 that was mailed to the house after the incident.

N.C. testified that when J.C. was suspended a teacher from the school would bring work to the house once a week. She stated that once the Board voted to expel J.C. everything stopped and J.C. was expected to work on-line without teacher assistance.

Testimony from M.C., J.C.'s father

M.C. also testified about the positive change in his son's behavior since his stay at Daytop. M.C. graduated from Ocean City High School. His older son graduated in 2017; therefore, he wanted J.C. to continue the family tradition.

On the day of the incident, he testified that he did not receive a call from the high school, only the police department.

ANALYSIS AND ADDITIONAL FINDINGS OF FACT

Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F. 2d 718 (9th Cir. 1963). Additionally, the witness' interest in the outcome, motive or bias should be considered.

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Given the forgoing, I found Assistant Principal Mattina to be a credible witness. His testimony was detailed about the events of the day and consistent with the testimony of J.C. Mattina testified that it is his practice to always call the parents whenever a student

is suspended. Mattina stated that he reached one of J.C.'s parents that day. However, both parents stated that they did not receive a telephone call from the high school on October 13, 2016. They both testified that they were called by the police department. N.J.A.C. 6A:17-7.3(a)(3) requires notification to the student's parents of the student's removal from school. Although the parents dispute receiving a telephone call from the Assistant Principal on October 13, 2016, there is no dispute that the parents were notified of their son's removal from school that day as required by statute. Accordingly, I **FIND** that despite the different recollections regarding a telephone call from Mr. Mattina, there was no violation of N.J.S.A. 6A:17-7.3(a)(3) because the parents of J.C. received notice that their son had been removed from school on October 13, 2016. It is clear that the spirit and intent of the statute was satisfied.

Petitioner claims violation of his due process rights pursuant to N.J.A.C. 6A:16-7.3(a)(2), because J.C. was not granted an informal hearing and the opportunity to present his version of the events. J.C. was present when Assistant Principal Mattina searched his backpack and found the weapons, marijuana, and drug paraphernalia. When Mr. Mattina asked J.C. why he had those items, J.C. did not deny ownership or possession. In this situation, I **FIND** the petitioner was given the opportunity to explain to Mr. Mattina why he brought weapons and drugs to school but he provided no explanation that justified his possession of prohibited and dangerous items on school grounds.

I further **FIND** that the letters dated October 14, 2016 (R-2) and October 19, 2016 (R-3) by Principal Jamison satisfy the requirements set forth in N.J.A.C. 6A:16-7.3(a)(5)(6)(8).

Petitioner claims that the board committee was tainted by the recusal of two of the four members and that his rights were jeopardized by a committee of two. Petitioner has provided no evidence to support this accusation. N.J.A.C. 6A:16-7.3(10) provides as follows:

> A formal hearing before the district board of education that shall, at a minimum:

> i. Be conducted by the district board of education or delegated by the board to a board committee, a school administrator, or an impartial hearing officer for the purpose of determining facts or making recommendations.

In accordance with the above statute, **I FIND** that the board committee had the authority to conduct the hearing and there is no prohibition against the committee having two members. There are no facts to support petitioner's contention that the recusal by a board member for a conflict of interest amounts to a tainted board.

Petitioner claims a violation of N.J.A.C. 6A:16-7.3(9) because he was not provided adequate educational services after the suspension. The testimony from Dr. Jamison was that the homebound work is contracted to a state-approved vendor. The program is on-line and no teachers are provided to the home. Performance is monitored by the provider and email reports are sent to the school. However, the administration also provided for a behavioral assessment and psychological evaluation of J.C. There is no dispute that J.C. put no effort into the homebound course after the suspension. Therefore, I **FIND** that there was no evidence to support a finding that the out-of-school educational services provided to J.C. after the suspension did not meet the statutory requirements.

Finally, I **FIND** that on December 12, 2016, J.C. had the opportunity to fully participate in the formal hearing and present his own defense to the Board, but the Board voted to expel. Petitioner was given a second opportunity to appear before the Board and this time present documentation of the progress he made during his time at Daytop, but the Board decided not to rescind the expulsion.

CONCLUSIONS OF LAW

School Board policies are entitled to a presumption of correctness and will not be upset by the courts unless there is an affirmative showing that such decision is arbitrary, capricious or unreasonable. Thomas v. Bd. of Educ. of Morris Twp., 89 N.J. Super. 327, 332 (App. Div. 1965), affirmed, 46 N.J. 581 (1966). In general, a board of education's actions are entitled to a presumption of lawfulness and good faith. Where board actions are challenged, the challenger bears the burden of proving that such actions were

unlawful, arbitrary, capricious or unreasonable. Schuster v. Ed. of Educ. Montgomery Twp., 96 N.J.A.R.2d (EDU) 670, 676 (citing Schnick v. Westwood Ed. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962)).

In matters involving the exercise of a local board of education's discretion, the 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." Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 296 (App. Div. 1960). Therefore, petitioner must demonstrate much more than simply a difference of opinion over the action taken by respondent. In order to satisfy the arbitrary and capricious standard, petitioner must prove that respondent acted in either bad faith or in disregard to the circumstances.

N.J.S.A. 18A:37-2 states that, "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: . . . (j) Knowing possession . . . without legal authority of . . . controlled dangerous substances on school premises . . . ." Here, J.C. brought drugs to school and the paraphernalia used in the sale of marijuana but he also had two knives and a strangulation cord in his backpack. Given the seriousness of the incident depicted on the video, and the possession of weapons and drugs on school property, I cannot say that the Board was arbitrary, capricious, or unreasonable in its determination that J.C. should be expelled from school. Therefore, I **CONCLUDE** that the Board's determination to expel J.C. must be affirmed.

Although I affirmed the Board's decision to expel J.C., Ocean City School District has a continuing duty to educate J.C. under N.J.S.A. 18A:38-1. Petitioner made a compelling case that his time spent at Daytop was positive and made a major difference in his life. It was noted by Dr. O'Reilly that J.C. could return to school but in a structured program. The program J.C. received at Daytop was highly structured and effective. J.C. is now seventeen years old and doing twelfth grade course work. Dr. Jamison testified that the only educational option available to J.C. is homebound instruction through Educere. Although J.C. would like the opportunity to return to the Extension School, that

is no longer possible. It is well established that participation in extra-curricular activities and ceremonies such as graduation are privileges, not rights, and no longer available to J.C. The Board reconsidered J.C.'s appeal for reinstatement based on his progress made through Daytop, but the Board did not rescind its decision to expel. This tribunal cannot substitute its opinion for that of the Board. Whether J.C. may be better served pursuing his High School Equivalency examination and continuing his education at the college level, that is a decision for him to make. However, he is entitled to a free public education from Ocean City School District in accordance with the parameters set forth in N.J.S.A.18A:38-1. Therefore, I **CONCLUDE** that Ocean City Board of Education must continue to provide educational services to J.C. under N.J.S.A.18A:38-1.

DECISION AND ORDER

It is hereby **ORDERED** that the decision by Respondent Board of Education of Ocean City expelling J.C. as a student at Ocean City High School and its Extension School 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, 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 12, 2018
DATE

Kathleen M. Calemmo
KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: January 12, 2018

Date Mailed to Parties: January 12, 2018

cmo

APPENDIX

WITNESSES

For Petitioner:

J.C.

N.C.

M.C.

For Respondent:

Matthew Jamison, Ed.D, Principal

Michael Mattina, Assistant Principal

EXHIBITS

For Petitioner:

P-1 2017-2018 Code of Conduct

P-2 Self-Evaluation

P-3 Class Schedule

P-4 Student of the Month Award

P-5 Email teacher recommendations

P-6 Psychiatric Evaluation

P-7 September 2017 Monthly Progress Report

For Respondent:

R-1 Email threatening teacher

R-2 October 14, 2016 Letter

R-3 October 19, 2016 Letter

R-4 Police Report

R-5 Pictures of items in backpack

R-6 Contents of backpack

R-7 Daytop report

R-8 Daytop report

T.K., ON BEHALF OF MINOR CHILD, B.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOWELL, MONMOUTH COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

Pro-se petitioner appealed the determination of the respondent Board that her child was ineligible for a free public education in respondent's school district. Petitioner had enrolled her child in the Board's school district in 2014, using the Howell Township mailing address of the property that the family owns. In December 2016, petitioner received a phone call from the Board advising that B.K. was enrolled in the wrong school district, as the family's house is actually situated in Brick Township. The Board filed a counterclaim for tuition. Hearings were held at the Office of Administrative Law (OAL) and an Initial Decision was issued in September 2017, in which the ALJ concluded that T.K. is domiciled in Brick Township and B.K. is therefore not entitled to a free public education in Howell Township schools; however, the ALJ also concluded that an equitable determination is appropriate in this case because petitioner had been unaware that B.K. was enrolled in the wrong school district. Accordingly, the ALJ assessed tuition only for the period after December 9, 2016, the date upon which petitioner received notice of the residency error. Subsequently, the Commissioner found that the record lacked the information necessary to determine how much tuition is owed to the school district, and therefore remanded the Initial Decision to the OAL for supplementation of the record and calculation of tuition due.

On remand, the ALJ found, *inter alia*, that: the factual findings set forth in the original Initial Decision, issued September 8, 2017, were adopted and incorporated in the decision on remand; the respondent Board provided certification from the Assistant Superintendent for Business Administration/Board Secretary regarding the number of school days for which B.K. was ineligible and the daily tuition rate effective during the 2016-2017 school year; based on the certification, the Board is owed tuition for 124 days of ineligible attendance at $84.24 per day, or $10,445.76. Accordingly, the ALJ ordered the Board's residency determination affirmed, and further ordered the petitioner to pay the respondent tuition in the amount of $10,445.76.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, and directed the petitioner to reimburse the Board for tuition as set forth above. 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 4/05/18

OAL DKT. NO. EDU 16020-17
(EDU 00360-17 ON REMAND)
AGENCY DKT. NO. 317-12/16

T.K., ON BEHALF OF MINOR CHILD, B.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOWELL, MONMOUTH COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record in this matter – including the September 8, 2017 Initial Decision of the Office of Administrative Law (OAL), as well as the February 23, 2018 Initial Decision of the OAL issued pursuant to the Commissioner's October 23, 2017 remand – has been reviewed. The parties did not file exceptions.

On October 23, 2017, the Commissioner determined that petitioner failed to sustain her burden of establishing that she was a domiciliary of Howell Township during the 2014-2015, 2015-2016 and 2016-2017 school years; thus, the minor child was not entitled to a free public education in the District's schools. Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in Howell Township. Because petitioner only became aware on December 9, 2016 that her home was in Brick Township, rather than Howell Township, the Commissioner limited the Board to tuition reimbursement from December 9, 2016 to the end of the 2016-2017 school year. As the record lacked the information required to calculate the amount of tuition owed to the District, the Commissioner remanded the matter to

the OAL for calculation of tuition due to the District and supplementation of the record as warranted.

Upon review, the Commissioner agrees with the Administrative Law Judge that the Board is entitled to tuition reimbursement in the amount of $10,445.76 ($84.24 per day for 124 days) for the time period from December 9, 2016 to the end of the 2016-2017 school year, during which time petitioner's minor child was ineligible to attend school in the District.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $10,445.76 for tuition costs incurred during the time period for which B.K. was ineligible to attend school in Howell Township. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/05/18

Date of Mailing: 4/05/18

* 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 16020-17
AGENCY REF. NO. 317-12/16
(ON REMAND OAL DKT. NO. EDU 00360-17)

T.K., ON BEHALF OF MINOR CHILD, B.K.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HOWELL, MONMOUTH COUNTY,
Respondent.

T.K., on behalf of minor child, **B.K.,** petitioner, pro se

Jan L. Wouters, Esq., for respondent (Bathgate, Wegener & Wolf, PC, attorneys)

Record Closed: January 19, 2018 Decided: February 23, 2018

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

Petitioner, T.K., on behalf of minor child, B.K., appeals the residency determination, and assessment of tuition by the Board of Education of the Township of Howell, Monmouth County (Board, respondent, District), disallowing their minor child, B.K., from attending public

school within the respondent's school District. The Board seeks to remove B.K. from its schools pursuant to N.J.S.A. 18A:38-1(b)(2), and demands tuition reimbursement.

PROCEDURAL HISTORY

Petitioner, T.K., on behalf of minor child, B.K., filed a pro se residency appeal with the Department of Education, Bureau of Controversies and Disputes, appealing respondent's determination that B.K. did not reside in the District, and in fact lived in Brick Township, New Jersey. On January 4, 2017, the Board filed an answer. The original matter was transmitted to the Office of Administrative Law (OAL), where it was filed on January 10, 2017, for determination as a contested case pursuant to N.J..A.C. 6A:3-1 et seq. and N.J.S.A. 52:14B-1 to -15. A hearing was held on July 19, 2017, and the record closed.

An initial decision was issued in the original matter by the undersigned on September 8, 2017. On October 23, 2017, the Commissioner of Education issued a decision concurring with certain findings of fact and conclusions of law but remanding the matter to the OAL "for calculation of tuition due to the District and supplementation of the record as warranted."

On December 6, 2017, a conference call was held between the parties and the undersigned. There was no disagreement or difference of interpretation or opinion as to the scope of the remand or what was required by the remand order, and all agreed that no further testimony was needed. It was agreed that the District would provide in writing a determination of the number of school days at issue along with supporting documentation by December 15, 2017. Petitioner would be given until January 2, 2018 to respond. It was agreed that in the event that no response was submitted petitioner would be deemed to have not disputed the District's determination as to the number of days.

The District provided its submission on December 11, 2017, although it was received by the OAL on December 22, 2017. As of January 19, 2018, no response was received from petitioner. The District's submission was deemed to not be in dispute and the record closed on the date.

THE REMAND ORDER

In the Remand Order of October 23, 2017, the Commissioner concurred with the findings and conclusions contained in the initial decision that petitioner failed to meet her burden in demonstrating that she was domiciled in Howell Township, that the minor child was not entitled to a free public education in the District's schools, and that the District is entitled to reimbursement from December 9, 2016 to the end of the 2016-2017 school year. Noting, however, that the record did not identify the number of ineligible days from December 9, 2016 to the end of the 2016-2017 school year, and that an accurate count of such is necessary in order to calculate the tuition owed to the District, the Commissioner remanded the matter to the OAL for "calculation of tuition due to the district and supplementation of the record as warranted."

FACTUAL DISCUSSION AND FINDINGS

The Factual Discussions and Findings set forth in the initial decision (C-2) are hereby **ADOPTED** and **INCORPORATED** into this Initial Decision on Remand as if set forth in full herein.

Additionally, respondent provided and relied upon the certification of Ronald Sanasac, Assistant Superintendent for Business Administration/Board Secretary in which he determined that the number of school days in question is 124. As petitioner provided no response in the substantial time since the certification was submitted, it is deemed to not be in dispute. Although Sanasac states in the certification that there were 124 days in which the Howell Township Schools were in session "for the period December, 2016 to June 23, 2017, the last day of the 2017-2017 school year," a review of the support documentation makes clear that that number applied to the period commencing December 9, 2016. Accordingly, I **FIND** that there were 124 school days held during the period from December 9, 2016 to the end of the 2016-2017 school year.

LEGAL ANALYSIS AND CONCLUSIONS

The Legal Analysis and Conclusions set forth in the initial decision (C-2) are hereby **ADOPTED** and **INCORPORATED** into this initial decision on remand as if set forth in full herein.

Additionally, it has been previously determined that the actual cost of B.K.'s attendance in-District is $84.24 per day for the 2016-17 school year, and that the District is entitled to reimbursement from December 9, 2016 to the end of the 2016-2017 school year. The record on remand reflects that there were 124 school days held during the period from December 9, 2016 to the end of the 2016-2017 school year. Accordingly, I **CONCLUDE** that the District is entitled to be reimbursed for tuition by petitioner in the amount of $10,445.76.

DECISION AND ORDER

It is, therefore, **ORDERED** that the Board's determination be **AFFIRMED** and that petitioner pay respondent tuition in the total amount of $10,445.76.for unauthorized attendance in the District's school for the period stated above. 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.

February 23, 2018 — **ELIA A. PELIOS**, ALJ

DATE

Date Received at Agency: 2/23/18

Date Mailed to Parties: 2/26/18

Nd/mph

APPENDIX

WITNESSES

For Petitioner:

None

For Respondent:

None

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Determination of Number of School Days between December 9, 2016 and the End of the 2016-2017 School Year

For the Tribunal

C-1 Remand Order

C-2 Initial Decision in Original Matter

OAL DKT. NO. EDU 08094-17
AGENCY DKT. NO. 95-5/17

M.O., ON BEHALF OF MINOR CHILD, J.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WANAQUE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the Superintendent of the Wanaque School District signed the Agreement on behalf of the Board. The file does not contain a copy of the Board's resolution approving the settlement and designating the Superintendent to sign the Agreement on its behalf, nor is the resolution attached to the Agreement itself. In the alternative, the Agreement is not signed by the Board Attorney, who is the Board's duly authorized representative in litigation. In the absence of either the Board Attorney's signature or the appropriate Board resolution approving the Agreement and designating the Superintendent to sign the agreement on its behalf – as required under *N.J.A.C.* 6A:3-1.13 – the Commissioner cannot approve the within settlement.

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: 4/05/18
Date of Mailing: 4/05/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 08094-17
AGENCY DKT. NO. 95-5/17

M.O. ON BEHALF OF MINOR CHILD J.G,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF WANAQUE, PASSAIC COUNTY,
Respondent.

Rosa Amica-Terra, Esq., for petitioner (Charles A. Gruen, Esq., attorney)

Jeffrey R. Merlino, Esq., for respondent (Sciarrillo Cornell Merlino McKeever & Osborne, attorneys)

Record Closed: February 16, 2018 Decided: February 23, 2018

BEFORE **RICHARD McGILL**, ALJ:

M.O. ("petitioner") filed a petition with the Commissioner of Education challenging a residency determination by the Board of Education of the Borough of Wanaque ("respondent") in regard to her son, J.G. Respondent's Answer included a counterclaim against petitioner for tuition reimbursement. The matter was transmitted

to the Office of Administrative Law on June 9, 2017, 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. 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.

Feb. 23, 2018
DATE

RICHARD McGILL, ALJ

Date Received at Agency:

3-1-18

Date Mailed to Parties:
ljb

MAR 1 2018

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

EDU 2017-08094 M.O. obo J.G. v. Wanaque BOE –Settlement Agreement

Petitioner, Maria Onnembo, and the Wanaque Board of Education (Board) have reached this Agreement to avoid the expense, inconvenience, and potential acrimony of a hearing, which was scheduled to commence on August 28, 2017.

The parties agree as follows:

2018 FEB 16 P 2:45

1. The Board agrees to withdraw its Answer and Counterclaim contesting the residency of JG for the 2016-17 school year.

2. Petitioner agrees to reimburse the Board the amount of $3,000 payable $500 per month for six (6) consecutive months by the 15th of each month beginning September 15, 2017. Payment will be made by check payable to the Wanaque Board of Education and forwarded to the Board's attorney.

3. Petitioner agrees to dismiss her Petition of Appeal and waives all claims for attorneys' fees, damages, fees and costs through the date of this agreement from the Board.

4. The parties agree to keep this Agreement confidential to the extent permitted by law.

5. The parties agree that this Agreement resolves any and all claims through the date of this Agreement.

6. The parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement.

7. This Agreement shall be incorporated into a Final Order by the Honorable Richard McGill, A.L.J. and disposes of any and all claims that were raised or could have raised in the captioned matter.

Maria Onnembo

Maria Onnembo (Petitioner) Dated: 11.16.17

FOR THE BOARD:

_____

Donna Cardiello, Superintendent Dated:

Maria Onnembo (Petitioner) Dated: 10.16.17

FOR THE BOARD:

Donna Cardiello, Superintendent Dated:

106-18E

OAL DKT. NO. EDU 11069-14
AGENCY DKT. NO. 156-6/14

LEONOR ALCANTARA, ET AL.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
DAVID HESPE, COMMISSIONER OF EDUCATION, ET AL.,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.* Upon such review, the Commissioner 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: 4/05/18
Date of Mailing: 4/06/18

* There was no oral argument at the Office of Administrative Law (OAL). The ALJ issued her Order on the papers.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 11069-14

AGENCY DKT. NO. 156-6/14

LEONOR ALCANTARA, ET AL.,

Petitioners,

v.

DAVID HESPE, COMMISSIONER OF EDUCATION, ET AL.,

Respondents.

Arthur H. Lang, Esq., and **Daniel Grossman**, Esq., appearing for petitioners

Jennifer Hoff, **Lori Prapas**, **Lauren Jensen**, and **Geoffrey N. Stark**, Deputy Attorneys General, appearing for respondents (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Michael I. Inzelbuch, Esq., appearing for participant Lakewood Board of Education

Paul L. Tractenberg, Esq., participant

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

STATEMENT OF THE CASE

Petitioners, consisting of students and parents of students attending schools in Lakewood School District (Lakewood), as well as parents of students attending nonpublic schools in Lakewood, filed this action challenging the allocation method and amount of State funding received by Lakewood. Petitioners generally allege that Lakewood shares certain characteristics with the districts identified as "Abbott Districts" in Abbott v. Burke, 119 N.J. 287 (1990), and that as a result, Lakewood students are deprived of a constitutionally mandated thorough and efficient education (T&E). Petitioners' requested relief falls into several categories. First, they request that the Commissioner increase funding appropriations to Lakewood. Next, they seek orders requiring that the Commissioner make certain policy recommendations to the State Legislature. They also seek various declaratory rulings and administrative remedies.

This matter is now the subject of an application for emergent relief, essentially alleging the same causes for relief set forth in the original due-process petition, and for funding for the anticipated budgetary shortfall for the 2018–2019 school year.

BACKGROUND AND PROCEDURAL HISTORY

The original Petition of Appeal was filed with the Department of Education on June 24, 2014, and amended on July 7, 2014. The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on September 4, 2014. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On September 2, 2014, the respondent filed a motion to dismiss in lieu of an answer. Following the submission of briefs and oral argument, the Hon. John Kennedy, ALJ, denied the motion on July 23, 2015.

On January 14, 2015, Paul L. Tractenberg, Esq., filed a motion for leave to participate pursuant to N.J.A.C. 1:1-16.6.[1] On March 11, an order was entered permitting Mr. Tractenberg to participate in the litigation.

On February 19, 2016, the petitioners moved for summary decision, which application was denied on July 19, 2016.

On November 21, 2016, Lakewood was permitted to participate.[2]

The Township of Lakewood Board of Education (BOE) moved to intervene prior to the commencement of the hearing, which motion was denied.[3] Lakewood renewed its application at the commencement of the hearing, and it was again denied.

The hearing was commenced and testimony was taken on February 5, 7, 12, 13, and 22, 2018. At the conclusion of the petitioner's case on February 22, 2018, the respondents moved for dismissal of the case. A telephone conference was scheduled for March 22, 2018, to set a briefing schedule, as both parties wished to order the transcripts.

On March 14, 2018, the petitioners filed an application for emergent relief, essentially alleging the same causes for relief set forth in the original due-process petition, which was in the process of being heard and which was the subject of the dismissal motion.

On March 22, 2018, a telephone conference was held, at which time counsel for the petitioners advised that his emergent application was filed in anticipation of a

[1] Mr. Tractenberg is a participant pursuant to N.J.A.C. 1:1-16.1.

[2] The matter was re-assigned from ALJ Kennedy to ALJ John Schuster and then was transferred to the undersigned in June 2017.

[3] Lakewood's counsel had changed since the commencement of these proceedings.

shortfall in excess of $20,000,000 in the proposed Lakewood school budget for 2018–2019.[4] An expeditious briefing schedule on the motion to dismiss was also set.

FACTUAL DISCUSSION

The petitioner's previous motion for summary decision based on the same factual allegations of a financial shortfall to the Lakewood school system based on fault in the State funding formula was denied. Thereafter, a hearing was scheduled on the merits, which is ongoing. At the conclusion of the petitioners' case, the respondents indicated that they would be filing a motion to dismiss for failure to state a case on which relief can be granted. The petitioners alleged that the respondents could not file such a motion, but indeed they can. Accordingly, an expeditious briefing schedule was to be set so that the issues could be addressed and a decision rendered.

Notwithstanding this effort to bring this matter to closure, the petitioners filed a motion for emergent relief under the same docket number, alleging the same facts, namely, inadequate funding and the unfairness of the law as it applies to Lakewood. However, nothing has changed in the legal arguments since the original petition was filed and which was in the midst of a hearing on the merits.

In this emergent application, the petitioners also allege that prompt intervention is required to address an anticipated shortfall in school year 2018–2019. But here, the application is premature, as it is not known whether this budget will be adopted by Lakewood, nor addressed by the county superintendent. It is not known whether the State will provide additional financial assistance in any form to Lakewood. The application is clearly premature.

LEGAL ANALYSIS AND CONCLUSION

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

[4] The budget had not yet been adopted by the Board, nor had it yet been reviewed by the County superintendent.

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [See Crowe v. DeGioia, 90 N.J. 126, 132–34 (1982).]

The petitioner must meet all four criteria to prevail on its motion. See Crowe, 90 N.J. 126; DEC Electric, Inc. v. Bd. of Educ. of the S. Gloucester Cnty. Reg'l High Sch. Dist. & USA Elec. Contractors, Inc., 96 N.J.A.R.2d (EDU) 789, 790 (citing DEC Electric, Inc. v. S. Gloucester Cnty. Reg'l High Sch. Dist. Bd. of Educ. and USA Elec. Contractors, Inc., EDU 10833-95, Order Denying Emergent Relief (Dec. 6, 1995), adopted, Comm'r (Dec. 26, 1995) (denied unsuccessful bidder's request for emergent relief because it was unable to establish that it would suffer immediate and irreparable harm, although it was able to establish a reasonable likelihood of success on the merits and that the parties opposing the motion would not suffer undue harm)). The moving party bears the burden of proving each of the Crowe elements "clearly and convincingly." Waste Mgmt. of N.J. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Accordingly, each prong of the test must be analyzed:

1. Whether petitioners will suffer irreparable harm if Lakewood has a shortfall in its budget for the 2018–2019 school year.

One of the principles for emergent relief is that relief should only be ordered to prevent irreparable harm to the petitioners. Crowe, 90 N.J. at 132–33. Harm is irreparable when it cannot be addressed with monetary damages. Ibid. This standard contemplates that the harm also be both substantial and immediate. Subcarrier Commc'ns, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). "In certain

circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief." Crowe, 90 N.J. at 133. "Pecuniary damages may be inadequate because of the nature of the injury or of the right affected." Ibid.

Here, the issue of next year's school budget is not ripe for determination. The adoption of the budget; the shortfall, if any; the need for additional State funding, have yet to be determined. It is premature to assume that the petitioners will suffer irreparable harm.

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

Petitioners claim that the legal right underlying their claim is well settled, but it is not. The school funding formula has been found to be constitutional; the petitioners allege that it is unconstitutional as applied to Lakewood. The legal right to such relief is not settled.

3. Whether petitioners are likely to be successful on the merits of its claim.

The petitioners have not demonstrated that he is likely to prevail on the merits. Much of that relief that the petitioners seek is subject to the determination of the Legislature. Moreover, the Commissioner may yet determine to provide financial assistance to Lakewood for the 2018–2019 school year.

4. Whether petitioners will suffer greater harm than respondents if the requested relief is not granted.

No doubt the issues raised by the petitioners are substantial, but the harm is not necessarily greater to the petitioners than to the respondents.

CONCLUSION

Here, the petitioners are seeking relief for the 2018–2019 school budget, which has not yet been finalized. This matter is not ripe for determination.

Moreover, the hearing on the merits of the petitioners' application was continuing, pending a motion appropriately filed by the respondents for dismissal of the claim. The petitioners have not satisfied the four prongs required to obtain emergent relief. They have not shown that they will suffer irreparable harm, that the legal right underlying their claim is well settled, that they are likely to be successful on the merits, or that they will suffer greater harm than respondents if the requested relief is not granted. Accordingly, the application for emergent relief must be denied.

ORDER

The matter having not been ripe for determination and the petitioners having failed to meet the four-pronged test, the application for emergent relief is **DENIED**.

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

March 27, 2018
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

SMS/cb

105-18

VITO NUFRIO, RONALD MATLOSZ AND LOUIS ALT,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY, AND PABLO MUNOZ,	:	
RESPONDENTS.	:	

SYNOPSIS

The petitioners in this case had been employed under tenure in the position of Vice Principal or equivalent, such as Assistant House Principal, for at least ten years when their positions were eliminated in a reduction in force (RIF) in June 2010; petitioners were then reassigned as teaching staff members based on their tenure and seniority. Petitioners appealed the action of the respondent Board in eliminating the vice principal positions, alleging that the Board failed to make the appropriate analysis of the school budget in so doing; petitioners claimed that the elimination of the vice principal positions was improper and contrary to state law and regulations.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:28-9, a local board of education has broad authority and discretion to implement RIFs for reasons of economy, reduction in the number of students enrolled, or other legitimate educational reasons; in the instant case, there were sound educationally-based reasons for implementing the RIF; and the 2010 RIFs implemented by the Board were valid and comported with the requirements of *N.J.S.A.* 18A:28-9. Accordingly, the ALJ ordered the petition dismissed.

The Commissioner concurred with the ALJ that – based on the parties stipulated facts – the RIFs conducted by the Board in 2010 complied with *N.J.S.A.* 18A:28-9. 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.

April 5, 2018

105-18

OAL DKT. NO. EDU 10859-15
AGENCY DKT. NO. 151-7/15

VITO NUFRIO, RONALD MATLOSZ AND LOUIS ALT,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY, AND PABLO MUNOZ,	:	
RESPONDENTS.	:	

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

Upon such review, the Commissioner agrees with the Administrative Law Judge that – based on the stipulated facts set forth in the Initial Decision – the reductions in force conducted by the Board in the Spring of 2010 complied with *N.J.S.A.* 18A:28-9.

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.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/05/18
Date of Mailing: 4/06/18

* 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 10859-15
AGENCY REF. NO. 151-7/15

VITO NUFRIO, RONALD MATLOSZ AND LOUIS ALT,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY AND PABLO MUNOZ,

Respondents.

Robert B. Woodruff, Esq., for Petitioner (Schiller & Pittenger, P.C., attorneys)

John E. Croot, Esq., for Respondent (Adam, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: December 20, 2017 Decided: February 21, 2018

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, Vito Nufrio, Ronald Matlosz and Louis Alt, filed a Petition of Appeal with the Commissioner of the Department of Education (DOE) on July 1, 2015 seeking an order that the Reduction in Force (RIF) performed by Respondent was invalid.

This matter was transferred to the Commissioner of the Department of Education by order of the Honorable Kenneth Grispin, JSC, dated October 31, 2014, in a matter pending before the Superior Court of New Jersey, Union County, Docket No. UNN-L-2832-11.

The matter was transferred to the Office of Administrative Law (OAL) from the Department of Education, where it was filed on July 23, 2015, as a contested case. N.J.S.A. 52:14B-1 to –15; N.J.S.A. 52:14F-1 to –13.

A prehearing conference was held on August 27, 2015, and a prehearing Order was entered on the same date. An amended prehearing order was entered on November 25, 2015.

Robert B. Woodruff, Esq., filed a substitution of attorney, dated August 30, 2016, substituting for Phillip B. Linder, Esq., as Petitioners' counsel.

A hearing was held on December 11, 2017.

A telephone conference was held on December 20, 2017, wherein the parties agreed to certain stipulated facts and requested the undersigned issue an Initial Decision based upon those facts.

ISSUE

Whether the RIFs were valid.

STIPULATED FACTS

1. The RIFs undertaken by Respondent Board of Education in the Spring of 2010 for the 2010-2011 school year were valid.

2. There were sound educationally based reasons for implementing the RIFs, and for the choice of the affected positions.

3. The Respondent Board of Education's actions in implementing the RIFs complied with N.J.S.A. 18A:28-9.

LEGAL ANALYSIS AND CONCLUSION

N.J.S.A. 18A:28-9 states:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

A Board has broad discretion to implement RIFs. In Carpenito v. Board of Educ. of Borough of Rumson, Monmouth County, 322 N.J. Super. 530 (App. Div. 1999) the court states" "If done for proper reasons, such as 'economy' or because of a reduction in the number of pupils enrolled, the effectuation in force is entirely within the authority and discretion of the board."

Based upon the above analysis, and the stipulated facts, I **CONCLUDE** that the RIFs conducted by the Respondent Board of Education in the Spring of 2010 were valid and comported with N.J.S.A. 18A:28-9, and that Petitioner's petition should be **DISMISSED**.

ORDER

It is hereby **ORDERED** that Petitioners' petition is **DISMISSED**.

This Initial Decision does not address any elements of the matter presently pending before the Superior Court of New Jersey, Union County, Docket No. UNN-L-2832-11, which is solely the jurisdiction of said Court.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 21, 2018
DATE

THOMAS R. BETANCOURT, ALJ

db

Date Received at Agency: February 21, 2018

Date Mailed to Parties: February 21, 2018

db

MARTINA GODBOLT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – hired by the Camden City School District in November 2012 under a Certificate of Eligibility with Advanced Standing – challenged the respondent Board's determination not to renew her teaching contract at the end of the 2014-2015 school year, for "failure to produce an appropriate certificate...and other good cause." Petitioner argued that she had completed the requirements of the Provisional Teacher program to qualify for a standard teaching certificate, but the District failed to submit the paperwork necessary for her to receive her Standard Certificate. Petitioner filed her appeal on February 25, 2016, seeking reimbursement for wages from September 1, 2015 to November 4, 2015. The Board filed a motion to dismiss, contending that petitioner's appeal was filed out of time, and that the petition failed to state a valid claim for relief.

The ALJ found, *inter alia,* that: pursuant to *N.J.S.A.* 18A:27-10(b), written notice of a decision not to renew a non-tenured teacher must be received by May 15 of the current school year; pursuant to *N.J.A.C.* 6A:3-1.3(i), a teacher seeking to contest a board decision must file a petition no later than the 90th day from the date of final notice of a board action; in the instant case, petitioner received notice from the Board that her contract was not being renewed on May 11, 2015, however – because District representatives assisted petitioner in obtaining her standard certificate and led her to believe that she would be reinstated once she had received it – the principal of equitable estoppel is applicable here; petitioner requested reinstatement by letter dated October 30, 2015, after her standard certificate was issued; the Board did not respond until December 2, 2015; thus, petitioner's appeal was filed within 90 days of final notice that she would not be reinstated. However, absent constitutional constraints, local boards of education have an almost complete right to terminate the services of a non-tenured employee, and petitioner was timely notified pursuant to *N.J.S.A.* 18A:27-10(b) that her contract would not be renewed – not only for lack of proper certification, but also for "other good cause," and petitioner failed to meet her burden to prove that the Board's decision was arbitrary, capricious or unreasonable. Accordingly, the ALJ granted the Board's motion to dismiss for failure to state a claim upon which relief can be granted, but denied the Board's motion to dismiss for failure to timely file.

Upon review, the Commissioner concurred with the ALJ's determination that the District's non-renewal of petitioner was within its discretion, and there was no obligation to reinstate the petitioner once she acquired her certificate. In so determining, the Commissioner pointed out that in light of the fact that the 90-day rule can be relaxed under certain circumstances that would result in injustice, the principle of equitable estoppel does not need to be applied here. 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.

Issued 4/05/18

OAL DKT. NO. EDU 4270-16
AGENCY DKT. NO. 59-2/16

MARTINA GODBOLT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN 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 review of the record in this matter, the Commissioner concurs with the Administrative Law Judge's (ALJ) determination that the petition of appeal was not time barred under *N.J.A.C.* 6A:3-1.3(i).[1] *N.J.A.C.* 6A:3-1.3(i) prescribes that an appeal to the Commissioner must be filed "no later than the 90th day from the date of the 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 hearing." The 90-day rule "provides a measure of repose, an essential element in the proper and efficient administration of the school laws." *Kaprow v. Board of Education of Berkeley Tp.*, 131 *N.J.* 572, 582 (1993).

The petitioner, a non-tenured teacher, was informed by the District in May 2015 that her contract was not being renewed for the 2015-2016 school year because she did not have the required certificate, and for other good cause. Although the petitioner was informed in May 2015 that her

[1] The Commissioner does not agree with the ALJ's determination that the principle of equitable estoppel is applicable to this matter. For purposes of the 90-day rule, the first step in the analysis is whether the petition was filed within 90 days after the receipt of notice of the Board's decision. If it is determined that a petition was filed outside the 90-day period, then it is appropriate to consider whether the application of the 90-day rule should be relaxed "where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." *Kaprow*, *supra*, 131 *N.J.* at 582. In light of the fact that the 90-day rule can be relaxed under certain circumstances that would result in injustice, the principle of equitable estoppel does not need to be applied.

contract was not going to be renewed, it was not until December 2, 2015 that she received notice from the District that she was not going to be reinstated despite the fact that she had acquired the requisite certificate.[2] The petitioner then filed the petition of appeal on February 25, 2016, challenging the District's decision not to reinstate her and seeking reimbursement for unpaid wages. Therefore, applying the most lenient trigger date of December 2, 2015 for purposes of the 90-day rule, the Commissioner finds that the petition of appeal was timely filed.

The Commissioner is also in accord with the ALJ's determination – for the reasons stated in the Initial Decision – that the petitioner is not entitled to unpaid wages from September 1, 2015 to November 4, 2015, when petitioner began teaching at a charter school. It is well recognized that local boards of education have "virtually unlimited discretion in hiring or renewing non-tenured teachers." *Dore v. Board of Educ. of the Twp. of Bedminster*, 185 *N.J. Super.* 447, 453 (App. Div. 1992). The District's non-renewal of the petitioner in May 2015 was certainly within its discretion and there is no evidence to suggest that its decision was arbitrary, capricious, or unreasonable. Therefore, the District was not obligated to reinstate the petitioner when she acquired her certificate or to reimburse the petitioner for unpaid wages between September 1, 2015 and November 4, 2015. Accordingly, the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/05/18

Date of Mailing: 4/05/18

[2] The timeline of events that occurred in this matter are fully outlined in the Initial Decision.

[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
ON MOTION TO DISMISS
OAL DKT. NO. EDU 04270-16
AGENCY DKT. NO. 59-2/16

MARTINA GODBOLT,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF CAMDEN, CAMDEN COUNTY,
Respondent.

Christopher A. Gulla, Esq., for petitioner (Zeller & Wieliczko, LLP, attorneys)

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

Record Closed: January 30, 2018 Decided: February 22, 2018

BEFORE **PATRICIA M. KERINS,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Martina Godbolt (Godbolt) challenges the non-renewal of her employment by respondent, the State-Operated School District of the City of Camden (Camden), on the grounds that she failed to produce an appropriate certificate, and for other good cause. She seeks reimbursement for wages from September 1, 2015, to

November 4, 2015. Her petition was filed with the Department of Education's Bureau of Controversies and Disputes on February 25, 2016. The matter was transmitted to the Office of Administrative Law (OAL) on March 18, 2016, for a 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. Camden has filed a motion to dismiss in lieu of answer on two grounds. Camden contends that Godbolt did not file her appeal within ninety days, and that the petition fails to state a valid claim for relief.

FACTUAL DISCUSSION

This matter arises out of Camden's decision not to renew Godbolt's teaching contract for "failure to produce an appropriate certificate . . . and other good cause." Godbolt began working in the Camden district at Forest Hill Elementary School in November 2012. At that time, she had a Certificate of Eligibility with Advanced Standing. During the 2012–13 school year, Godbolt completed the requirements of the Provisional Teacher Process to qualify for a Standard Certificate.

The Department of Education (DOE) requires that the school district submit the paperwork necessary to obtain a Standard Certificate through the Provisional Teacher Process (PTP) to the PTP Office for review. Although she had completed the necessary certification requirements, Camden failed to submit the necessary paperwork for Godbolt to receive a Standard Certificate. In May 2015, Godbolt learned that her Standard Certificate had not been issued when she was notified that she would be receiving a notice of non-renewal. On May 11, 2015, Godbolt received the official notice of her non-renewal.

Also on May 11, 2015, Godbolt met with Camden's certification specialist, Tameeka Mason (Mason). Godbolt was told that Camden had to submit further forms for her to qualify for the Standard Certificate. On May 27, 2015, Mason represented to Godbolt that "the Forms would be submitted to the DOE and that the May 11, 2015 Non-Renewal Notification letter would likely be rescinded once [Godbolt] was issued a Standard Certificate." (Verified Petition of Appeal at 7.) Over the next few months,

Godbolt met with various Camden employees to get assistance in acquiring the Standard Certificate. Godbolt relied on this assistance under the assumption that once she received the Standard Certificate she would continue employment with Camden.

Camden representatives continued to assist Godbolt in the process of obtaining her standard certificate, and she was issued a Standard Certificate on October 27, 2015. On October 30, 2015, through her attorney, Godbolt sent a letter to Louis R. Lessig, labor counsel for Camden, demanding reinstatement and unpaid wages from the beginning of the 2015–16 school year. On November 4, 2015, Godbolt secured employment with Camden Community Charter School.

On December 2, 2015, Godbolt received a letter from Camden's counsel denying her requests for reinstatement and lost wages. This letter "was the first time that the District responded to [Godbolt's] continued inquiries regarding the District's mishandling of the necessary forms and . . . addressed the District's position regarding [Godbolt's] termination." (Pet'r's Br. at 2–3.) Godbolt was not aware of Camden's intent not to rehire her until she received this letter.

On February 25, 2016, Godbolt filed a Petition of Appeal seeking reimbursement for wages from September 1, 2015, to November 4, 2015. On March 16, 2016, Camden filed a motion to dismiss in lieu of an answer on the grounds that Godbolt failed to file a petition in a timely manner, and that she failed to set forth a cause of action upon which relief can be granted.

LEGAL DISCUSSION

Camden asserts that Godbolt's petition should be dismissed because she did not file a challenge to its action within ninety days of receiving notice of her non-renewal.

In New Jersey, if a board of education decides not to renew the contract of a non-tenured teacher, the teacher must receive written notice of the decision from the chief school administrator by May 15 of current school year. N.J.S.A. 18A:27-10(b). If

the teacher wants to contest the decision of the board, the teacher must file a petition "no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing." N.J.A.C. 6A:3-1.3(i).

The Supreme Court of New Jersey addressed what is considered adequate notice to begin the ninety-day time limit for filing a petition in Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572, 587 (1993), stating that "notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." The Court further noted that

> [w]hen a plaintiff knows or has reason to know that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action.
>
> [Kaprow, 131 N.J. at 587 (quoting Farrell v. Votator Div., 62 N.J. 111, 115 (1973)).]

Other considerations cited by the Court include that a "notice requirement should effectuate concerns for individual justice by not triggering the limitations period until . . . teachers have been alerted to the existence of facts that may equate in law with a . . . cause of action." Ibid.; see Burd v. New Jersey Tel. Co., 76 N.J. 284, 291 (1978). "At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order 'to enable the proper and efficient administration of the affairs of government.'" Kaprow, 131 N.J. at 587 (quoting Borough of Park Ridge v. Salimone, 21 N.J. 28, 48 (1956)).

A review of the facts in Kaprow is relevant to the analysis in the within matter. There, a tenured administrator became aware that his position was being terminated and that non-tenured employees were hired to perform his duties. The administrator received formal notice only when the secretary of the local board informed him that two positions to which he claimed tenure rights had been filled by non-tenured employees.

The administrator sent letters to the board attempting to negotiate and get clarification on his employment. The board did not respond to the letters, and the ninety-day time limit to bring a claim expired.

The administrator claimed that the ninety-day period never began because he did not receive adequate notice from the board of his termination. The Court found that the administrator's attempt to resolve his claim through negotiations with the local board was irrelevant and did not negate the fact that he received adequate notice when he spoke to the secretary, nor did it toll the running of the limitations period. The Court reasoned that "[t]o insist under these circumstances that there be additional or more-specific notice will not further the objectives of the regulatory scheme, and would only defeat the considerations of repose and interfere with the efficient administration of the school laws." Kaprow, 131 N.J. at 589.

Here, Godbolt received formal notice from Camden that her contract was not being renewed for failure to produce an appropriate certificate and other good cause on May 11, 2015. While that notice was adequate to inform Godbolt of any cause of action she may have had against Camden as a result of her non-renewal, absent misleading action by Camden, the ninety-day period would begin to run from May 11, 2015. However, unlike Kaprow, the principal of equitable estoppel is applicable to this matter. Camden representatives led Godbolt to believe that she would be reinstated once she received a Standard Certificate. On May 27, 2015, Mason, the District's certification specialist, represented to Godbolt that the non-renewal would likely be rescinded once Godbolt was issued a Standard Certificate. Camden representatives continued to assist Godbolt in obtaining the Standard Certificate until it was issued on October 27, 2015. Godbolt then sent a letter requesting reinstatement on October 30, 2015. The District did not respond until December 2, 2015. Thus, Godbolt found out that she was not being reinstated despite obtaining the Standard Certificate in the letter from Camden on December 2, 2015.

Godbolt filed her petition of appeal on February 25, 2016. Thus, her petition was filed within ninety days of her receiving notice that she would not be reinstated.

Because Camden led Godbolt to believe she would be reinstated upon receiving a Standard Certificate, and she reasonably relied on its representatives, the ninety-day time period was relaxed, and the petition was timely filed.

In this matter, however, Camden further contends that even if the petition was timely filed, Godbolt was never entitled to reinstatement, and therefore not entitled to reimbursement of wages.

A non-tenured teacher must be given notice of a District's decision not to renew her contract by May 15 of the current school year. N.J.S.A. 18A:27-10(b). Here, Godbolt was notified on May 11, 2015, that her contract was not being renewed for the 2015–16 school year.

Local boards have "virtually unlimited discretion in hiring or renewing nontenured teachers." Dore v. Twp. of Bedminster Bd. of Educ., 185 N.J. Super. 447, 453 (App. Div. 1982). "[A]bsent 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." Id. at 456. Discretionary decisions of the local board will only be vacated where the board acts in an arbitrary, capricious, or unreasonable manner. Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). The petitioner has the burden of proving that the underlying reasons for the board's actions are improper. Bigart v. Paramus Bd. of Educ., 1979 S.L.D. 123, 133.

Dore, 185 N.J. Super. 447, is the leading case on the issue of a board's responsibilities regarding non-renewal of non-tenured teachers. In Dore, the court reversed a Commissioner's decision to reinstate the teacher because the board was not required to state reasons for non-renewal. Dore, 185 N.J. Super. at 456–57. The court went on to assert that N.J.S.A. 18A:27-3.2 "'urges' local boards of education to give reasons to employees who are being terminated," but the statute provides no penalties for a board's failure to comply. Ibid. Therefore, a board is not required to prove its

reasons for non-renewal of a non-tenured teacher. Procopio v. Wildwood Bd. of Educ., 1975 S.L.D. 805, 816.

Here, Godbolt's contract was not renewed for failure to produce an appropriate certificate and other good cause. Godbolt argues that she was qualified for an appropriate certificate, but Camden failed to fulfill its obligation to submit Godbolt's paperwork to the DOE so that she could be certified. N.J.A.C. 6A:9B-8.6(c). Because it was Camden's fault that Godbolt was not certified, and Godbolt subsequently became certified, Godbolt claims that she was entitled to reinstatement in the District.

However, Camden also decided not to renew Godbolt's contract for "other good cause." Godbolt has not claimed that Camden violated any constitutional rights or legislation involving tenure rights. N.J.A.C. 6A:9B-8.6(c) does not involve tenure rights of teachers. This regulation only concerns procedures for evaluating a provisional teacher for a Standard Certificate. N.J.A.C. 6A:9B-8.6(c). Because there are no constitutional or tenure rights asserted, Camden has almost a complete right to terminate Godbolt.

While N.J.S.A. 18A:27-3.2 urges a district to provide reasons for nonrenewal, the statute does not provide any penalties if a district does not comply. Therefore, Camden may decide not to renew Godbolt by stating "other good cause," and the burden is on Godbolt to prove that this decision was arbitrary, capricious, or unreasonable. Although Godbolt has shown that it would be unreasonable to not renew her due to the lack of a Standard Certificate, she has not shown that Camden did not have other good cause. Thus, Godbolt has not overcome her burden and she has not shown that she was entitled to reinstatement for the 2015–16 school year. Because she was not entitled to reinstatement, she is not entitled to unpaid wages from September 1, 2015, to November 4, 2015.

Here, Godbolt reasonably relied on Camden's representations that she would be reinstated upon receipt of a Standard Teaching Certificate, so her petition is not time-barred by the ninety-day time limit. However, Camden's non-renewal of Godbolt's

contract was within its discretion, so she is not entitled to unpaid wages from September 1, 2015, to November 4, 2015.

ORDER

Camden's motion to dismiss for failure to file within the ninety-day period is **DENIED**, but the motion to dismiss for failure to state a claim 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.

February 22, 2018
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: February 22, 2018 (emailed)

Date Mailed to Parties: 2/23/18

PMK/mel

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
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In the Matter of the TENURE Charges Against

JEANNE GANNON,

Agency Dkt. No.
17-1/18

By: SECAUCUS BOARD OF EDUCATION,
BERGEN COUNTY
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Before **MELISSA H. BIREN, Esq.,** Impartial Arbitrator

ORDER APPROVING SETTLEMENT OF TENURE CHARGES

The Secaucus Board of Education, Bergen County (the "Board") certified tenure charges against Jeanne Gannon ("Respondent" or "Gannon"), a tenured school psychologist in the Secaucus Public School District ("District"). The Board's counsel, Stephen R. Fogarty, Esq. (Fogarty & Harra), filed the tenure charges alleging conduct unbecoming and other just cause with the Commissioner of Education of the State of New Jersey on January 19, 2018. Respondent, by her counsel, Colin M. Lynch, Esq. (Zazzali, Fagella, Nowak, Kleinbaum & Friedman) filed an answer with the Commissioner on February 2, 2018, denying the allegations and asserting various defenses. The Commissioner of Education, having reviewed the charges and the Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation and, therefore, referred the matter to arbitration. These charges were referred to the undersigned Arbitrator on February 16, 2018 pursuant to *P.L.* 2012, c. 26, as amended by *P.L.* 2015, c.109.

A hearing was held on March 12, 2018. During the course of the hearing, the parties reached a mutually acceptable settlement of the tenure charges. The settlement terms were set forth in a written document (the "Settlement"), signed by Respondent on March 12, 2018. At a meeting of the Board on March 15, 2018, the Board accepted the Settlement. On March 21, 2018, the Settlement was forwarded to the arbitrator for review and approval. In accordance with *N.J.A.C.* 6A:3-5.6, the terms of the Settlement

are hereby approved; the standards for settlement have been satisfied as set forth below.

1. Copies of documents as to the nature of the charges and the Settlement are attached.
2. The settlement of the tenure charges is warranted as it resolves the charges without additional cost to the State or to the parties. The settlement also removes the uncertainty of litigation for both the Board and the Respondent.
3. Both the charged and charging parties have consented to the settlement terms. Both parties were represented by counsel in the negotiation of the settlement terms and the preparation of the Settlement. Gannon signed the Settlement indicating her voluntary agreement to its terms on March 12, 2018. The Board approved the Settlement at a meeting on March 15, 2018.
4. Respondent confirmed to the arbitrator at the hearing that she fully understands the settlement terms and that she voluntarily entered into the settlement with a full understanding of her rights. Competent counsel provided advice and counsel to the Respondent throughout the settlement process.
5. The settlement is in the public interest. By the settlement, the Board avoids the uncertainty of the outcome of the arbitration, the time and expense associated with litigation and any disruption to the District resulting from school personnel's participation in the hearing. In addition, because no payments are made to the Respondent as part of the settlement, there are no additional costs incurred by the Board in connection with the settlement terms, such as severance or continued health care costs.
6. Respondent has agreed to resign her position with the District, with no admission of guilt, with the Board's agreement to withdraw the tenure charges. Respondent's counsel and the Arbitrator advised Respondent that because she is resigning her position with the District, the tenure determination resulted in the loss of her position and, therefore, that it is the

Commissioner's duty to refer the tenure determination to the State Board of Examiners and that revocation of suspension of her license remained a possibility. Gannon confirmed at the hearing that she understood. She proceeded with the settlement voluntarily, with this understanding.

By reason of the foregoing, the settlement of the tenure charges against the Respondent, Jeanne Gannon, pursuant to the terms set forth in the Settlement, is approved.

Dated: April 3, 2018

Melissa H. Biren, Esq., Arbitrator

State of New Jersey)

County of Essex)

On this 3rd day of April, 2018, before me personally came and appeared MELISSA H. BIREN, to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that she executed the same.

Robert D. Agree
Notary Public

Robert D Agree
Notary Public
New Jersey
My Commission Expires February 8, 2023
No. 2429835

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March 20, 2018

VIA E-MAIL ONLY

Melissa H. Biren, Esq.
Arbitrator
81 Parker Avenue
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Re: In the Matter of Tenure Hearing of Jeanne Gannon, Secaucus Board of Education, Bergen County
Agency Ref. No. 17-1/18
Our File No.: 139

Dear Arbitrator Biren:

Please accept the following submissions along with all attached documentation as confirmation of the settlement between the Secaucus Board of Education (hereinafter referred to as the "Board") and Ms. Jeanne Gannon (hereinafter referred to as "Ms. Gannon") in the above-captioned matter.

In accordance with N.J.A.C. 6A:3-5.6, tenure chares which have been certified to the Commissioner must meet the six outlined standards, as adopted by In re Cardonick, State Board decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846), before a settlement may be approved. The following are the required standards:

(1) Accompaniment by documentation as to the nature of the charges;
(2) Explication of the circumstances justifying settlement or withdrawal;
(3) Consent of both the charged and charging parties;
(4) Indication the charged party entered into the agreement with a full understanding of his or her rights;
(5) A showing the agreement is in the public interest; and

(6) If the charged party is a teaching staff member, a showing the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

As per the first standard, please find attached the filed tenure charges (Exhibit A). Consistent with the second standard, the circumstances justifying settlement in this case are that Ms. Gannon has agreed to resign from her position as a school psychologist and the Board has agreed accept her resignation and withdraw the tenure charges. The terms of this settlement are addressed in greater detail in the Settlement Agreement executed by Ms. Gannon and expressly set forth at the hearing that took place in this matter on March 12, 2018 (Exhibit B). Under the third standard, consent of both parties is established by and through the Settlement Agreement of March 12, 2018, executed by Ms. Gannon, and approved by the Board at its meeting on of March 15, 2018, at which time the Board accepted Ms. Gannon's resignation (Exhibit C). In compliance with the fourth standard, Arbitrator Biren confirmed that Ms. Gannon was aware of her rights before entering into the Settlement Agreement, as evinced in the March 12, 2018 Transcript, pages 25-27 (Exhibit D).

The fifth standard is satisfied based on both parties' acceptance of and consent to the Settlement Agreement, as exemplified by the Settlement Agreement of March 12, 2018 executed by Ms. Gannon and the Board Resolution of March 15, 2018 (Exhibit C). Furthermore, settlement is significantly in the public interest as opposed to continued litigation. The Settlement allows for litigation to be concluded, thus avoiding additional hearing days, payment to the court reporter for each of the hearing days, and substantial legal fees and costs. Additionally, through this settlement the Board accepted Ms. Gannon's resignation with no financial consideration. Ms. Gannon's resignation was accepted without any separation compensation or health care costs from the Board. Moreover, by avoiding additional hearing days through settlement, the teachers and administrators that were involved are able to direct their time and attention to the students of the Secaucus School District, rather than preparing for and testifying in this tenure hearing. Therefore, it is evident there are

compelling reasons why settlement is in the public interest rather than continuing this litigation.

Finally, in adherence with the sixth standard, Arbitrator Biren ensured that Ms. Gannon understood that because she resigned, the tenure determination resulted in the loss of her position and thus notice will be provided to the State Board of Examiners for possible suspension or revocation of certificate (Exhibit D). See March 12, 2018 Transcript page 26, line 22 through page 27, line 9.

Additionally, in compliance with N.J.A.C. 6A:3-5.6(b), please find attached the Board Resolution accepting Ms. Gannon's resignation from her position as school psychologist further indicating the Board's consent to the terms of the settlement (Exhibit C).

Respectfully submitted,

FOGARTY & HARA, ESQS.

BY: /s/ Stephen R. Fogarty
Stephen R. Fogarty

SRF:kd
Enclosures
cc: Colin M. Lynch, Esq. (via e-mail only)
Ms. Jennifer Montesano (via e-mail only)
Superintendent of Schools
Ms. Grace Yeo (via e-mail only)
Business Administrator/Board Secretary

Charge No. 1

THAT, JEANNE GANNON, A TENURED TEACHING STAFF MEMBER IN THE EMPLOY OF THE SECAUCUS BOARD OF EDUCATION, ENGAGED IN CONDUCT WHICH WAS IN DIRECT VIOLATION OF THE NEW JERSEY PROFESSIONAL STANDARDS FOR TEACHERS, N.J.A.C. 6A:9-3.3, AND THE SECAUCUS BOARD OF EDUCATION DISTRICT POLICY NO. 3211 WHEN SHE REPEATEDLY REFUSED TO PERFORM HER ASSIGNED DAY 3 LUNCH DUTY, AND REPEATEDLY REFUSED TO WORK WITH THE DISTRICT AND HER COLLEAGUES TO RECONCILE HER ALLEGED CONCERNS WITH THE ASSIGNED LUNCH DUTY, AND SUCH ACTIONS CONSTITUTE UNBECOMING CONDUCT WARRANTING DISMISSAL FROM HER POSITION AS A TEACHING STAFF MEMBER.

1. Jeanne Gannon ("Gannon") was first employed by the Secaucus Board of Education (the "Board") to serve as a full-time teaching staff member, specifically school psychologist, in the Secaucus Public School District (the "District") on September 9, 2009. Although strictly due to budgetary purposes, she was not renewed for the 2011-2012 school year, on May 11, 2012 she was re-appointed by the Board to serve again as school psychologist. Thereafter, Gannon received tenure from the Board.

2. The District provides educational programs and services to students who reside in the Town of Secaucus from kindergarten through twelfth grade.

3. During her tenure in the District, Gannon has been employed as a school psychologist for the middle and high schools.

4. The Board sent Gannon notification of her lunch duty for the middle school in or around early September 2017, as a result of an insufficient number of teachers to adequately and safely provide supervision for the middle school lunch period.

5. After receiving the notification that she was assigned middle school lunch duty every Day 3, more specifically on September 11, 2017, Gannon emailed Robert Valente ("Valente"), Secaucus Middle School Principal, requesting a meeting regarding the assignment.

6. Gannon followed up three days later on September 14, 2017 because she had not had an opportunity to speak with Valente in person about the assignment. She divulges in her email that not only is she entirely in disagreement that PAC or lunch time can be used for lunch duty supervision in addition to the counseling services she provides during this time, but also that she "would have been out of the building" for her first lunch duty assignment on September 11, 2017 for a mediation. However, the mediation session was re-scheduled and she proceeded to arrange a new counseling session with a different student in lieu of performing her assigned lunch duty. During this session an

office secretary informed Gannon that she was needed in the cafeteria for her lunch duty.

7. That same day, September 14, 2017, Valente responded to Gannon's concerns and inquiries by email informing her that the school "needs people in place at certain times of the day in order to operate safely. One of those times is at lunch." Additionally, to ensure he was providing correct assignments and information, Valente explained that he had met with a Secaucus Education Association (the "Association" or the "SEA") representative to check the Association's contract, met with the Secaucus Board of Education School Government Committee to express the dire coverage position the Middle School is facing, and finally, met with Kenneth Knops ("Knops"), then interim Superintendent of Schools, regarding this situation. After diligently meeting with these parties, all three agreed that there is nothing in the contract preventing Child Study Team ("CST") members from being assigned lunch duty, and that assigning a CST member to dedicate one period every four days to supervise students is certainly reasonable. As a result, the Secaucus Middle School assigned teachers, guidance and CST members to supervise lunch duty.

8. Rather than attempting to make the schedule change incorporating lunch duty, Gannon proceeded to forward her

email chain with Valente to Knops for his input and then emailed Susan Smahl ("Smahl"), Director of Special Services, to complain that assigning members of the CST to lunch duty is "disconcerting, not to mention confusing."

9. Smahl responded to Gannon's email by directing her to continue to work out the lunch duty assignment with Valente, reiterating that Valente understands if a student has an emergency preventing Gannon from performing her lunch duty, she will be excused from such.

10. Continuing to ignore the importance of sufficient lunch duty coverage, Gannon immediately emailed Smahl back on September 19, 2017, in a palpably hostile tone, alleging that Smahl was prioritizing lunch coverage over IEP mandated services and insinuating that lunch duty was far beneath the CST member's job description ("For the past 9 years I have been here, there were both teachers and non-teaching staff dept chairs, supervisors, etc. doing lunch duty. How did that somehow change and lunch duty became the role of the Child Study Team???"). Identifying the tone in her email, Smahl instructed Gannon in her response email of the same date, to discuss her continued complaints with Nancy Lynch ("Lynch"), the Association President.

11. Smahl subsequently retired as the Director of Special Services and Raymond Dorso ("Dorso") replaced her as Interim

Director of Special Services.) On October 4, 2017, despite having a meeting scheduled with Dorso the next day, Gannon sent him an email further expressing her inability to commit to her lunch duty assignment and further asserting that the lunch duty is a compliance issue. Additionally, Gannon alleged that Valente was telling other teachers that they received lunch duty because Gannon was refusing to perform her assigned lunch duty. However, this accusation was disputed by Valente who explained to Dorso in a separate email that he had not informed any other faculty members of the situation with Gannon. More importantly, he addresses the fact that he has had to hastily find coverage for each Day 3 lunch duty because Gannon has not covered one lunch duty this school year. Valente explains in greater specificity the *de minimus* inconvenience Gannon's Day 3 lunch coverage would pose for her students as follows:

> What I requested is that she rearrange her meetings on Day 3. With this system, each student that a CST member is scheduled to meet with would miss one class every four weeks. This works out because the CST meet with students on a five day schedule (Monday - Friday). The school (and lunch duty schedule) run on

> a four day schedule (Day 1 – Day 4). For example in the month of October, if a CST member meets with Student A and Student B every Monday at lunch time, those two students would miss class Monday, October 16th. That's it. This would impact CST members meetings each day 3, but would be different students each week.

12. In preparation of their October 5, 2017, meeting and as per the request of Dorso, Gannon emailed Dorso her counseling schedule. She took the opportunity as well to reiterate the difficulty she anticipates having if she actually provided her assigned lunch duty coverage. She further argues that she cannot perform the lunch duty because parents and teachers frequently request she meet with students. However, this scenario still does not prove her incapability to provide lunch duty coverage.

13. Following the October 5, 2017 meeting between Dorso and Gannon, a subsequent meeting was scheduled to discuss and review optional times to provide the required counseling. This subsequent meeting was intended to explore the option of scheduling counseling sessions in alignment with the 4-day building schedule rotation and modifying the behavior plan of a certain student.

14. While Dorso continued to try to work with Gannon regarding the lunch duty, Gannon sent back the following in an email dated October 9, 2017:

> As I have mentioned, this request for me to do lunch duty is inappropriate, as it directly conflicts with my time to see the students for counseling. There are plenty of teachers and other staff members who do not provide related services on Day 3 between 11:30 and 12:30 who can do the lunch duty. I'm trying to do my job and this situation is starting to make me feel uncomfortable. If it continues, I will be pursuing this as a compliance issue.

In light of this email, Dorso proposed another meeting between Valente, him and her to review the situation. Dorso additionally invited her to bring an Association representative in an effort to make her feel more comfortable. However, she could not even comply with this directive as she informed Dorso that this situation is "not a union issue," and that she would instead be bringing outside representation. Once again proving she was never inclined to work with the District administration to find

an agreeable solution to her schedule concerns with the lunch duty.

15. On October 25, 2017, in an effort to reschedule a subsequent meeting with Gannon (which she cancelled) to October 27, 2017 and in an effort to continue working with Gannon to convey that she could make her schedule work while incorporating the lunch supervision duty, Dorso sent Gannon an email with an attached memorandum. As per the memorandum, Dorso informs Gannon:

> As I noted when we met on October 5th and indicated in my follow-up email, also on October 5th, you need to ensure all IEP counseling and other mandates are met.
>
> In addition to ensuring all IEP mandates are met, you are expected to begin providing lunch coverage beginning on October 31, 2017. This will provide you with time to make any required changes to the existing counseling schedule.
>
> I remain confident that this matter can be resolved creatively, to this end, please see the table below. It is intended to provide a possible framework for providing counseling. Please

> consider this as a starting point to find a creative solution to this matter. In the event that this proposed structure does not work, you will need to schedule counseling sessions during other times of the student's day.

As indicated, the memorandum provided a sample schedule moving students' counseling sessions to allow her to successfully provide counseling services while incorporating the Day 3 lunch duty.

16. In response to the October 25, 2017 memorandum from Dorso, Gannon responded: "[j]ust because you are able to move the kids around based on what will fit the rotation, doesn't mean that fits in with my day to day role." Gannon further indicates in the email that she has parents individually request her to counsel and tutor their children during PAC or lunch and "[a]dministrators telling a case manager to reschedule these students for the purposes of lunch duty, once again, is not appropriate and not in accordance with FAPE." Gannon concludes her email by purporting that her role as case manager "in putting the needs of the students first is protected from retaliation in the 504 Act."

17. On October 26, 2017 Gannon informed Dorso by email that she would not be able to attend the re-scheduled October 27,

2017 meeting, and provided subsequent dates and times she *may* be available for a second rescheduling. Additionally, despite being informed in the October 25, 2017 memorandum that she may bring Association representation, her excuse for cancelling the rescheduled meeting last minute was because her "representation" was not available. Moreover, the fact that she delayed her response that she could not attend the meeting until last minute, that this was her second cancellation for this meeting, and that she did not indicate any inclination to at least be open to restructuring her schedule to include the lunch supervision duty exemplifies her refusal to work with the school community and her fellow colleagues.

18. On October 31, 2017, Gannon neglected to fulfill her assigned lunch coverage in blatant defiance of the initial assignment in September, and the direct assignment per the memorandum October 25, 2017. She reiterates in her email to Dorso on October 31, 2017 that she believes "being asked to reschedule [her] students based on a staffing issue is inappropriate." Rather, what is in appropriate is that a teaching staff member repeatedly refuses to help supervise school children when the school is in dire need of coverage and has repeatedly asked her for the help it requires.

19. On November 16, 2017, Dorso sent Gannon a second memorandum addressing her refusal to provide the assigned lunch duty coverage for the middle school lunch period and her refusal to attend the multitude of meetings scheduled to address her lunch duty assignment concerns. The memorandum specifically reads as follows:

> On October 25, 2017 you received a memo indicating that you were expected to begin providing lunch coverage effective October 31, 2017. You did not provide coverage on October 31, 2017 and have not provided coverage on any subsequent Day 3. The next scheduled time for your lunch coverage is Friday (11/17/17); the expectation remains that you will fulfill this request. Importantly, please note that if you do not provide coverage it will be considered insubordination and the matter will be referred to Ms. Montesano, Superintendent of Schools.
>
> As you are aware, we have scheduled several meetings to provide you with an opportunity to discuss your concerns related to this matter. Mr. Valente and

> I have scheduled another meeting for Monday November 20, 2017 at 9:00AM in Mr. Valente's office. If you plan to bring outside representation please notify me who you will be bringing by 2:00PM on November 17, 2017 as our Board attorney will also attend the meeting.
>
> Lastly, please note that your participation in the meeting on November 20, 2017 does not impact your obligation to provide lunch coverage on November 17, 2017.

20. In response to the November 16, 2017 memorandum, Gannon reported that she will "try to" attend the meeting rescheduled this time for November 20, 2017. Additionally, Gannon told Dorso that she would be unable to attend the assigned November 17, 2017 lunch supervision coverage as she had students to see during that time. Dorso indicated in a response email on November 17, 2017 that he has provided her "with multiple options to provide the required support and have asked to make the required changes in [his] 10/25 memo; [she has] the autonomy to determine how the students will be serviced on the days you need to provide coverage." Dorso also again explained that "providing

related services to students during alternative times during the school day is clearly not a compliance issue under IDEA or Section 504."

21. Gannon failed to supervise the November 17, 2017 assigned lunch supervision coverage.

22. In light of the constant refusal to provide her assigned lunch duty coverage and her inability to meet with and work with Dorso to mend her schedule to provide both her counseling services and her lunch duty coverage, Dorso sent a disciplinary letter to Gannon regarding her attitude and behavior with respect to the lunch duty coverage. The November 22, 2017 letter provides as follows:

> This correspondence constitutes a formal directive that you immediately begin the assignment that was given to you at the beginning of this school year to supervise the lunchroom on the rotational cycle that has been assigned to you. I have exhausted all efforts to meet with you and I view your continued defiance of my directive, and now your refusal to meet with me, as rank insubordination and conduct unbecoming a teaching staff member in this District. If you continue

> to refuse this assignment then I will refer this matter to the Superintendent for further disciplinary action.
>
> In addition, this directive and the concerns I have expressed in this correspondence will be placed in your personnel file and that pursuant to Board Policy No. 3152, "Withholding an Increment," this shall serve as a reasonable effort to inform you that your unprofessional conduct and disregard of your professional responsibilities as a teacher, may result in the withholding of your salary increments for the 2018-2019 school year.

23. On December 6, 2017, Valente sent Gannon an email informing her that she was assigned lunch supervision coverage on December 7, 2017, and that it was expected she fulfill her contractual duty of assigned lunch coverage in the cafeteria/dining hall from 11:32 A.M. to 12:28 P.M. Valente continues to advise Gannon in his email that she again failed to complete her contractually obligated lunch duty assignment on December 1, 2017 and did not notify the Middle School office of her intention to neglect this duty. On the

same day, December 6, 2017, Gannon responded to Valente's email in which she disclosed that she consulted an attorney regarding, as she labels it, "the ridiculously inappropriate assignment of a lunch duty, during the exact time from where normally [she] sees students for counseling." To her disappointment, the attorney instructed her to comply with the lunch coverage assignments and to document any "harmful effects and IEP compliance issues and then file a grievance afterward." Despite the attorney's advice and instruction to comply with the lunch coverage assignments, Gannon proceeds to state in her email that she will continue to defy the directive and refuses to even attempt changing her schedule to incorporate the lunch coverage, even though she concedes that it "*might* have a negative impact on [her students]." In the conclusion of her email she informs Valente that she has no choice but to resign from the District at the end of the school year and if "these insubordination emails, memorandums, and threats continue, [she] is prepared to give [her] 60 days' notice immediately."

24. At this juncture, not only was Gannon persistently refusing to work with the administration, she also was absent from school two of the last three Day 3 school days, as was addressed in an email to Gannon by Jennifer Montesano

("Montesano"), Superintendent of Schools. While her biggest complaint was that she could not reschedule her students from the single fifty-six minute lunch period to another part of the day, as the administration asked her to do, Gannon was absent from the entire day of school on two Day 3 school days (which Gannon even admittedly contributed to the ongoing lunch duty situation). These absences likely required her to reschedule more counseling sessions than missing only the lunch period.

25. Gannon responded to Montesano's message on December 10, 2017 stating in pertinent part:

> Contractually, as a "teacher" I would only to be (sic) assigned a duty if I have a prep and a lunch. Also, contractually, as a "teacher", I should also be paid for each IR&S, IEP, and 504 meeting that I attend after 6 meetings. With that said, we will have to agree to disagree.
>
> There are 12 teachers in the middle school available on a day three, as they have two preps and a lunch in their schedules. So, the claim that this is

> based on student safety needs is absolutely ridiculous.
>
> As I'm sure you would agree, a school psychologist/case manager resigning in the middle of the school year is really not in our student's (sic) best interests. I find it sad that this sudden shift in lunch duty responsibility appears to be the priority. I will be sure to provide the board office with formal notice should I decide to resign before the end of the year.

Evident from this email, not only is Gannon *again* totally refusing her mandated supervision assignment, but she is also threatening her superiors that she will resign from her position in the middle of the year. It is rather contradictory that she claims she cannot perform the lunch duty because it will affect her students, and then threatens to resign mid-school year identifying that such an action will have a negative impact on the students. This behavior, especially using the students' welfare as a means to threaten her administration is outlandish and immensely inappropriate, particularly for a tenured staff member.

After this the Board does not and cannot anticipate any change in her attitude and as such no longer trusts her.

26. Gannon also vastly oversimplifies the process the administration must follow to make these extra duty assignments, including lunch duty supervision, further demonstrating her selfish and unreasonable attitude. While Gannon is correct in her assertion that there are other teachers with a lunch and two prep periods on Day 3, Dorso explained that in order to be compliant with the contract, those teachers must also have a preparation period which falls during a period when lunch is served. Consequently, while twenty-six teachers have a lunch and two preparations on Day 3, only two (including Gannon) have a flexible period during a lunch period, meeting the full contractual obligation for lunch duty assignment. A similar scheduling issue exists for Day 1 as well. In an effort to reconcile these scheduling issues and ensure students are adequately supervised during lunch, Valente coordinated the following:

> To make sure that I had at least 2 SEA members in both the cafeteria and PAC, I assigned a lunch duty to both guidance counselors (Samantha Boczon and Sarah Sciscilo) and all three child study team members (Jeanne Gannon, Nancy Jaber-

> Bajes, and Jonathan Mimmo.) The two guidance counselors and Jon Mimmo were assigned their duty on Day 1 (to cover the lack of availability there.) The other two CST members (Jeanne & Nancy) were assigned Day 3. On November 13th, Mrs. Jaber-Bajes provided a doctor's note that removed her from duty. Our School nurse (Kathy Gerbasio) has volunteered to fill in for Mrs. Jaber-Bajes.

The fact that other non-teacher teaching staff members are willing to volunteer for the lunch supervision further reveals not only the desperate need for teaching staff supervision during lunch but also Gannon's complete selfishness. As of December 8, 2017, there had been a total of sixty days of school, fifteen days of which were a Day 3 schedule. Of the fifteen Day 3 scheduled days Gannon did not serve one period.

27. In a final attempt to get Gannon to perform her assigned lunch duty on December 13, 2017, Montesano again emailed her identifying that pursuant to the contract the administration may assign the lunch duty and not following such a directive is complete insubordination. Although the administration had been directing her to perform the lunch

duty since September, Montesano asserted that if Gannon did not attend the December 13, 2017 lunch duty, further disciplinary action would result. Nevertheless, rather than attending the Day 3 lunch duty, Gannon emailed Montesano back an inappropriately toned email which readdressed her refusal to comply with the directive.

28. As a result of her continued defiance, on December 19, 2017 Montesano sent Gannon a letter placing her on suspension with pay. Specifically the letter states as follows:

> I am hereby suspending you with pay, as a result of your failure to report your assigned duties despite repeated requests and directives that you do so. You have also refused to meet with me and your Principal to discuss your duty assignment and have been absent on each of the days that your rotational assignment was scheduled over the past two weeks. Your willful refusal to perform your contractual responsibilities constitutes insubordination and conduct unbecoming an employee of this School District.

> My action is being taken with the approval of the President of the Board, pursuant to the provisions of N.J.S.A. 18A:25-6 and N.J.S.A. 18A:6-8.3. During the period of your suspension, you are not to be present on any of the Secaucus School District's property for any reason without prior written authorization from me. Your suspension shall be reported to the Board of Education forthwith and, the Board shall determine what further action is appropriate.

29. A resolution regarding Gannon's suspension was presented to the Board at the December 21, 2017 Board meeting. At the meeting the Board unanimously voted in favor of continuing Gannon's suspension with pay pending a further investigation and, thereafter, a determination by the Board as to what further action, if any, shall be taken.

30. In accordance with *N.J.A.C.* 6A:9-3.3, teachers are expected to align their teaching performances, personal conduct and student and staff interaction with the eleven "Professional Standards for Teachers" articulated by the State Board of Education. Likewise, pursuant to Board Policy No. 3211, Code of Ethics, the Board requires all employees to comply

with the Code of Ethics for Personal Educators published by the National Education Association. Gannon's conduct since September 2017 violated both the Professional Standards for Teachers and the Code of Ethics for Professional Educators, such that she must be dismissed from her position.

31. As to *N.J.A.C.* 6A:9-3.3, Gannon's conduct, in refusing to perform her assigned Day 3 lunch duty and refusing to work with and meet with District administrators and her colleagues regarding her assigned Day 3 lunch duty, violates Standard Ten (Leadership and Collaboration) and Standard Eleven (Ethical Practice).

32. Standard Ten requires teachers to seek appropriate leadership roles and opportunities; to take responsibility for student learning; to collaborate with learners, families, colleagues, other school professionals, and community members to ensure learner growth; and to advance the profession. To effectuate these objectives, teachers are expected to, among other things, "engage[] collaboratively in the school wide effort to build a shared vision and supportive culture;" "contribute[] to a common culture that supports high expectations for student learning;" "take[] responsibility for contributing and advancing the profession;" and "take[] initiative to grow and develop with colleagues."

33. As to Standard Eleven, teachers must act "in accordance with legal and ethical responsibilities" and use "integrity and fairness to promote the success of all students." As a professional tasked with shaping the minds of students, Standard Eleven expects that Gannon will, *inter alia*, (1) maintain professional relationships with colleagues, (2) recognize that an educator's actions reflect on the status and substance of the profession, (3) uphold the highest standards of professional conduct as an employee vested with the public trust, and (4) not engage in any conduct contrary to sound professional practices and/or applicable statutes, regulations, and policy.

34. Gannon's behavior in response to the assigned lunch duty was not only contrary to the expectations of Standard Eleven, it was the absolute opposite of such expectations. As articulated herein, Gannon has violated Standard Eleven at every opportunity so far this school year rightfully resulting in the Board's diminished trust in her.

35. With respect to the Code of Ethics of the Education Profession, this code "indicates the aspiration of all educators and provides standards by which to judge conduct." Through Principal II, Commitment to the Profession, the Board recognizes that the "education profession is vested by the public with a trust and responsibility requiring the

highest ideals of professional service." Accordingly, staff members are required to "exert every effort to raise professional standards to promote a climate that encourages the exercise of professional judgment."

36. In accordance with the provisions of Board Policy No. 3211, Gannon is expected to "promote a climate that encourages the exercise of professional judgment." Here, Gannon has created quite a contrary type of climate in the Secaucus School District. She out right refused the directive of her Building Principal, her Director of Special Services and her Superintendent of Schools. Each one individually directed her more than once to perform her assigned Day 3 lunch duty, each to which she rejected the responsibility. If she genuinely believed the Day 3 lunch duty was going to prevent her counseling and IEP compliance, she should have in the very least tried to implement the schedule provided to her and coordinated for her by Dorso. Rather, she consistently threw tantrums to each requester about the inappropriateness of assigning her a lunch duty, despite the fact that its permitted by her contract and Board Policy. Gannon also relentlessly focused on the anticipated inconvenience (as she could not confirm such inconvenience without trying to implement it) the Day 3 lunch duty would pose for her schedule not once considering the actual

inconvenience it posed on her colleagues who were forced to cover for her. Gannon repeatedly resisted her lunch duty on to one of the other teachers all of whom, according to Gannon, had much more flexibility than she did to provide the coverage.

37. Based on the foregoing, Gannon should be dismissed from her position as a teaching staff member in the Secaucus School District. Her behavior since September consistently demonstrates a lack of respect for the trust placed in her, and a complete disregard for the professional responsibilities expected of her. Gannon's unwillingness to comply with the Professional Standards for Teachers and Board Policy No. 3211 render her unfit to continue her duties.

Charge No. 2

THAT, JEANNE GANNON, A TENURED TEACHING STAFF MEMBER IN THE EMPLOY OF THE SECAUCUS BOARD OF EDUCATION, ENGAGED IN CONDUCT CONSTITUTING INSUBORDINATION WHEN SHE REPEATEDLY REFUSED TO PERFORM HER CONTRACTUALLY OBLIGATED ASSIGNMENT AND REPEATEDLY REFUSED TO MEET WITH VARIOUS MEMBERS OF THE DISTRICT ADMINISTRATION, AND SUCH ACTIONS JUSTIFY DISMISSAL FROM HER TEACHING POSITION.

1. The Board incorporates by reference all the allegations contained in Charge One as if set forth herein at length.

2. Pursuant to Board Policy No. 3270, the Board will "establish and enforce rules for the assignment of specific duties to teaching staff members and for the conduct of teaching staff members during the work day." The Superintendent shall additionally implement uniformly throughout the district additional rules for teaching staff members which includes: "[d]uring the work day, teaching staff members may be assigned extra or alternative duties by the Building Principal in accordance with Board Policy No. 3134."

3. Under Board Policy No. 3134, "the professional responsibilities of teaching staff members include such extra duties as may be assigned by the Board of Education." The Board may appoint any teaching staff member to an extra duty position and such member is expected to serve unless an excuse for extenuating circumstances is approved. However, a "member's refusal to serve or resignation from extra duty service without permission may constitute an act of insubordination subject to discipline."

4. As to Board Policy No. 3270, the Board was well within its right to permit the Building Principal, Valente, to assign a Day 3 lunch duty to guidance and CST staff members. Despite Gannon's allegation of being singled out, the lunch duty assignments were uniformly administered to all teaching staff members whose schedule permitted the assignment. As

such, Gannon's lunch duty assignment was well within the right of the District administration and any defiance of such is a violation of Board Policy No. 3270.

5. Taken in conjunction with Board Policy No. 3270, Board Policy No. 3134 makes any defiance of an extra duty assignment, specifically refusal to serve the extra duty, a possible act of insubordination. Here, Gannon's explicit and habitual refusal to perform her Day 3 lunch duty is a clear act of insubordination. The District, unnecessarily, provided her with fifteen separate chances to comply with her assigned lunch duty, all of which she openly refused to perform. After the very first refusal she was insubordinate, however she continued to refuse each and every Day 3 lunch duty assignment for nearly three months. Not only did she refuse the fifteen Day 3 lunch duty assignments, she repeatedly refused to meet with and work through her alleged reasons for neglecting the lunch duty assignment with her Building Principal, her Director of Special Services and even her Superintendent of Schools. In one of the very few meetings she agreed to, back in October, Dorso dedicated the time to create and provide her with a possible schedule which incorporated her Day 3 lunch duty with the rescheduled counseling sessions with her students, nevertheless, she did not once attempt to implement this schedule.

6. Based on the foregoing, Gannon should be dismissed from her position as a teaching staff member in the Secaucus School District. Her persistent refusal to perform her assigned Day 3 lunch duty and her persistent refusal to work with the District administration constitutes insubordination in utter violation of Board Policy Nos. 3270 and 3134 rendering her unfit to continue her duties.

Charge No. 3

> That, Jeanne Gannon, a teaching staff member in the employ of the Secaucus Board of Education, engaged in conduct which endangered the welfare of children by refusing to supervise students during the middle school lunch period, and such action justifies dismissal from her teaching position.

1. The Board incorporates by reference all the allegations contained in Charge Nos. One and Two as if set forth herein at length.

2. Pursuant to Board Policy No. 3280, all teaching staff members are accountable for the supervision of pupils and "must discharge that responsibility with the highest levels of care and prudent conduct." Every teaching staff member is subject to the entirety of the nine rules set forth in Board Policy No. 3280 so to protect the wellbeing of pupils. Under rule number one, specifically, "each teaching staff member must maintain a standard of care for supervision,

control, and protection of pupils commensurate with the member's assigned duties and responsibilities."

3. Gannon has not once this year met the expectations set forth by Board Policy No. 3280. It is evident that Gannon does not exert the highest levels of care and prudent conduct with regard to the supervision of the middle school students during their lunch period. As set forth above, there are only two teaching staff members whose schedules permit the Day 3 lunch duty coverage. It follows that by habitually neglecting her lunch duty assignment, Gannon risks the entire middle school class being supervised by one teacher. While there are lunch aides also facilitating some supervision during the lunch period, the school is required to have at least two certificated staff members supervising the children, so an influx of lunch aides does not ever compensate for an absent teaching staff member. As such, a single teacher supervising the entire middle school class clearly places those students' welfare at risk because one teacher can only safely supervise a limited number of children. Additionally, if the other teacher who is assigned this duty is absent or is excused from the assignment for that day, and Gannon refuses to provide the supervision, this leaves the middle school students without any teaching staff member supervision. There is no question that a

congregation of eleven to thirteen year olds are not mature enough to be left without adequate supervision for an entire fifty-six minutes and as such the wellbeing of the students is at risk if left unsupervised.

4. Gannon further demonstrates her lack of responsibility to provide supervision to all the students, as is required under Board Policy No. 3280, by continuously contending that as a CST member the assigned lunch duty is beneath her. Gannon expresses this sentiment clearly in a September 19, 2017 email sent to Smahl:

> I'm sorry, I really need clarification, are you saying, as the Director of Special Education, that IEP mandated services (Speech, OT, PT, Counseling, Social Skills) are less important than lunch coverage? For the past 9 years I have been here, there were both teachers and non-teaching staff dept chairs, supervisors, etc. doing lunch duty. How did that somehow change and lunch duty became the role of the Child Study Team???

Much to the contrary, however, Board Policy No. 3280 explicitly governs "all teaching staff members." Even if

there had been sufficient teachers in the past to cover all of the lunch duties, such that CST members were not assigned it, this does not negate her responsibility, as a teaching staff member, to provide supervision to any and all students when assigned such duties and responsibilities.

5. Gannon also repeatedly distinguishes herself from all teachers because she is a CST member. However, regardless of the differences of schedule flexibility between CST members, teachers and guidance, all are equally liable for pupil welfare and must maintain a standard of care for supervision when assigned duties and responsibilities. So her CST member position does not shield her from providing assigned student supervision.

6. Gannon has time and time again failed this standard of care for supervision and as a result has risked the welfare of all the middle school students she has denied supervision to.

7. Similar to her obligations as a teaching staff member under the Board Policies, Gannon has the same responsibilities and obligations as teachers pursuant to the Agreement between the Board and the Association. Under Article VI.C.2.b., "on any given day, an administrator is unable to secure aides or other appropriate persons to supervise during the lunch period, and if, on such day the administrator has exhausted

all possible alternatives in the given situation, the administrator shall direct a teacher to assume such duties." In accordance with the Association's contract, Gannon is contractually obligated to perform any lunch duty assigned to her by the administration. Clearly she has not performed her contractual obligation once over the course of three months and fifteen assigned lunch duties. Therefore, not only is she obligated to supervise the students when assigned under the Board Policies, she is also in breach of her contractual obligations set forth by the Association's contract with the Board.

8. Based on the foregoing Gannon should be dismissed from her position as a teaching staff member in the Secaucus Public School District. Her deliberate repudiation to provide the assigned lunch duty supervision to the middle school class during their lunch period has risked the welfare of each of the students, and she has completely ignored her liability for pupil welfare as set forth by Board Policy No. 3280, rendering her unfit to continue her duties.

In the Matter of the Tenure Hearing of Jeanne Gannon

SECAUCUS BOARD OF EDUCATION	
- and -	**Agency Ref. No. 17-1/18**
JEANNE GANNON	

Whereas, the Secaucus Board of Education certified tenure charges against Jeanne Gannon before the Commissier of Education of the State of New Jersey on or about January 18, 2018: and

Whereas, Jeanne Gannon filed a sworn statement of evidence denying the charges and asserting her belief that due to the nature of her job as a School Phycologist she could not commit to supervising students in the cafeteria on a regular basis because of her professional commitment and ethical commitment to classified students' to whom she provided counseling and other services: and

Whereas, on March 12, 2018, the first day of hearing commenced before arbitrator Melissa H. Biren who was appointed by the Commissioner of Education to adjudicate the tenure charges: and

Whereas, the parties have reached and amicable settlement in this matter:

Now therefore be it resolved at the parties hereby agrees as follows:

1. Jeanne Gannon shall submit her irrevocable letter of resignation from all employment in the Secaucus School District, effective immediately.
2. The Board of Education shall withdraw the tenure charges upon its acceptance of Jeanne Gannon's resignation from all employment in the district.
3. Jeanne Gannon makes no admission of wrongdoing or liability.
4. The terms of this settlement are subject to approval by the arbitrator in accordance with applicable standards for the settlement of tenure charges. Counsel for both parties shall submit post hearing letter briefs to the Arbitrator Biren in support of the approval of this settlement.
5. Following the acceptance of Jeanne Gannon's resignation by the Board and withdrawal of the Tenure Charges by the Board, neither party shall have any rights or claims the other party arising out of Jeanne Gannon's employment with the district.

6. Jeanne Gannon's signature on this agreement shall constitute her letter of resignation to be submitted to the Board and shall require no further submission by her.
7. If the Board does not approve the terms of this agreement for any reason, the parties shall be returned to the status quo and the arbitration hearing shall be rescheduled by Arbitrator Biren.

Jeanne Gannon

March 12, 2018

R1.12

RESOLUTION OF THE BOARD OF EDUCATION
TOWN OF SECAUCUS, COUNTY OF HUDSON
STATE OF NEW JERSEY

INTRODUCED BY:

SECONDED BY:

BE IT RESOLVED, that the Secaucus Board of Education hereby approves to accept the resignation of the following individual

Employee ID	Effective
4177	03/12/2018

Jack Mc Stowe, President

ATTEST:
Grace Yeo, Business Administrator

DATE: **March 15, 2017**
VOTE:

	Yes	No	Abstain	Absent
Lance Bartletta				
Joan Cali				
Sharon Dellafave				
Louis Giele				
Norma Hanley				
Kathleen Mc Farlane				
John McStowe				
Kathy O'Connell				
Ruby Pantoliano				

NEW JER$EY DEPARTMENT OF EDUCATION
BUREAU OF. CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing of Mary Mackenzie

Agency Dkt. No. 219-9/17

HILLSBOROUGH TOWNSHIP
BOARD OF EDUCATION

"Petitioner"

OPINION
AND
AWARD

--and-

MARY MACKENZIE

"Respondent"

Before Peter Adomeit, Esq. Arbitrator

Appearances:

For the Petitioner:

Fogarty & Hara, Esqs.
By: Vittorio S. LaPira, Esq.
On the Brief: Robert D. Lorfink, Esq.

For the Respondent:

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

OPINION

Procedural Background

This dispute arose when a tenured teacher, Mary Mackenzie ("the Teacher")[1] employed by the Petitioner Board of Education ("the Board" or the District"), received "partially effective" evaluations in two consecutive years, 2015-2016 and 2016-2017. On August 30, 2017, the Superintendent of Schools filed Tenure Charges, along with supporting documents, with the Board. September 11, 2017, the Board considered the Charges and evidence and passed a resolution determining that the Charges be sent to the Commissioner of Education, and suspending the Teacher with pay Accordingly, acting pursuant to *N.J.S.A.* 18A:6-17.3, the Petitioner's Superintendent of Schools, Dr. Jorden Schiff, filed "Tenure Charges", with the State of New Jersey, Department of Education, Bureau of Controversies and Disputes, received by the Bureau on September 18, 2017. On September 28 2017, the Teacher filed an answer. On October 6, 2017, the Department of Education assigned undersigned arbitrator to hear and decide the dispute. After After a procedural hearing by telephone, we held hearings on December 11, 2017, December 20, 2017, January 16, 2018, and January 23, 2018. Both parties were present and represented by counsel at all hearings. Each counsel presented extensive written evidence, the testimony of witnesses under oath, and cross-examined opposing witnesses. A court reporter, present during all testimony, provided transcripts to counsel and the arbitrator. By agreement, counsel filed simultaneous electronic briefs on February 23, 2018. After an extension of time, the undersigned filed this Opinion and Award on April 9, 2018.

The Arbitrator has carefully studied and analyzed the entire record, as it relates to the charge and the statutory protection for tenured teachers. N.J.S.A. 18A: 28-5, as amended by the TEACHNJ ACT, P.L. 2012, c. 26, which states in

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[1] To be consistent with my discussion, I have changed all references in the positions of the parties from "Mackenzie" or "The Teacher" to "the Teacher."

operative language:

> The services of all teaching staff members employed prior to the effective date of P.L. 2012, c.26, in the position of teacher serving in any school district or under the board of education shall be under tenure in 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....

The arbitrator has also considered the evidence in light of the statutory requirements requiring help and assistance to teachers who are deemed ineffective or partially effective, and the procedures Boards much follow before filing Tenure Charges.

The Board asserts the ground for dismissal is "inefficiency." As to whether such grounds exist, the Board bears the burden of proof.

The Tenure Charges

The Tenure Charges allege, generally and in addition to specific detailed charges, that The Teacher "consistently demonstrated inefficiencies and ineffectiveness in her teaching skills throughout the 2015-2016 and 2016-2017 school years and, as a result of the significant negative impact that her poor teaching performance has upon the quality of education of her students, she must be dismissed from her position." The Charges are included in the "Board Position" set forth below.

For two consecutive school years, 2015-2016 and 2016-2017, the Teacher's performance was rated "partially effective" on her summative evaluations, thereby necessitating the filing of the Tenure Charges for "inefficiency."

Steven Kerrigan ("Kerrigan") is the Principal of the Woodfern Elementary School and one of the Teacher's supervisors. As such, Kerrigan, along with

other members of the school improvement panel, is responsible for observing and evaluating the Teacher in her position as the special education teacher.

The Teacher had a relatively poor performance in the 2014-2015 school year. With a composite score of 2.66, as noted on her *Composite Score Report,* the Teacher barely met the criteria for an effective teacher. On a four-point scale,[2] with a score of one being the lowest rating, and four the highest, the Teacher earned an "ineffective rating" (a one) in the area of "Instructional Planning," and "partially effective" (a two) in the areas of "Instructional Delivery" and "Learning Environment."

As a result of her poor performance, the Board provided the Teacher with a *Professional Improvement Plan,* specifically to address the following deficiencies:

a) In "Instructional Planning," they included "lack of consistent lesson plan availability, lack of consistent detailed content, lack of evidence of consistent differentiation of instruction, and inconsistent pacing in math";

b) In "Instructional Delivery," there was a "lack of consistent evidence of differentiated instruction[3] to meet individual student needs;

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[2] A score of one is considered ineffective; two, partially effective; three, effective; and four, highly effec
tive. [Footnote in original]

[3] "Differentiated instruction and assessment ... is a framework or philosophy for effective teaching that involves providing different students with different avenues to learning (often in the same classroom) in terms of: acquiring content; processing, constructing, or making sense of ideas; and developing teaching materials and assessment measures so that all students within a classroom can learn effectively, regardless of differences in ability." *See bttps-ILen wikjpedia orglwikjl Dj(ferentiated jnstructjon, citing* Tomlinson, Carol (2001). "How to Differentiate Instruction in Mixed-Ability Differentiated Instructions provides access for all students to the general education curriculum. The method of assessment may look different for each child, however the skill or concepts

c) and in "Learning Environment," the Teacher demonstrated "inconsistent use of classroom procedures, organization of materials, etc. which results in lost instructional time." She was required, among other things, to invite Kerrigan to see a lesson where she would differentiate instruction for math students in her classroom, and to meet every two weeks with her Kerrigan and a math content specialist to ensure that she used appropriate lesson pacing and progress.

The Teacher's inability to submit lesson plans on a timely basis continued early on in the school year. Even though it was clear that she was required, like all other staff members, to submit her lesson plans no later than 8:30 am every Monday morning, Kerrigan had to remind her via email at 12:21 pm on Monday, September 21, 2015, that she had not yet submitted her lesson plans for the week. The Teacher's response was that she would get them to him, but that the "internet wasn't cooperative this morning." She ultimately uploaded them around 3:42 pm that afternoon. This continued to happen on at least five other occasions throughout the year, including on January 4, 2016- when she would have had ample time over the holiday break to have those ready (she emailed Kerrigan at 8:38 am to advise him that her "plans are almost done" and that she was taking a half day).

The Teacher also struggled with getting to school on time, including for reasons such as oversleeping because her cell phone was not charging and as a result, her alarm did not sound, and another time because of traffic and school buses which impacted her as a result of her responsibilities as a dog sitter/walker. As of February 4, 2016, she had three instances where she was significantly late to school.

During the 2015-2016 school year, Kerrigan observed and evaluated the Teacher on two separate occasions, on November 2, 2015 and January 21, 2016. The first observation was announced and was a "long" observation (40

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taught is the same." *Classrooms* (2 *ed.).* Alexandria, VA: Association for Supervision and Curriculum Development Development

minutes), while the second observation was even longer-60 minutes (the full period). That observation was essentially an "announced" observation, insofar as the Teacher invited Kerrigan to see that lesson in particular, consistent with the requirements of her Professional Improvement Plan for that year.

For the November 2, 2015 observation, the Teacher and Kerrigan completed a *Pre-Observation Conference Record* on October 29, 2015, where the Teacher described what would be observed, what she wanted to highlight, and her area of concerns. The class (a special education mathematics class) was comprised of five 4th grade girls.

As detailed in his *Formal Classroom Observation Report* dated November 3, 2015, Kerrigan did not observe much differentiation of instruction, especially because all five students struggled with the lesson. Kerrigan offered advice as to better teaching techniques and strategies, such as having various activities and incorporating real world connections to determine if students can apply knowledge, and also offered to discuss other ideas at the post-observation conference.

When the Teacher had her students complete a survey in November of 2015 - as all teachers do - when asked if "my teacher is prepared and ready for teaching every day," two out of the five students responded, "sometimes." The Teacher noted in her *Student Survey Analysis* dated November 16, 2015, that she felt "much more prepared than last year, but there always is room for improvement."

The teacher asked Kerrigan to observe a class. When Kerrigan observed the Teacher in this class January 2016 the observation was not positive. Kerrigan noted in his *Formal Classroom Observation Report* dated January 28, 2016, there was "very little evidence of the use of differentiated instruction techniques," and to that end, Kerrigan provided her with various articles on the topic. This was the lesson that, as per Mackenzie's Professional Improvement Plan, she would invite Kerrigan *to observe her use of* differentiated instruction. Kerrigan also noted other issues with the Teacher 's instruction and offered

further suggestions. In particular, he noted that "all activities in this lesson were teacher directed with very little student exploration."

Kerrigan and the Teacher met and discussed the observation at a post-observation conference held on February 1, 2016. They discussed the importance of differentiating instruction to students on different levels, and arranged to have the Teacher observe a classroom where differentiated instruction was being utilized.

The Teacher's *Teacher Summative Performance Report,* where the Teacher earned "partially effective" ratings (a two) in the areas of "Professional Knowledge" and "Instructional Delivery. " She earned "ineffective ratings" (a one) in both "Assessment of and for Learning" and "Professionalism." Her *Composite Score Report* revealed a total score of 2.20, which falls within the "partially effective" category. That score was among the lowest in the District. In the area of "Professional Knowledge," Kerrigan noted that the Teacher was unable to demonstrate consistent evidence of her ability to differentiate instruction, which was one of the primary focuses of her *Professional Improvement Plan* for that year. Kerrigan determined that the Teacher "inconsistently demonstrate[ed] understanding of the curriculum, content and student development or lack[ed] fluidity in using the knowledge in practice," which is the standard for a "partially effective" rating in that domain.

Although Kerrigan rated the Teacher as effective in the domain of "Instructional Planning," he noted that while she was required to turn in lesson plans on a timely basis each week-and this was specifically addressed in her *Professional Improvement Plan.* The Teacher failed to do so no less than six occasions. Notwithstanding the fact that the plans should not have been late once all year, especially given her need to focus on this area, that was still considered "a significant improvement from the previous school year," aided by her bi-monthly meetings with Kerrigan, who noted that she "must abide by policies for regular timely submission of lesson plans.

The Teacher also earned a "partially effective" summative rating in

her "Instructional Delivery." Kerrigan specifically noted that her *Professional Improvement Plan* provided her with "an opportunity to invite administration to observe a lesson in which the Teacher could highlight the use of differentiated instruction." Although the Teacher did invite Kerrigan to see a lesson, she did not perform well. In completing the *Summative Performance Report,* Kerrigan noted that Mackenzie could not consistently provide evidence of differentiated instruction, either through the documents[4] that Mackenzie uploaded to the system as proof of the same, or during the lessons Kerrigan observed. In particular, he noted that the evidence instead showed "an inconsistent use of instructional strategies to meet individual student needs."

The Teacher was rated as ineffective in the areas of "Assessment of and for Student Learning," as Kerrigan noted that "the artifacts and accompanying teacher narrative included here provide little to no information regarding variety of assessment, frequency of assessment, and use of data to inform overall instruction. Further, no artifacts displaying assessment in any other academic discipline are present." Kerrigan also noted that there were concerns, as memorialized in emails to the Teacher, about her timely reporting of academic progress/assessment data.

In the area of "Professionalism," the Teacher also earned an "ineffective" rating. Kerrigan highlighted a number of issues in this area, namely several instances of lateness to school (20minutes late, 30 minutes late, and another where she was 50 minutes late), which were discussed at bimonthly meetings and memorialized in emails and memoranda, as well as an issue pertaining to appropriate conduct when interacting with a student (as memorialized in another memorandum).

As a result of the Teacher's "partially effective" summative rating for the 2015-2016 school year, the Board developed and implemented an individualized and comprehensive *Corrective Action Plan ("CAP")* to address the areas noted

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[Footnote in original]

[4] The staff members refer to these documents in the various reports as "artifacts."

for improvement, which the Teacher and Kerrigan discussed and signed on September 15, 2016. The *CAP* included multiple demonstrable goals intended to assist Mackenzie and facilitate professional development.

The *CAP* sought to improve the Teacher deficits in differentiating instruction through her review of the book *Differentiating Math Instruction: Strategies that Work for K-8 Classrooms,* and through bimonthly meetings with the administration; providing her with the opportunity to visit the classroom of a math mentor two to three times per marking period to observe strategies that enhance meaningful student engagement and differentiation of instruction; and allowed her to arrange for the administration's observation of a lesson where she would showcase differentiation of instruction.

The *CAP* also sought to have the Teacher systematically gather formative data on student learning and utilize such data to guide instruction, through the use of formative assessments (such as an "exit ticket") for each lesson and maintaining a journal to demonstrate how she utilized the data.

The *CAP* required the Teacher to adhere to all District policies, in particular regarding timeliness of her attendance to school and the timely submission of lesson plans and assessment data.

Kerrigan arranged to meet with the Teacher bimonthly during the 2016-2017 school year to review her progress toward her *CAP* goals and to provide her with assistance.

Notwithstanding Kerrigan's assistance, the Teacher was still unable to earn an effective rating for the 2016-2017 school year. The Teacher continued to struggle with her timely submission of lesson plans. Kerrigan sent her an *email* on Tuesday, October 4, noting that as of 10:21 am, her lesson plans for the week (which are to be submitted Monday morning) were still not posted electronically, nor had she provided him with a hard copy as per her *CAP* requirements. In response, the Teacher explained that she had neglected to "click post" on *Monday night* (which was, obviously, already late). Kerrigan reminded her that lesson plans are due *the beginning of the day* on *Monday,*

each week (which was not new). Ultimately, the Teacher indicated that she understood, and had a "reminder note taped to [her] computer to click submit when done with plans online."

The Teacher also began the year with some issues in one of her In-Class Resource classrooms (where she would be a second teacher, along with a general education teacher, and was responsible for the special education students integrated in the mainstream classroom). For example, the Kindergarten teacher, Katherine Goldman, advised Kerrigan that on October 11, 2016, the Teacher failed to follow a prescribed format when instructing the students. That was surprising, because Kerrigan had just met with the Teacher a few days before, as part of their bi-monthly *CAP* meetings, and directed her to follow the prescribed format for the alphabet program. As a result, Kerrigan sent the Teacher an email that date directing her "to follow the program as it is prescribed" and stated "Do not deviate from this."

District administrative staff evaluated the Teacher on four occasions during the 2016-2017 school year. Kerrigan observed her twice, both during announced observations, while Michael Volpe, Director of Human Resources, and Suzan Radwan, Director of Special Services, observed Kerrigan in unannounced observations.

For the November 3, 2016 observation, the Teacher and Kerrigan completed a *Pre-Observation Conference Record* on November 2, 2016, where the Teacher described what would be observed, the instructional strategies she would use to help her students learn the intended learning target, and what she would do for each student if they achieved the objective (or struggled). The classroom was a 3rd grade resource room class with two students.

As detailed in his *Formal Classroom Observation Report* dated November 4, 2016, Kerrigan noted that this lesson demonstrated advanced preparation, which was good: the Teacher had arranged teacher stations with different content and skill requirements, appropriate materials, and her lesson

plans aligned with learning standards. Kerrigan asked the Teacher to discuss how she would utilize assessment data to target instruction at their post-observation conference. It was, in other words, what one would expect from an announced observation.

Unfortunately, the next two observations-both of which were unannounced-revealed that the Teacher did not consistently perform up to expectations.

Volpe observed the Teacher on December 7, 2016, for forty minutes, also in a resource room math setting with two students. Although the Teacher noted in her lesson plans that she would differentiate instruction, as Volpe detailed in the *Formal Classroom Observation Report* dated December 12, 2016, she did not implement that in the actual lesson. Moreover, while the Teacher's lesson plans indicated that she would use multiple methodologies, she did not do that either. Volpe observed that Mackenzie used the same methodology throughout the lesson, which was teacher direction, student performance on the teacher-directed task, and the asking of follow-up questions. Mackenzie also had to do a great deal of redirection to address student behaviors - in a class of two - and Volpe indicated that "positive reinforcement was not evident as often and may have engaged students further into the lesson." He offered strategies and asked the Teacher to reflect on her approach.

Volpe met with the Teacher on December 21, 2016, at which time he discussed his observation and progress towards her *CAP* (as well as any additional supports she would need to be successful). the Teacher advised that she did not need any additional supports.

Radwan observed the Teacher in an in-class resource writing lesson on January 25, 2017, and had a co-observer present as well: Donna Landon, the Supervisor of Special Services for the Elementary schools. Radwan noted, in her *Formal Observation Report,* that the Teacher "did not consistently demonstrate an understanding of the intellectual needs of her students," inasmuch as she "did not adjust the pace of instruction when working with a student with a

learning disability." In addition, Radwan did not observe the Teacher use accommodations for diverse learners. There was also little evidence of planning for differentiating instruction. She also noted that the Teacher did not clearly communicate with students and check for understanding; after "helping" a student, that student instead sought assistance from the general education teacher. Radwan observed that the Teacher did not use a variety of instructional strategies to support the students when they were editing their writing. She "just told the student what needed to be edited rather than using questioning techniques to facilitate student editing." Finally, Radwan noted that the Teacher did not provide a student with appropriate wait time after asking a question- essentially failing to assess for student understanding. The Teacher met with Radwan for a post-observation conference on that same day to discuss the observation.

The administrators were not the only individuals to notice the Teacher's poor performance. Indeed, other teachers had brought their concerns regarding the Teacher's performance to Kerrigan's attention. Kerrigan sent an *email* to the Teacher on February 6, 2017 to let her know that he wanted to meet with her to discuss concerns that have been raised about her work performance during her in-class resource/push-in assignments.

On February 13, 2017, Kerrigan met with the Teacher and her union representatives to address, as he memorialized in a February 17, 2017 email summarizing the February 13, 2017 meeting, "concerns that had been voiced to the administration by other Woodfern staff members regarding The Teacher's performance and work during her in-Class Resource responsibilities." During that meeting, Kerrigan explained the specific concerns voiced by staff, which included:

a. The Teacher's failure to perform her duties consistently, where the classroom teacher modeled the manner in which the Teacher should complete tasks, and the Teacher subsequently altered those procedures;

b. The Teacher's failure to consistently engage with students during

work time, as Radwan observed in her January 25 observation;

c. The Teacher's spending significant amounts of time on her computer during class, which her fellow teachers perceived as the Teacher use of her computer for non-work purposes.

The Teacher offered various excuses for the issues raised above none of which were particularly compelling - but her initial response was telling: she felt teachers should have come to her first before bringing these issues to the administration. Kerrigan advised the Teacher, however, that at least one teacher said she *had* met with the Teacher on multiple occasions, and was frustrated about having to revisit the topic with the Teacher again.

Kerrigan also met with the Teacher that day to perform her midyear evaluation, as memorialized in a *CAP Progress Summary* dated February 13, 2017, which the Teacher signed that day. Kerrigan noted that he expected the Teacher to "Document differentiation during in-class resource services in grade 3 literacy, science, and social studies - based upon 1/25/17 lesson observation"

Notwithstanding the meeting where Kerrigan reviewed her colleagues' concerns with her performance, on March 7, 2017, the Kindergarten teacher (Goldman), sent an email to the Teacher, with a copy to Kerrigan, about her performance on that date. Goldman memorialized the Teacher s failure to instruct the students in the areas where they needed instruction the most, and indicated that she *left the classroom twenty minutes early.* Goldman also provided the Teacher with times when she could meet with her, including after school, to makes sure that students had "a schedule that will ensure a full 40 minutes of intervention." There was some back and forth about what the Teacher felt she should or could do in the classroom, which led Goldman to respond, "I do not mind if you touch base as far as where a student is or what I am teaching, but I do not have time each day to tell you what to do." She also indicated while the Teacher's plan to introduce Rapid Words to students on Mondays was extremely helpful, that "should not take the whole 40 minute

intervention time ... there are other great things you can be doing as well."

Kerrigan sent an *email* to the Teacher that same day, addressing both her decision to leave the classroom early - which was not permitted or justified in any way - and the fact that her lesson plans were, once again, significantly late (as of 10:36 am on Tuesday).

The Teacher, once again, indicated that she "forgot to press post" when submitting the online lesson plans (apparently the note she put on her computer in October was not the "cure all" as she had hoped). Kerrigan explained that this was not a valid excuse, as she had ample experience with working with the online lesson plan program, and that with regard to leaving class early, he wrote that "it is not up to you to decide to leave a class if you are scheduled to be there. You are to follow your class schedule. This is not up to individual interpretation." The Teacher ultimately apologized for the lesson plan submission, and indicated that with regard to the Kindergarten class, she "will stay the full amount" and that the teacher had "given [her] more things to do."

Kerrigan also had to address the Teacher s professionalism at this time. In an *email* dated March 10. 2017, he noted that she had, to date, been absent 12 days (or 10% of the school year to date). Moreover, he noted that more than half of those absences occurred on Fridays, and that two were on a Tuesday and Wednesday following a Monday holiday (President's Day). He advised that she also notified the District of her sick days relatively late in the morning on several occasions, which led to the school being unable to secure a substitute teacher on three of those days. Kerrigan stressed the importance of timely reporting of her absences.

On March 21, 2017, Kerrigan performed another announced observation - one where the Teacher invited him to see the lesson, as per her *CAP* requirements, in a 3rd grade literacy class with a general education teacher. He stayed for the full sixty minutes of the lesson. The observation revealed, among other things, that the Teacher's lesson plans provided few details of

differentiation for the special education students she teaches, as they were basically copies of the general education teacher's lesson plans with a statement added that said, "Miss Mack: read w/ HA; fact/opinion; Key words for fact/opinion file folder game."

The Teacher's performance seemed appropriate in several domains, but Kerrigan noted that in terms of assessing students to drive instruction, he had concerns about the reading level used for a particular student, and questioned why she took no anecdotal written records - how would she further differentiate for this student without any data?

Kerrigan met with the Teacher on April 3, 2017 for her post observation conference, and Mackenzie indicated that she would follow up on his suggestions.

The Teacher and Kerrigan reviewed her *CAP* progress on May 9, 2017. Kerrigan found that she met expectations on her *CAP,* insofar as performing certain tasks (reading a book, observing mentor teachers, etc.) was concerned. However, that ultimately did not translate into effective classroom teaching, as demonstrated in the various observations and Kerrigan's summative evaluation of her overall performance.

Kerrigan prepared the *Teacher Summative Performance* Report ~ dated May 31, 2017 and evaluated the Teacher's job performance as a special education/resource center teacher for the District. Once again, the Teacher earned partially effective ratings in four performance areas and ineffective in one (Assessment of and for Learning). In the six educator practice domains, she only obtained one effective rating (in "Learning Environment"). Kerrigan noted a significant difference between her performance in the announced observations and the unannounced observations, and indicated that even though she read articles and a book on differentiated instruction, "content from these articles should have been evident in lesson observations by the administration." She did not consistently detail differentiation in her lesson plans (which were late several times, again), and inconsistently demonstrated actual

differentiation of instruction. On the whole, her performance in most areas was quite inconsistent. She failed to provide evidence that her instruction was data-driven, which was a key element of her *CAP.*

The *Composite Score Report* for the 2016-2017 year reflected a rating of 2.30-tied for the second lowest rating in the entire district, and, once again, a "partially effective" rating.

Position of the Board

The Board introduced evidence to substantiate the Tenure Charges.

The Board demonstrated that it substantially adhered to the evaluation process as mandated by TEACHNJ, and the Teacher did not offer any evidence to the contrary

The arbitrator is only empowered to consider, among other things, whether or not "the employee's evaluation failed to adhere substantially to the evaluation process, including but not limited to, providing a corrective action plan" and the employee is only entitled to a reprieve if such failure "materially affected the outcome of the evaluation." N.J.S.A. 18A:6-17.2 (a), (b). "Material" is defined as "having real importance or great consequences," citing Merriam Webster dictionary.

The Board adhered to the Stronge Evaluation Model 4. A review of recent arbitrator decisions reveals that the District substantially adhered to the evaluation process and, assuming for the sake of argument that the District failed to do so, the Teacher did not meet her burden to demonstrate that such actions or inaction materially affected the outcome of the evaluation

The Teacher did not demonstrate by a preponderance of credible evidence any "mistakes of fact" in either her 2015-2016 or 2016-2017 evaluations, let along any that materially affected her evaluations.

The Teacher produced no evidence that the tenure charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination prohibited by law, or other conduct prohibited by law.

The Teacher failed to demonstrate through a preponderance of credible evidence that the District's actions were arbitrary and capricious in any way or that any such actions materially affected the outcome of her evaluation.

So long as the Board complied with the process for the most part, it has met its burden of proof. Even if a board fails to adhere substantially to the evaluation process, the arbitrator is still required to dismiss the teacher unless the failure was critically important to the outcome of the evaluation. The Board substantially complied with the evaluation process, giving the Teacher and opportunity to improve her performance and save her job – which she failed to do.

The Teacher failed to show through a preponderance of credible evidence that the District's actions were arbitrary and capricious in any way or that any such actions materially affected the outcome of her evaluation.

The Teacher entered the 2015-2016 school year after barely achieving a rating of effective during the prior school year, scoring a 2.66 where she needed a 2.65 to be scored "effective."

Her low rating indicated she had "issues": An "ineffective" rating for instructional planning, a "partially effective" rating for instructional delivery and a "partially effective" rating for instructional delivery, and a "partially effective" rating for learning environment. Given these low scores, the Stronge Model required the administration to initiate a Professional Improvement Plan, which is "designed to support a teacher in addressing areas of concern through targeted supervision and additional resources.

The targeted issues were not having lesson plans available, lack of detail in the lesson plans that were available, and differentiation of instruction.

Her summative evaluation for instruction planning was "effective". During 2015-2016 school year, she taught pull-out resource math and push-in resource for science, social studies and literacy. Her math class had four or five students.

During the 2015-2016 school year, the District observed the Teacher

twice, pursuant to a waiver it obtained from the New Jersey Department of Education of the requirement that it conduct three observations of tenured teachers. The waiver allowed the District to perform, and it did perform, one long observation of 40 minutes and one short observation of 20 minutes in lieu of three short observations.

As explained by Michael Volpe, Director of Human Resources, the change made administrators "more available" for informal observations, giving feedback and handling discipline situations.

No waiver is necessary from the creators of the Stronge Model.

The evaluators who observed the Teacher were trained on the Stronge Model.

The District's position on the content of the first and second observations of 2015-2016 observation is already stated above and need not be repeated.

The Teacher did not introduce any documentary or testimonial evidence that would support a finding that her first observation of the 2015-2016 school year failed to comply with the evaluation process.

The Teacher commented on the second observation report but did not object to it, and wrote that she "say [Kerrigan's point about [the instruction] not appearing different." She wrote she would "begin to incorporate" a suggestion that "partner work may provide [her] with more information about their actual abilities."

The Teacher introduced no evidence that the second evaluation report was not in compliance with the evaluation process.

The second observation for the 2015-2016 school year was the last for that school year, as the Teacher took a leave of absence from mid-March to the end of the 2015-2016 school year, and did not receive the third observation contemplated by the Professional Improvement Plan.

A third observation is not required by the Stronge model or by law, given the waiver, but even if it were a substantial deviation from the evaluation process, the Teacher provided no evidence that it materially impacted her

evaluation.

During the school year 2015-2016, the Teacher continued to be unable to provide timely lesson plans and the plans that were submitted did not have an appropriate level of detail. She had issues with being late for work, sometimes significantly late. These are detailed above in the findings of fact and need not be repeated.

The Teacher's annual Summative Evaluation for 2015-2016 were as follows: Performance Standard One – "partially effective." The evaluator, Kerrigan, did not see sufficient evidence of effective performance, but "inconsistencies." Performance Standard Two - "effective". Kerrigan found she still submitted lesson plans late a number of times but had improved from the previous year. Performance Standard Three - "ineffective." Kerrigan explained that the artifacts Mackenzie uploaded and the observations showed an "inconsistent use of instructional strategies." Performance Standard Four (assessment of student learning) – "ineffective". Kerrigan explained she uploaded few artifacts, the ones she did related only to her math class. Kerrigan had discussed this with teachers previously that if they have a literary class, they must upload literacy assignment information, and it showed Mackenzie's "inability to report on student progress in a timely manner." Performance Standard Five (learning environment) – "effective." Her PIP focused on this standard and Kerrigan found she improved and wrote she "should continue to perform at this expected level." Performance Standard Six (professionalism) – "ineffective." Kerrigan found she continued to be late to school, sometimes significantly late, continuing after they met to discuss this. Kerrigan concluded she demonstrated "inflexibility, a reluctance and/or disregard toward school policy, and rarely takes advantage of professional growth opportunities." Performance Standard Seven (student academic progress) – effective. Kerrigan testified this standard is calculated separately and based on the student grown objectives the Teacher created.

The Teacher's annual Summative evaluation showed a rating of 2.2 –

"partially effective."

Kerrigan notified the Teacher that a Corrective Action Plan would be necessary.

The Teacher at no point provided evidence supporting a conclusion that the Summative Evaluation failed to comply with the evaluation process.

In summary, the Board substantially adhere to the evaluation process. The administration observed the Teacher twice, consistent with the District's waiver from the Department of Education. Both were announced observations (the regulations only require one announced observation), one of which was preceded by an electronic pre-observation conference, as permitted by the regulations. Two of the observations were long with one lasting 20 minutes longer than a standard long observation. Kerrigan recalled one post-observation conference with the timeframe, and the Teacher provided no evidence that there was no post-observation conference for the other observation or that it occurred outside of the required time frame. The Board substantially adhered to the evaluation process. At the year's end the Teacher did not exercise her right to file written objections to the evaluations or summative evaluation. The arbitrator cannot conclude that she disagreed with the evaluation process.

The Board's argument for the second year show a similar pattern – a development of a Corrective Action Plan; the first, second and third observations; her mid-year evaluation; her fourth observation. The Teacher continued to have issues with her lesson plans being late; she did not conform her teaching with the regular classroom teacher but deviated from the alphabet arch, despite being told not to deviate. After the Teacher deviated again a week later, Kerrigan sent her an email stating, "You are hereby directed to follow the program as it is prescribed. Do not deviate from this."

The corrective action plan progress review indicated she showed some improvement over the prior year and Kerrigan concluded she met expectations. The CAP is not the summative evaluation; it measures progress.

Kerrigan's Summative Evaluation for 2016-2017 concludes she was "partially effective." Standard One (professional knowledge) – "partially effective" because she was "inconsistent in demonstrating an understanding of the curriculum, content, and student development or lacks fluidity in using the knowledge I practice." Standard Two (instructional planning) - "partially effective." The Teacher was "inconsistent in the use of State standards, the school's curriculum, data, or strategies, so that's why it's partially effective." Standard Three (instructional delivery) – "partially effective." Kerrigan found her inconsistent. Too much direct instruction and little use of other instructional strategies. Standard Four (assessment of and for student learning) – "ineffective". Kerrigan found she only uploaded math artifacts after being told he wanted assessments of all of her classes, and she did this one year after being rated "ineffective" in this standard for precisely the same issue. Standard Five (learning environment) – "effective" because she effectively used "resources, routines, and procedures to provide a respectful, positive, safe student centered environment that is conducive to learning." Standard Six (professionalism) – "partially effective." Kerrigan testified she struggled throughout the year, requiring meetings regarding other teachers' concerns about her, lack of lesson plans, directives about not leaving the room. It indicated an "inconsistent display of professional judgment...." Standard Seven (student academic progress) – '"highly effective" based on the data the Teacher's entered data. Kerrigan explained it does not reflect growth of all of her students and it was specifically directed to math, not literacy (which she also taught).

The Teacher's annual summative evaluation was a rating of 2.3, or "partially effective."

Kerrigan reviewed the evaluation reviewed with Madwan, the Teacher, and Henry Goodhue, who along with with the Teacher expressed dissatisfaction with the evaluation. Goodhue recommended that she write a rebuttal, but none was submitted. Superintendent Schiff reviewed the documents, spoke with

Radwan, Volpe and Kerrigan, and concluded there were no exceptional circumstances warranting giving the Teacher another year.

The District demonstrated that it substantially adhered to the evaluation process.

Recent arbitration decisions support the Board's decision, showing that they have consistently dismissed teachers in similar situations.

The Teacher failed to demonstrate through a preponderance of credible evidence that the District's actions were arbitrary and capricious or that any such actions materially affected the outcome of her evaluation.

Board's Conclusion: TEACHNJ ensures that students are not required to have a partially ineffective or ineffective teacher for three years. if a teacher cannot demonstrate effective teaching in two consecutive years, he or she must be dismissed as long as the school district fulfilled its responsibilities. The district substantially complied with the evaluation process. Its actions are not arbitrary or capricious, but based on the good faith judgment of her teaching performance. The Teacher minimally complied with the clear expectations of the Corrective Action Plan, which was designed to help her improve her teaching. She made no serious effort to improve her performance. Accordingly, the Board submits that she should be dismissed from her tenured employment in the District.

The Teacher's Position

Tenure laws are meant to protect teachers from dismissal for unfounded, flimsy, or political reasons.

Pursuant to N.J.S.A. 18A:6-17.2, the Board has the "ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met." If the District meets this burden, the Arbitrator may then consider whether or not: **(1)** the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan; **(2)** there is a mistake of fact in the evaluation; or **(3)** the district's actions

were arbitrary and capricious.

In New Jersey, it is axiomatic that in an administrative proceeding, the petitioner has the burden of proving its case by a preponderance of the competent, credible evidence. The law governing the process is detailed. N.J.A.C. 6A:9C-4.4, Requirements for and implementation of teachers' individual professional development plans; N.J.A.C. 6A:10-2.1, Evaluation of teaching staff members; N.J.A.C. 6A:10-2.2 Duties of district boards of education; N.J.A.C. 6A:10-2.4 Evaluation procedures for all teaching staff; N.J.A.C. 6A:10-2.5 Corrective action plans for all teaching staff; N.J.A.C. 6A:10-4.4 Teacher observations.

The Board's evaluation of the Teacher was arbitrary and capricious. The phrase means "having no rational basis." That "acts of government be grounded on established legal principals." It means that administrative bodies cannot take "willful and unreasoning action, without consideration and in disregard of circumstances." [Citations omitted.]

From the 1991-1992 School Year through the 2012-2013 School Year[5], the Teacher was evaluated as "Successful" in every single category, on every single one of her annual evaluations, a total of 252 "Successful" performance ratings.

The Board did not evaluate the Teacher's performance, but, rather, her use of the Stronge computer system. The Board: evaluated the Teacher based solely upon her uploads to the Stronge software system, and not on her actual performance; did not compile or review information necessary to properly observe and evaluate the Teacher; evaluated the Teacher against no

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cts."

[Footnote in original]

[5] The Teacher's annual evaluations for the 1997-1998 through 2000-2001 school years were not contained in the personnel file provided by the Board in discovery an

measurable or definable standards; and evaluated her in a manner contrary to her admitted level of teaching performance. As a result of these arbitrary actions, the Teacher did not receive the rating of Effective, which she would have otherwise achieved. Accordingly, the tenure charges should be Dismissed.

Despite this, during the 2016-2017 school year, Principal Kerrigan did not evaluate the Teacher based upon her overall teaching record. Rather, he evaluated her solely based upon the information which she uploaded into the Stronge software system. Because of this, his evaluation of the Teacher as "partially ineffective" in several areas was arbitrary and capricious, and had a substantial effect upon her overall evaluation score. Had Principal Kerrigan not arbitrarily evaluated the Teacher in this matter, she would have received a summative score of "Effective" for the 2016-2017 school year, in which case, the Board would not have been empowered to bring inefficiency tenure charges against her seeking her removal.

An examination of Principal Kerrigan's misevaluation of the Teacher begins with her 2016-2017 Corrective Action Plan ("CAP") Summative Review. The CAP had set several "Demonstrable Goals" specifically:

1: More differentiated instructional techniques, especially in math
2: Incorporation of differentiated instructional strategies to enhance EveryDay Math lessons.
3: Formative assessment data entry and use
4: Adherence to all district policies, specifically attendance / arrival to school, lesson plan submission, data inputting, etc.

Principal Kerrigan, who had developed and administered the CAP, found that the Teacher had "Met Expectations" in each of these four categories, citing several "Sources of Evidence" supporting his determination. With respect to each "Demonstrable Goal," those sources of evidence were:

1: Lesson plans
Discussion at bi-monthly CAP progress meetings with administration
2: Lesson plans

Discussion at bi-monthly CAP progress meetings with administration

3: Data base information is current

4: Digital and hard copy lesson plan submission

Arrival time to school noted by administration / attendance book sign-in

Time stamps on data entry

Mr. Kerrigan also acknowledged that there was voluminous documentation generated by the Teacher in the form of, *inter alia*, lesson plans and a grade book, which was not uploaded into the Stronge system. He was aware of this all of this documentation, as it was provided to him on a regular basis during the 2016-2017 school year.

Principal Kerrigan testified that there was not sufficient detail in the Stronge documentation log in order for him to rate The Teacher as effective or highly effective. He "did not see enough evidence" uploaded to the Stronge document log to show that the Teacher, was effective in the area of *Performance Standard 1, Professional Knowledge*. Similarly, in her 2016-2107 Summative Evaluation under *Performance Standard 2, Instructional Planning*, Principal Kerrigan wrote: The artifacts[6] and the narrative included by The Teacher do not evidence consistently detailed lesson plans.

This is directly contradictory, however, to Principal Kerrigan's findings on the Teacher's CAP Summative Review wherein he determined that the Teacher's lesson plans had, in fact, met the expected performance level: Effective.

Principal Kerrigan evaluated the Teacher based upon her document uploads. For the 2016-217 school year, the Teacher was rated as "ineffective" *Performance Standard 4, Assessment of/for Learning*. When he assigned this

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d are not part of the record.

[6] The term "artifacts" refers to documents uploaded into the

rating, Principal Kerrigan admitted that he ignored the fact that the Teacher's special education students would also have been assessed by the regular classroom teacher. As a resource teacher, the Teacher's role was to support the delivery of the lesson by the main classroom teacher to the subset of special-needs students to whom she was assigned. Principal Kerrigan did not take the regular classroom teacher's assessment of the Teacher's students into account because "[I]t was not included in the documentation log." He admitted that her rating of ineffectiveness was not based upon actual student assessments, but rather, upon the Teacher's documentation log. As the Teacher's CAP Summary made clear, however, she did achieve an Effective performance level in the area of "formative assessment data entry and use."

It is clear from her CAP Summary and the evidence referenced therein that, for the 2016-2017 school year, the Teacher was, at minimum, Effective in the areas of *Performance Standard 2, Instructional Planning, Performance Standard 3, Instructional Delivery, Performance Standard 4, Assessment of /for Learning and Performance Standard 6, Professionalism*. It is also clear that all of the materials referenced in the CAP summary were not uploaded into the Stronge documentation log system. Taken together with Principal Kerrigan's own testimony, one is led ineluctably to the conclusion that Principal Kerrigan did not evaluate the. Teacher based upon the entirety of her work performance, but rather, solely upon the work reflected in her Stronge document log.

Teachers were given no guidelines or direction as to "how much" needed to be uploaded to the document log. A teacher would expect that materials submitted to and reviewed by her Principal on a regular basis, such a lesson plans and grade books, would be taken into consideration in connection with her evaluation. Here, that did not happen.

Since the Teacher's rating is based not upon her performance, but instead upon the manner in which that performance was recorded, Principal Kerrigan's rating of the Teacher as Partially Effective for the 2016-2017 school year was arbitrary and capricious. Since, had he appropriately rated her as

Effective under the aforesaid Performance Standards, she would have received a final summative score of Effective for the 2016-2017 school year, the tenure charges should be Dismissed.

The Board did not Compile or Review Information Necessary to Properly Observe and Evaluate the Teacher.

During their testimony, the Board's witnesses—particularly Principal Kerrigan—focused extensively upon the concept of "differentiation," and the Teacher's purported failure to sufficiently utilize same. The Teacher did, in fact, meet Principal Kerrigan's requirements to utilize differentiation for the 2016-2017 school year, as per her CAP summary. It is clear that the Board's evaluators acted arbitrarily and capriciously in faulting the Teacher for not using differentiated instructional techniques. The Board's evaluators did not review or compile the information necessary to make such determinations.

Principal Kerrigan defined differentiation, generally speaking, as providing content, process, or materials varied ways to address the different learning needs of students. He acknowledged that the purpose of differentiation is to "meet student needs." He admitted that he has no background in Special Education and that there is no Board policy, procedure, or other directive which sets forth a requirement that teachers utilize differentiated instructional techniques.

Principal Kerrigan provided the Teacher with a poor evaluation based upon his observation of January 21, 2016. The basis of this poor evaluation was that "[t]he lesson [was] not a good example of differentiation." Principal Kerrigan was unable, however to testify that the needs of any student had not been met by the lesson—differentiated or not—delivered by the Teacher.

Principal Kerrigan had not reviewed any student materials, grades, papers, Individualized Education Plans ("IEPs") or other materials prior to the observation, not did he speak with any students after the lesson. He claimed that "students were struggling" with the lesson, but could not identify the

struggling students or any student whose needs were not met based upon the Teacher's November 2, 2015 observation.

Principal Kerrigan observed the Teacher again on March 21, 2017. In the area of instructional planning, he complained that the Teacher's lesson plan contained "few details of differentiation." Prior to this observation, however, he had reviewed no documents. Notably, he did not review the lesson plan of the regular classroom teacher (the Teacher was in the room as a special education teacher) and could not know whether or not it would have been appropriate for her to utilize differentiation in the classroom that day. Rather, he seemed fixated, not upon the effectiveness of the lesson delivered to students, but rather, on the fact that the Teacher was supposed to show him differentiation that day. Finally, in the summative evaluation Kerrigan opined that "[c]ontent from these articles should have been evident in lesson observations by administration." He admitted, however, that he had never even read the documents that he was referring to. Accordingly, he had no idea whether content from the articles was presented in her observed lessons.

The Teacher was observed by Donna Landon and Suzan Radwan on January 25, 2017. During her entire career, Dr. Radwan had never served as a classroom teacher. Prior to the observation, she did not review the main classroom teacher's[7] lesson plans, nor the IEPs of any students to whom the Teacher was assigned. Similarly, Ms. Landon had not been a classroom teacher for more than 20 years, and did not recall reviewing any student IEP in preparation for her observation of the Teacher. Despite having no information about the student, however, faulted the Teacher for not using a "variety of instructional strategies" to support the student.

The Teacher was observed by Michael Volpe on December 7, 2016. Prior to that observation, he reviewed no documents other than her CAP plan. He

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e Stronge documentation log.

[7] As an in-class support teacher, The Teacher's role was to provide academic support to the students in the class who had I

looked at her lesson plan during the observation. He did not know the names of the students in the class, nor had he ever had any previous interactions with them. He had never reviewed the IEPs of the students, and had no idea whether or not they suffered from attention deficit disorder, or any other learning disabilities. Notwithstanding this, in his observation, he faulted the Teacher for failing to utilize "differentiation."

He was unable to say whether the needs of the Teacher's students had been met, or not met. He also criticized the Teacher for the "methodologies" which she utilized to implement her lesson; however, he had no factual basis upon which to make this criticism. Effectively, Mr. Volpe acknowledged that a student's getting "off task" could be the result of an insufficiently engaging lesson, or, in the alternative, due to the student's own behavioral issues. He admitted, however, that he had no idea whether the Teacher's students had behavioral issues or not. As such, he negatively evaluated the Teacher based upon his uninformed assumption that her lesson, and not the students' issues, caused them to require redirection.

The prerequisite to faulting a teacher for failing to use differentiated instruction, or any other instructional method, is knowledge or information that such differentiation or method will be helpful to meeting the needs of the specific students involved in the observed lesson. Absent this, there is no rational relationship between a teacher's performance, and the use or non-use of differentiation or any other instructional technique. Since that prerequisite was not present here, the Board's negative evaluation of The Teacher based upon its claim that the Teacher did not utilize differentiation or other instructional techniques. was arbitrary and capricious.

The Board evaluated the Teacher against no measurable or definable standards. As the testimony of Principal Kerrigan made clear, his determination that the Teacher was Partially Effective and/or Ineffective in several performance standard areas was not merely subjective—it was wholly untethered to any standard whatsoever. An evaluation which is unbound by any measurable

standard, let alone any standard which has been communicated to the employee, is arbitrary and capricious.

As discussed, *supra*, there were no guidelines lines or directives governing the quantity or quality of materials which teachers were supposed to upload to their document logs. There was also no policy, procedure, or guideline promulgated by the Board setting forth a requirement for differentiated instruction.

Additionally, there was no measurable guideline governing *Performance Standard 4, Assessment of / for Learning*. The Teacher was rated as "Ineffective" under this standard, during both the 2015-2016 and 2016-2017 school years, despite the fact that there was no policy, procedure, guideline or directive governing the type or frequency of student assessments. This was the case despite the fact that, during the 2015-2016 school year, Principal Kerrigan never notified the Teacher that there was any problem with her grade book, which she was required to keep, and he was required to monitor.

Principal Kerrigan was inconsistent in his assessment of the Teacher. Testifying regarding her March 2017 observation, he admitted that her demonstration of professional knowledge was appropriate. In her 2016-2017 summative evaluation, however, he claimed that she was only Partially Effective, and that her lesson observed in was "not a strong example of it [Professional Knowledge]." Thus, while when she was first observed, her performance was appropriate; at the end of the day, it was not Effective. Throughout his testimony, Principal Kerrigan repeatedly resisted any attempt to characterize any discrete portion of the Teacher's performance under the Stronge Rubric (i.e., as Highly Effective, Effective, Partially Effective, or Ineffective). The fact that he could simultaneously find a teacher's performance in an instance to be "appropriate," yet not "Effective, when the expected level of performance under the Stronge Model is "Effective" demonstrates the arbitrariness and unfairness of Principal Kerrigan's summation.

Principal Kerrigan found The Teacher to be ineffective and partially effective for the 2015-2016 and 2016-2017 school years, respectively, in the area of *Performance Standard 6*, *Professionalism*, based largely upon purported attendance / tardiness concerns. During the 2015-2016 school year, Principal Kerrigan documented 3 occasions (out of approximately 180 school days) when The Teacher was late. He had no idea why she was late for work those three days. He admitted that being late under circumstances outside a teacher's control would not evidence a lack of professionalism. He also admitted that there was no policy, procedure, or guideline whatsoever addressing how many times a teacher could be late before receiving an ineffective or partially effective rating under this standard. When pressed, Principal Kerrigan stated that "the guideline is the preponderance of the evidence of what is contained in this section of the summative." This is nonsensical. Principal Kerrigan had inadequate evidence upon which to determine that The Teacher's lateness on 3 occasions evidenced any lack of professionalism. Additionally, under his unintelligible standard, one teacher could be deemed ineffective for a single lateness, while another teacher could be late many times, and still receive an effective rating. This is subjective to the point of arbitrariness.

For the 2016-2017 school year, Principal Kerrigan faulted the Teacher in the area of Professionalism for taking sick days and for missing a professional development day due to illness, despite his acknowledgement that he had no reason to doubt the sincerity of her illnesses on the days in question. "I never thought she was faking it or trying to get away with something", he testified, and that coming into work sick was a bad idea. He also admitted that, pursuant to their Collective Bargaining Agreement, teachers were entitled to take approximately 12 sick days per year, and that The Teacher had not exceeded that number. Faulting a teacher for legitimately taking a sick day to which she is contractually entitled is irrational, arbitrary, and capricious.

Principal Kerrigan faulted The Teacher in the area of Professionalism for the 2016-2017 school year based upon the fact that there had been a meeting

to discuss "concerns" voiced by The Teacher's co-workers. The purported "concern" was that The Teacher was misusing her computer during class time (i.e., going on Facebook, etc..); however, there was no evidence that this actually took place. Reducing a teacher's evaluation score based upon an unsubstantiated "concern" is beyond arbitrary and capricious—it violates the teacher's right to Due Process.

The Board evaluation the Teacher in a manner contrary to her admitted level of teaching performance. For the 2016-2017 School Year, The Teacher improved her rating in that Performance Standard to "Highly Effective." Principal Kerrigan testified that the benchmarks set for student growth by way of the Student Growth Objectives were subject to his review and approval. This being the case, neither The Teacher, nor any other teacher, could "skew" her evaluation in her favor by setting low student achievement benchmarks.

Hence, this case presents a quandary. If a teacher's purpose is to cause student achievement, and the teacher, in fact, is the cause of a "high level" of student achievement, how can the teacher be considered "partially effective" in achieving her purpose? Logically, she cannot. The Board, clearly, quibbles with The Teacher's methodologies, yet it does not deny their high level of effectiveness.

An evaluation which is wholly unconnected, and in fact contrary to, an intended and achieved level of outcome is, *per se*, arbitrary and capricious.

The Teacher, by the Board's own admission, got the job done. That should be the end of this matter.

The Board failed to prove that it followed the regulatory requirements of the TEACHNJ Act. During the 2015-2016 School Year, pursuant to N.J.A.C. 6A:10-4.4, school districts were required to observe tenured teachers three times. Likewise, the Stronge Model, itself, stated that tenured teachers were required to be observed "at least three times.

Despite this, during the 2015-2016 School Year, The Teacher was only observed two times. The Board's Superintendent claimed that the Board they

had received a "waiver" from the Department of Education, excusing it from this requirement. No such "waiver," however, was actually introduced into evidence, which would have been necessary for the Board to demonstrate that it had actually complied with all of the requirements of same. Additionally, notwithstanding any purported "waiver" obtained from the Department of Education, the Stronge Model itself, which expressly requires "at least" three observations, does not provide that this requirement may be "waived" by a School District.

Likewise, for the 2015-2016 school year, Principal Kerrigan never conducted a mid-year review the Teacher's document log with her, despite the fact that the Stronge Model provided that such a review must take place. Had he conducted such a review, she would have been aware that her document log was, at least according to Mr. Kerrigan, insufficient.

A school district that does not follow the requirements of the administrative code, nor of the Stronge Model, is entitled to no presumption of correctness in its evaluations of a teaching staff member. Consequently, for this and all the aforesaid reasons, the Board's tenure charges should be dismissed.

The Board did not follow the Teacher's Professional Improvement or Corrective Action Plans. For the 2015-2016 school year, the Teacher's Professional Improvement Plan ("PIP"), under a section titled *Resources / Assistance Provided, Activities to be Completed by the Employee*, provided that the following would occur:

D. Meeting once every two weeks with principal and math content specialist to verify appropriate lesson pacing and progress; Ms. Mackenzie to write summaries of the content of these meetings and attach these summaries to hard copy lesson plans submitted to principal.

B. At least one additional formal observation to be completed during the 2015-2016 school year. Ms.

Mackenzie to invite observer into classroom for a lesson which highlights differentiated instruction.

Principal Kerrigan prepared this document. Despite this, he was unable to recall whether these meetings ever took place. He also admitted that the "extra observation" of the Teacher called for by the PIP simply never took place. Linda DeFrancesco, the "math supervisor" referred to in the PIP, testified that she never attended any such meetings with the Teacher and Principal Kerrigan, nor did she ever discuss the referenced summaries with her.

Similarly, the Teacher's Corrective Action Plan ("CAP", provided for certain "Supervisor Responsibilities." These included the following:

- Meet with The Teacher twice per month ("CAP progress meetings").
- Arrange for math mentor.
- Provide a substitute for overages as needed.
- Review record / journal
- Conduct additional observation (of a lesson selected by The Teacher), as well as additional unannounced walk-through observations.

Principal Kerrigan testified that administrator prepares the CAP Plan; he developed the Teacher's. He was unable to testify that all of the meetings provided by the CAP Plan took place. He also did not recall whether he had reviewed the Teacher's record / journal with her, as provided in the "Supervisor Responsibilities" on the CAP.

Principal Kerrigan did not know whether the Teacher was provided with any in-service special education training during the 2015-2016 or 2016-2017 school years. He also claimed that a "co-teaching" model was the preferred special education teaching method, but had no knowledge that this had ever been communicated to The Teacher.

The purpose of the PIP and CAP are to assist the teacher in achieving effective performance. The assistance to be provided is not gratuitous—rather, it is required by law. See Administrative Code, *supra*. Having failed to hold up its

"end of the bargain" with respect to assisting the Teacher, the Board has, consequently, failed to meet the statutory prerequisites for her removal. The tenure charges should therefore be Dismissed.

Discussion and Analysis

The District employed the Teacher since September 1, 1991. She was assigned as a special education teacher in 2015-16 and 2016-17 at Woodfern Elementary School. She taught special education subjects in math and literacy. At times she taught small numbers of only special education students in a separate room. At other times she entered the classroom to assist the regular teacher with the special education students who were mainstreamed into that classroom. The tenure charge of "inefficiency" is based on her rating of "partially effective" in the annual summative evaluations for two consecutive years, 2015-2016 and 2016-2017.

According to N.J.S.A. 18A:6-17.2, an arbitrator hearing these cases "shall only consider whether or not: (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to, providing a corrective action plan; (2) there is a mistake of fact in the evaluation; (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or (4) the district's actions were arbitrary and capricious." The statute then states that "[i]n the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed. " N.J.S.A.

18::6-17.(a). The statute also provides that "the evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review." NJ.S.A. 18A:6-17.2(C).

The summative evaluation for 2015-2016 was based on a mathematical average of seven standards plus a score for Student Growth Objectives. The administration conducted two evaluations during 2015-2016. The Teacher took a leave of absence from mid-March to the end of the 2015-2016 school year, and did not receive the third observation contemplated by the Professional Improvement Plan. This leave made the third observation impossible. The credible evidence shows the District had earlier asked for and received from the New Jersey Department of Education a waiver of the requirement of three observations in all instances, not just this Teacher's. The written waiver was not shared during discovery and for that reason the document was not admissible. Credible oral evidence showed that the waiver in fact was requested and received. After careful consideration of the facts and law, I conclude 1) That the absence of the third evaluation was caused by the teacher taking a leave of absence; 2) That a teacher who is under an corrective action plan so requests and is granted a leave of absence two months before school ends for the year presents the Board with this choice: Either wash out the plan and its two completed observations for the entire year and start over the following year; or base the summative evaluation on the evidence available. That evidence consisted of all but two months of the entire school year, and two evaluations, a sufficient time for the Teacher to have created a record through observations and the corrective action plan sufficient to create a viable summative evaluation. I conclude that the Board's decision to have two evaluations instead of three did not materially affect the outcome of the evaluations. Indeed, the Department of Education issues waivers to allow Boards to have two evaluations instead of three, including this Board. I further conclude that the failure to have three observations in a District where it was widely known that the District had asked

for and received a waiver of the three observations is an affirmative defense which the teacher must raise, with the burden then shifting to the Board to prove by a preponderance of the evidence that the Department of Education issued a waiver. The Board fulfilled that burden through oral testimony.

Kerrigan's observation of November 1, 2015 was balanced and credible. He found that the "teacher effectively engages students in learning." She understood the content of the lesson – geometry. She had submitted lesson plans in advance. He found the pacing appropriate. Kerrigan's testimony about what he observed was likewise balanced. I found him credible. He also found that "as all 5 students struggled with the lesson, there was not much opportunity for extensive differentiation – when this concept arises again, it would be advisable to seek to have various activities incorporate real-world connections to determine if students can apply knowledge (we can discuss some ideas at the post-observation conference.)" He makes the point that because all the students were struggling, there was no opportunity to differentiate the instruction according to the needs of each student, but tells her they will discuss differentiation later.

On January 12, 2016, Kerrigan sent an email to the Teacher listing the dates her lesson plans were untimely 9/15, 9/21, 10/19, 10/26, 11/12 and 1/4. The reasons for lesson plans in advance are obvious. First, they establish that the teacher has prepared lesson plans in advance, as required. It is based on the twin premise that planning is good, not planning is bad. Planning doesn't guarantee a good result, but it goes a long way. Second, the lesson plan filed in advance is available to the substitute if the teacher is absent. Without the regular teacher's lesson plan, the substitute is at a significant disadvantage. And that happened on March 18, 2016, when the Teacher was absent and left no lesson plans for the substitute.

Kerrigan's observation on January 21, 2017 was critical of what he saw. In his report, he wrote: "All activities in this lesson were teacher directed with very little student exploration." He wrote, "During this lesson, there was little

evidence of differentiated instruction: all students completed the same tasks in the same way at the same materials; this was a lecture-style lesson."

He also wrote that she should make the evidence of her "standards evident to the observer." Where she does not have a "great deal of observable evidence" she was to "include high quality examples in your documentation log." There is no "mistake of fact" in this evaluation, or is it "arbitrary and capricious." The message is clear: 1) You spent the time lecturing the same material to all students; and 2) Don't. Differentiate.

For 2015-2017, there is no evidence that a second observer did an interview. Kerrigan did both interviews. I have discussed above that her leave of absence made a third interview impossible. The considerations are the same: The Board had a choice – throw out the year and start over; or conclude the year with the information available. Her Summative Rating for 2015-2-16 is a 2.2, or "partially effective". Even if she scored a 2.6 in the third (but missing) evaluation, a score significantly higher than she had achieved in 2014-2015 and higher than her 2.2 average for 2015-2016, her average for the year 2015-2016 would not reach the next level of "effective" (2.65 to 3.49) which she needed to forestall two consecutive years of "partially effective." It would only be 2.47.[8] I conclude that the failure to have a third evaluator by a different evaluator under these facts would not have "materially affected the outcome" of the Summative Rating.

Michael Volpe's Summative Performance Report for 2015-2016 is supported by credible evidence. He noted her absence towards the end of the year as making a third observation impossible. He recommended she again be placed again on a Corrective Action Plan. Professional Knowledge: Partially Effective Instructional Planning: Effective (It notes the six dates her plans were

[8] The average of the first two evaluations for 2015-2016 was 2.2. Adding a third evaluation of 3.0, which would have been significantly above her score for 2014-2015 or 2015-2016, she would still be "partially effective." Her final average of the three evaluations would 2.47. (2.2 plus 2.2 plus 3.0 divided by 3 equals 2.47.) She would need 2.65 to reach the "effective" range.

late). It states that she must be timely with her lesson plans. Instructional Delivery: Partially Effective. It refers to the 1/21/16 observation. She selected the date. "All activities in this lesson were teacher directed with very little student exploration." It cites the recent PIP and repeats the need for multiplication chart and other charts. "Little evidence of differentiated instruction." Her performance was "inconsistent." Assessment of and for Student Learning: "Ineffective." It reflects her failure to timely upload math students beginning of the year assessment data, after having been asked to do so by email of 9/22/15 she failed to respond and received a second reminder a month later on on 10/28/15. Learning Environment: Effective. The note states that "should continue to perform at this expected level. Professionalism: Ineffective. It notes a meeting with Union representative and the Teacher to "discuss appropriate conduct when interaction with students." It notes the approximate times she was late to work: 30 minutes, 20 minutes, and 50 minutes, resulting in a meeting with the Teacher and her Union representative. Mr. Volpe's notes reflect it was the cumulative effect of being late three times and having to meet with her and her Union representative two times within 6.5 month of service.

Under Commendations" the document states she "showed improvement" in areas of Learning Environment and Instructional Planning, it states that because of improvement in planning, "pacing was appropriate" and she "was able to cover more material." The report is balanced and credible. It contains no errors. It is not arbitrary and capricious. The content is not otherwise reviewable.

Her Corrective Action Plan is quite specific. It lists the areas that needed improvement, the sources of information behind each issue, the goals, staff member responsibilities, supervisor responsibilities, and completion date. One goal: The Teacher "will demonstrate more consistent use of differentiated instruction techniques, specifically in math." It states under "Staff Member Responsibility" that she will be provide with a specific named book, she will incorporate "strategies from the book within her weekly lesson plans"; For each strategy used from the book, she "will write a description of the strategy and a

reflection on its use in the classroom." She will "implement varied instructional strategies that engage students...." She will "incorporate differentiated instruction to enhance EveryDay Math lessons...." She will "invite an administrator to observe a lesson which highlights the use of differentiated instructional strategies. She will "visit the classroom of a math mentor 2-3 times per marking period" and "maintain a record/journal of math mentor classroom visits, observations of strategies utilized, etc." She will meet with administrators twice each month to discuss CAP progress, lesson planning, consistent incorporation of differential instructional strategies, use of assessment data to drive instruction, and professionalism." She "will prepare a formative assessment for each lesson." She will "keep all required assessment data...."

The results of this effort was not as hoped. Her observations for 2016-2017 and her summative evaluations resulted in a score of "partially effective", not enough to stay employed if she were get two in a row.

The old issues continued. On October 4, 2016 Kerrigan reminded her by email that her lesson plans were neither given to him in hard form or uploaded into the Genesis computer system. Her response was she forgot to hit "send."

She continued to fail conform her work to the system within which she worked. On October 6, 2016, a kindergarten teacher with whom she worked that she was using the alphabet arch improperly, and gave detailed instructions.

On October 10, 2016, she attended a documented CAP meeting, which discussed the alphabet arch. The next day, October 11, 2016, Kerrigan sent her a stiff email stating that she was not doing what she said she would do at the October 10, 2016 CAP meeting. The Teacher had again changed "the delivery of the program." Kerrigan's email closes with these words: "You are hereby directed to follow the program as it is prescribed. Do not deviate from this."

Kerrigan's formal observation on 11/3/16 was positive. Kerrigan testified that each part contained no problems He wrote observation comments such as "advanced preparation is evident" and "having students trace the same objects

but possibly get different answers was a good way to generate further discussion about area." And "the teacher has good rapport with students." When asked at a CAP meeting on 11/4/16, she said, among other things, that "she adjusts the differentiation based upon student need in individual lessons. It was agreed that Ms. Mackenzie would go back into her lesson plans to explain the differentiation she provided in the general education setting.

I find Kerrigan's assessment fair and objective. He is able to distinguish acceptable from unacceptable work and report accurately what he observes.

On December 5, 2016, the Teacher attended another CAP meeting. It states that her pacing "seem appropriate at this time" and he was "inputting student scores into Genesis. Mr. Michael Volpe's observation of 12/7/16 is mixed. She posted lesson plans, which contained differentiation, but she did not implement differentiation in the lesson. She used the "same methodology" when teaching "throughout most of the lesson..." The lesson was "teacher direction, student performance on the teacher's directed task, then follow up questions were asked."Mr. Volpe writes she should "use more than one methodology" and "incorporate differentiation as you have noted in your plans."

Suzan Radwan's observation of 1/25/17 was mixed. She wrote the Teacher did not adjust the pace of instruction when working with a student with learning disabilities. She did not accommodate diverse learners. The Teacher did not use a variety of instructional strategies. So "rather than using questioning technique to facilitate editing," the Teacher "just told the student what needed to be edited." The Teacher "did not provide the student with appropriate wait time after asking a question. She didn't pace property, and did not access for student understanding. After the Teacher gave instructions to the students, the students asked the general education teacher to repeat the instructions. The bottom of the evaluation contains identical language found in earlier ones. It states the teacher should "include high quality examples showing consistency over tie in your documentation log."

February 21 2017, Kerrigan emailed the Teacher, who had been absent, about her lesson plans for the substitute. The document the Teacher attached said the course was "Grade 4 Math" but the lesson plans said LLD kindergarten.

On March 7 2017, Kerrigan admonished the Teacher by email for leaving Kate Goldman's class 20 minutes early, writing it was not up to her to decide when to leave a class.

On 3/7/27, Kerrigan emailed the Teacher at 10:36 am, that her lesson plans were not yet posted and would memorialized for her summative evaluation. Kerrigan replied her reason was not valid, as she had ample experience using Genesis. She responded an hour later that she "forgot to press post." She apologized in a 1:16 pm email the same day. As for leaving the class early, she denied leaving 20 minutes early, writing it more like 5 to 10 minutes. The Teacher emailed, "As for Kate's class, I will stay the full amount."

On March 10, 2017, Kerrigan wrote the Teacher that she had been absent 12 days, including 6.5 Fridays. Kerrigan wrote that on 8 of the days, she logged in too late to find substitutes. The arbitrator will discuss this when turning to the teacher's defenses. Kerrigan backtracked on cross-examination, during the arbitration, and said he was not saying she was being dishonest.

Kerrigan wrote up his formal announced evaluation. The teacher had invited him in to observe a calls. Her CAP required her to invite an administrator.

Kerrigan wrote a descriptive report. He wrote that her lesson plans "contain few details for differentiation... The plans were copies of the classroom teacher's lesson plans with words added: Miss Mack: Read w/HA, fact/opinion; Key words for fact/opinion file folder game." During the class, the Teacher circulated, meeting with several students on their Reading Logs, met with a special education student to read *Calvin and Hobbs*, worked with vocabulary with a student, and assisted others. Kerrigan questioned on his Observation Report how the activity would be assessed to address individual student needs.

On May 9, 2017, Kerrigan filled out a Summative Review of CAP Progress.

The review had two choices for four goals: Expectations met: Yes, or No. All goals were "Y", for "Yes." The goals were: 1) "More differentiated instructional techniques specifically in math." 2) "Incorporation of differential instructional strategies to enhance Everyday Math lessons." 3) Formative assessment data entry and use." 4) "Adherence to all district policies, specifically attendance/arrival to school, lesson plan submission, data inputting, etc." Kerrigan testified that the reason he scored the Teacher at "Y" was because the teacher improved. "Improvement" is not the same standard as used for the Summative Evaluation. When asked whether this means the teacher was "effective" in these categories, Kerrigan agreed.

He was actually being asked a legal question of whether the CAP grades override the Summative Evaluation. I conclude they do not.

Kerrigan's Summative Performance Report considers the entire year, not just the last month or two. The standards for the Summative Evaluation are not the same for a CAP report. They are not whether the teacher showed improvement, which is what Kerrigan said the CAP ratings meant, but how would categorize the full sweep of the entire year. Kerrigan made it clear that he was not saying the Teacher's Summative Evaluation had to be the same as the CAP report. They are different documents serving different purposes. The Summative Evaluation is based on established, fixed categories. The CAP report is based on whatever the parties agreed to focus on. The Summative Evaluation has four grades, from lowest to highest: "Ineffective"; "Partially Effective"; "Effective"; and "Highly Effective." The CAP report has two grades: "Y" for "Yes", "N" for "No."

I conclude that teach of the Summative Evaluations referred to below, are supported by substantial evidence relating to 2016-2017, including credible testimony from the witnesses, from the content of documents, and inferences drawn therefrom, and the statutes, and prior arbitration decisions, and are not based on mistakes of fact, and are not arbitrary and capricious. I will discuss

separately the inappropriate use of 12 absences as part of the Professionalism Standard score, but I have concluded their inclusion would not have affected the score for Professionalism, and did not materially affect the outcome of the evaluation, and may be disregarded.

The Summative Evaluation, dated 5/31/17, states as follows:

Standard 1 – "Professional Knowledge" – "Partially Effective" ("The teacher is inconsistent in demonstrating an understanding of the curriculum, content and student development or lacks fluidity in using knowledge in practice."

Standard 2 – "Instructional Planning" – "Partially Effective" ("The teacher is inconsistent in his/her use of the state standards, school's curriculum, data, or strategies and resources to meet the needs of all students."

Standard 3: "Instructional Discovery Evidence"- "Partially Effective." ("The teacher is inconsistent in his/her use of relevant instructional strategies or in engaging students in active learning, promoting key skills, or meeting individual learning needs")

Standard 4. "Assessment of/for Student Learning" – "Ineffective" ("The teacher uses an inadequate variety of assessment sources, assesses infrequently, does not use baseline or feedback data to make instructional decisions, or fails to provide student feedback in a timely manner.") The "Comments" state in part: "[The] only math is referenced in this section of the documentation log, while Ms. Mackenzie's teaching responsibilities include literacy, science, social studies, and work with kindergarten LLD students." The "Comments" also state: "The preponderance of evidence indicated an inadequate variety of assessment source, a lack of inclusion of assessment data beyond math, and incomplete evidence of assessment data analysis and use."

Standard 5. "Learning Environment Evidence" – "Effective"- ("The teacher uses resources, routines, and procedures to provide a respectful, positive, safe,

student-centered environment that is conducive to learning.") The "Comment" indicates that "Effective" is supported by substantial evidence

Standard 6 – "Professionalism" - "Partially Effective." ("The teacher is inconsistent in displaying professional judgment, collaborating or communicating with relevant stakeholders, participating in professional growth opportunities, or applying learning from growth opportunities in the classroom.") Comments include: "Administrative emails and an email from a colleague to Ms. Mackenzie memorialize lateness of lesson plans, a directive to leave a scheduled classroom concerns (including missing a district-organized professional development day), a meeting with administration and union representation to address multiple concerns voiced by Ms. Mackenzie's colleagues, etc."

Standard 7 – "Student Progress" – "Highly Effective." ("The teacher is a role model in that his/her work results in an exceptional level of student progress with all populations of learners." This relates to the Student Growth Objective. The "Comments" state that the Teacher "is to be commended for the following: highly effective achievement in the SGOs [and] attention to limited school resources and a willingness to explore ways to utilize technology...." The Teacher obviously does not contest this score

The Teacher's argument that the final CAP report controls the Summative Evaluation has been discussed above and is rejected.

The Teacher argues that the Board's evaluation of the Teacher was arbitrary and capricious among the grounds listed are her evaluations from 1991 through 2013 were "successful" in every category, for a total of 252 "successful" ratings. The argument is not persuasive. The finding of two successive years of Summative Evaluation scores at "partially effective" or "ineffective" defines "ineffective" teaching and requires termination. The statute does not consider prior successes in days long past relevant.

The Teacher's argument that the Board did not evaluate the Teacher's performance but rather, her use of the Stronge computer system is not

persuasive. A major part of the evidence in this case was the teacher's behavior, in the classroom, with her peers, in the school, in the form of eyewitness testimony and observations. Her failure to provide timely lesson plans on numerous occasions was, except the one time she failed to hit "send", not based on the computer system. The evaluation system relies on the teacher to provide information to the reviewer. It is the responsibility of the teacher to provide the information. It is not the responsibility of the administrators to go seek it out. The method of providing the information is by computer. She was aware and was reminded by language in the bottom of the Observation reports that if you want the evaluator to have more information provide it.

The Teacher's argument that there were no guidelines about "how much" needed to uploaded to the document log is not persuasive. The uploads add to the overall picture of the teacher. The teacher, by the uploads, is given control of how her or she will be perceived. The Board can only provide the means to the teacher to upload information. If the teacher decides not to provide information, or to provide little information, the Board is not responsible. With hundreds of teachers in the system, the Board can rightly place the responsibility to provide information on the teacher.

The argument that the Teacher's rating is based not on performance but on manner in which that performance was recorded is not persuasive. The evaluation system relies on the written word. A teacher does something. It is observed, either by the teacher or someone else. The observer produces a document, maybe on a computer, or on an email. The documents are reviewed by administrators. Something happens because of those records. There is an objective reality, but that reality must be captured and documented. The event is instantaneous and disappears. The record preserves it.

The argument that the Board did not review information necessary to properly observe and evaluate the teacher is not persuasive, particularly with differentiation. The evidence does not show she never used differentiation. She frequently did not. The CAP shoes she received extensive training in its use. She

practiced it. She was supposed to write it into her lesson plans. She was supposed to then use it. And sometimes she did, but often she did not. The evidence shows that she **inconsistent** in the use of it. Therefore, her Summative Evaluation Score of "Partially Effective" accurately stated what was observed and recorded on the observations.

The argument that the Board never adopted a policy to use differentiated instruction is not persuasive. It is the responsibility of the Superintendent and Principals and Teachers to perform the important work of education, and that includes education of the teachers as well. The administration trains teachers to try to deliver a product that is not the same for all, but recognizes that students have different learning styles and speeds, and adjust for that difference. The administrators who required the Teacher to adjust her teaching to the needs of individual students and not to lecture to them as a group had complete authority to make that decision.

The argument that Kerrigan's written observation of the Teacher, stating that the Teacher did not the meet the needs of the students, and the students were struggling, while Kerrigan could not identify which needs were not met or which students were struggling, is not persuasive. As Yogi Berra once said, "You can observe a lot just by watching." Administrators can separate out good from poor teaching, effective from ineffective teaching, by watching and listening to the interaction of teacher with the students. That is how the evaluation process works. The evaluators look, record and leave. They do not record student names, a process what would be intrusive, counterproductive, and irrelevant.

The argument that Kerrigan on March 21, 2017 had not read the documents he provided to the Teacher on differentiated learning is not persuasive. He knew what differentiated learning is, of course, and he knows it when he sees, and knows its absence as well. and he knew the material would be helpful.

The argument that he did not read the lesson plans of the primary teacher on the March 21, 2017 observation, and therefore didn't know if differentiation would be proper, is not persuasive. Having read Ms. Mackenzie's lesson plan, he wrote in his evaluation that the Teacher's lesson plan had "few details of differentiation." By this time, Kerrigan had been working with the Teacher for months as part her CAP, and he knew she was supposed to be writing differentiation into her lesson plans as part of her CAP training. She didn't. He saw the lesson plans, noticed no differentiation mentioned, and wrote it into the evaluation.

The argument that the observation of Donna Landon and Suzane Radwan on January 25, 2017 was somehow deficient because Dr. Radwan never taught and Dr. Landon was 20 years removed the classroom is not persuasive. Both were experienced supervisors capable of performing an objective evaluation. The argument that both had not reviewed any students IEP and therefore their observation that the Teacher did not use a variety of educational strategies is somehow deficient is not persuasive. An observation is not disqualified if the observers do not review IEPs. That is left to the individual choice of the observer.

The Teacher argues that Michael Volpe's observation of December 7, 2016 is deficient for procedural reasons because Volpe didn't review documents other than her CAP plan ahead of time; he looked at her lesson plan during the observation; he didn't know the students and never interacted with them; never reviewed the students' IEPs; didn't know if they had learning disabilities – and therefore his finding that the teacher had failed to utilize "differentiation" is invalid.

The argument is not persuasive. Whether and to what extent the evaluator knows much or little about the students is within the evaluator's discretion to determine, not the teachers, neither before nor after the evaluation.

The Teacher's CAP, which Volpe read ahead of time, required her to put differentiation into her lesson plans. She knew this was an important Observation. She knew from the CAP that she was supposed to include differentiation in her lesson plans. And she didn't include differentiation, and she didn't use it. And she offered no explanation as to why she did not. The evaluation is not arbitrary or capricious. The Teacher's argument is not persuasive.

The argument against the "ineffective" score for Standard 4, Assessment of Learning, is not persuasive. Her score involved her assessment of students in her responses to their questions; her making informal assessments without recording them; her artifacts show no adequate evidence of systematic gathering of relevant data. She was faulted for "an inadequate variety of assessment sources, a lack of inclusion of assessment data beyond math; incomplete evidence of assessment data analysis and use."

The argument that Kerrigan's conclusion of "ineffective" on the 2015-2016 and 2016-2017 Performance Standard 6, is arbitrary and capricious, and based largely upon alleged attendance/tardiness concerns, is not persuasive for either year.

For 2015-2016, the Summative evaluation mentions tardiness but does not mention attendance. It mentions a conference to discuss appropriate conduct when interacting with students. She was late 3 times: 30 minutes, 20 minutes and 50 minutes. The evidence shows it is disruptive when a teacher fails to show up, because her students need to be watched. The evaluation mentions another meeting to discuss tardiness. The 50-minute incident was caused when she failed to set her alarm. While not mentioned on the form but in evidence, she walks dogs in the morning. Reasonable minds can differ about the number of times a teacher be late to work without consequence. When you add to that the problems with her interaction with students, two disciplinary meetings within 6.5 months, the "ineffective" score does not rise to the level of being "arbitrary and capricious."

For 2016-2017, the absences are mentioned in the "Notes" of the Summative Evaluation of "Ineffective" for Professionalism. The Teacher argues that she should not have been punished for 12 absences. I agree. Students and teachers get sick, especially in the winter. Teachers by contract receive paid sick leave. Some teachers are more often sick than others. The contention that 6.5 days of sick leave occurred on a Friday creates the need for discipline is not persuasive. At the hearing, Kerrigan acknowledged that they were not claiming she had done anything wrong. To use the absences is arbitrary and capricious.

Having so determined, I now turn to the statutory requirement to consider whether the materially affected the outcome. Here is what remains on the "Notes" for Professionalism": "lateness of lesson plans"; a directive not to leave a scheduled classroom duty early; a meeting with administration and union representation to address multiple concerns voiced by Ms. Mackenzie's colleagues." Additionally, the Teacher refused to follow the classroom teacher's request not to deviate from the planned activity, and when formally asked to stop, she did it again, resulting in a scathing email: ""You are hereby directed to follow the program as it is prescribed. Do not deviate from this."

I conclude more likely than not, her Professionalism evaluation would have not changed by removing the 12 absences from the mixture, and it did not materially affect the outcome.

The same is true of her interactions with other teachers. That she was observed using her computer during class time was not the only concern her co-workers were having. Even eliminating the computer use issue, the remaining conduct could reasonably support the same evaluation, and therefore did not materially affect the outcome.

The Teacher contends that because her score on "Performance Standard 7: Student Progress, was "Highly Effective" means that the Board quibbles with her methodologies, yet it does not deny their high level of effectiveness. The argument is not persuasive. The legislature structure provides for weighted score. Her total score was "ineffective."

The Teacher contends the Board did not follow the statutory requirements of three observations. That is earlier considered above and rejected.

The Teacher contends that for 2015-2016, Kerrigan never conducted a mid year review of her document log, as required by law; that the Board did not follow the Professional Improvement Plan for 2016-2017, including meeting every two weeks with principal and math content specialist.

The arbitrator is not persuaded by the argument. The plan states that this is an activity to be "completed by the employee." She bears some of responsibility of making sure these meetings occur.

The Teacher contends that Kerrigan could not recall of all the meetings required by the PIP plan, and all the activities, occurred. The argument is not persuasive. Even if this were a material deviation, it would not have affected the outcome. The Teacher had two years of PIP and CAP. After those two years, her Summative scores were still "partially effective." Tellingly, after being coached on the meaning of differentiated instruction, how to apply it, and given exercises to write differentiated instruction into her lesson plans, in an observation by Mr. Volpe, which was announced, her lesson plans contained no differentiation. After being told not to deviate from the regular teacher's approach to teaching math, she failed to heed the teacher, who had to go to Kerrigan, and then, after agreeing not to do it, did it again a week later, resulting in the scathing email.

I have carefully reviewed the Teacher's brief, and arguments not directly responded to in this award were considered and rejected.

For the above reasons, I conclude that The Board has met its burden of

proof and has established sufficient grounds for termination of the Teacher as alleged in the Charges.

AWARD

The arbitrator renders a decision in favor of the Board and in accordance with the law, the Teacher shall be dismissed.

Dated: April 10, 2018

Peter Adomeit, Esq.
Arbitrator

State of Connecticut)

SS: West Hartford

County of Hartford)

On this 10th day of April, 2018, before me personally came Peter Adomeit, Esq., to be known and known to me to be the individual described herein, and who executed the foregoing instrument and acknowledged to me that he executed same.

Notary Public

My Commission Expires December 31, 2020

My Commission expires on

109-18IM

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, Ed.D.
Acting Commissioner

April 12, 2018

Morrison Kent Fairbairn, Esq.
Michael A. Armstrong & Associates, LLC
79 Mainbridge Lane
Willingboro, New Jersey 08046

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Brown & Connery, LLP
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Re: *Claudine Hayes v. State-Operated School District of the City of Camden, Camden County, OAL Dkt. No. EDU 18048-16, Agency Dkt. No. 301-11/16.*

Dear Counsel:

I have reviewed the papers filed in connection with petitioner's request for interlocutory review of Administrative Law Judge (ALJ) Susan Scarola's March 28, 2018 Order, granting in part and denying in part respondent's motion for summary decision, and granting petitioner's motion for partial summary decision. Upon full consideration of all of the submitted materials, and pursuant to my discretion under *N.J.A.C.* 1:1-14.10, I have determined not to grant interlocutory review. Such review of this matter is unnecessary because the issues being raised in the request for interlocutory review are already subject to immediate review as a partial summary decision order, pursuant to *N.J.A.C.* 1:1-12.5(e).

Accordingly, respondent's request is denied. Should the parties wish to file exceptions to the March 28, 2018 Order, such exceptions must be filed within thirteen days of the date of this letter and any replies must be filed within five days from receipt of exceptions, in accordance with *N.J.A.C.* 1:1-18.4.

Sincerely,

Lamont O. Repollet, Ed.D
Acting Commissioner

LOR/SLP/BCM

cc: Susan M. Scarola, Administrative Law Judge
Clerk, Office of Administrative Law

VIA FACSIMILE AND REGULAR MAIL

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INTERLOCUTORY ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION FOR SUMMARY DECISION, AND GRANTING PETITIONER'S MOTION FOR PARTIAL SUMMARY DECISION

OAL DKT. NO. EDU 18048-16

AGENCY DKT. NO. 301-11/16

CLAUDINE HAYES,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN,

Respondent.

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

Benjamin Teris, Esq., for respondent (Brown & Connery, LLP, attorneys)

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

STATEMENT OF THE CASE

Petitioner Claudine D. Hayes (Hayes), a tenured special-education teacher who was employed by respondent State-Operated School District of the City of Camden (District) for approximately twelve years until she was deemed mentally unfit for service, asserts that the District violated N.J.S.A. 18A:16-4 by failing to reemploy her upon receiving proof of her recovery, and seeks an order compelling the District to reemploy her or to allow her to provide the District with additional proof of her recovery.

PROCEDURAL HISTORY

This is the second petition Hayes has filed with the Commissioner of Education to challenge the District's refusal to accept her proof of recovery submissions after a psychological examination conducted in 2014 indicated that she suffered from mental abnormalities. The first petition, which was filed in 2015, was dismissed on summary decision upon a finding by an administrative law judge that, in accordance with N.J.S.A. 18A:16-4, the District had reasonably rejected letters from two doctors as proof of Hayes' recovery. That decision was adopted by the Commissioner and affirmed by the Appellate Division.

On November 21, 2016, while the first petition was pending on appeal in the Appellate Division, Hayes filed a separate petition of appeal and motion for emergent relief with the Commissioner, alleging that the District again violated N.J.S.A. 18A:16-4 by rejecting a report from a psychologist, Dr. Michael Ferenschak, as additional proof of her recovery and seeking an order compelling the District to reemploy her or allow her to provide the District with further proof of her recovery.

On November 29, 2016, the Commissioner transmitted the motion for emergent relief and the underlying petition to the Office of Administrative Law (OAL). N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On December 9, 2016, Hayes' motion for emergent relief was denied pending a plenary hearing.

On September 1, 2017, shortly after the Appellate Division affirmed the Commissioner's decision to dismiss the first petition, the District filed a motion for summary decision on the second petition, arguing that the District reasonably rejected the report of Dr. Ferenschak as proof of recovery.

On November 27, 2017, Hayes filed a brief in opposition to the District's motion and in support of a cross-motion for partial summary decision on the issue of whether she is entitled to provide additional proof of recovery. Oral argument was held on February 9, 2018.

FACTUAL DISCUSSION

During her nearly twelve years of employment with the District, Hayes mostly taught high-school students with specials needs. However, for the last several years of her employment, she taught special-education elementary-school students. During the 2011–2012 school year, Hayes was assigned to teach autistic students, but, in March 2012 she was reassigned to a class for behaviorally challenged students at a different school after she requested a transfer for her "own well-being and physical safety." She stayed in that position until February 2013, when she requested a leave of absence for panic attacks, anxiety, and insomnia.

When she returned from her leave of absence in March 2013, she was assigned to a class for behaviorally challenged students at a different elementary school. However, shortly thereafter, she was involved in an incident in which she physically restrained one of her students, and, as a result, she was reassigned to yet another elementary-school class for behaviorally challenged students for the 2013–2014 school year.

On December 11, 2013, Hayes suffered a panic attack in the school and was taken to the hospital by paramedics. On December 13, 2013, the District advised Hayes that, due to her "concerning pattern of behavior this year," she would be placed

on paid administrative leave effective December 16, 2013, and required to undergo a psychological examination to determine her fitness to teach.[1]

On May 28 and May 29, 2014, Hayes was evaluated by a psychologist, Jonathan Mack, Psy.D. During the evaluation, Dr. Mack "conducted a battery of psychological tests" and interviewed Hayes. In an August 11, 2014, report, Dr. Mack concluded that Hayes suffered from a personality disorder and a panic disorder, and that, in his opinion, "Ms. Hayes is at an unacceptable risk for future problems with the elementary school behaviorally disordered population throughout the [District] at this time." He also opined that "[i]f another less stressful population is found for [her] to work with . . . she should be mandated to have weekly psychological counseling with a licensed psychologist and to be evaluated for mood stabilizing medications."

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

On March 31, 2015, Hayes provided the District with a one-page letter from her psychiatrist, Safeer Ansari, D.O., and a one-page letter from her primary-care physician, Chris Colopinto, D.O., as proof of her recovery. According to Dr. Ansari, who reviewed Dr. Mack's report:

> I currently find her to be stable and mentally healthy to return to work. However, due to Ms. Hayes' physical disabilities and limitations . . . I do agree with Dr. Mack's recommendation that Ms. Hayes is not to be placed in a B.D. or Behaviorally Disordered Classroom with students who are

[1] Hayes has not worked for the District since December 13, 2013.

> emotionally disabled and can become physically violent particularly at the elementary level. As stated by Dr. Mack, it appears that [Hayes] had the most success working with students at the High School level who suffer from Multiple/Learning Disabilities, Other Health Impairments, and/or the Autistic population.

And according to Dr. Colopinto, who also reviewed Dr. Mack's report, "[b]ased on my own independent findings I believe Ms. Claudine Hayes is mentally healthy enough to return to work granted that she is provided with the accommodations that have been recommended as appropriate."

Petition I

On June 1, 2015, Hayes filed a petition of appeal with the Commissioner in which she alleged that the District had not responded to her proof-of-recovery submissions, and requested reinstatement to her position ("Petition I"). After Hayes filed Petition I, the District, in a letter dated June 16, 2015, informed Hayes that it had reviewed the letters from Dr. Ansari and Dr. Colopinto, but stated that the letters "confirm that she continues to be ineligible for service since neither letter provides proof of Ms. Hayes' recovery satisfactory to the District so that she can return to work."

On June 23, 2015, the Commissioner transmitted Petition I to the OAL as a contested case. The District subsequently moved for summary decision, arguing that Petition I should be dismissed because Hayes had failed to provide adequate proof of recovery in accordance with N.J.S.A. 18A:16-4. On January 4, 2016, the administrative law judge (ALJ) granted the District's motion and, in an initial decision, dismissed Petition I, finding that the District had reasonably rejected the letters from Dr. Ansari and Dr. Colopinto as unsatisfactory proof of recovery.

On February 19, 2016, the Commissioner adopted the initial decision as the final decision. According to the Commissioner:

> Here, the record supports a finding that the District's rejection of petitioner's proof of recovery—which consisted of

> one-page letters from two practitioners—was reasonable. Indeed, neither letter references the multiple diagnoses made by Dr. Mack, nor do the letters describe petitioner's recovery efforts and/or any treatment regimen in place to address Dr. Mack's concerns. Both letters merely provide conditional recommendations that petitioner be permitted to return to work—with certain parameters in place, e.g., that she only be permitted to teach certain grade levels and student populations. Under the law, student safety must be the District's paramount concern.
>
> [Footnotes omitted.]

And in a footnote regarding Dr. Mack's recommendations, the Commissioner explained that, "[s]ignificantly, petitioner fails to address Dr. Mack's recommendation that she be mandated to undergo weekly psychological counseling and be evaluated for medication by a psychiatrist—and provides no proof that same has occurred."

Hayes subsequently filed an appeal with the Appellate Division and, on August 23, 2017, the court affirmed the Commissioner's final decision on Petition I:

> we discern no basis to disturb respondent's decision. Dr. Mack's extensive report diagnosed petitioner with several mental conditions, which placed her at risk for inappropriate behavior with students. The report left no question that petitioner's mental health issues affected her teaching and disciplinary abilities. Moreover, Dr. Mack only noted a different position "may" be better for petitioner, and only upon certain specified conditions. Although the report raised the possibility that petitioner could return to a "less stressful population," given the totality of Dr. Mack's findings, respondent acted reasonably by deeming her ineligible for service absent proof of recovery.
>
> We further agree with the Commissioner that respondent acted reasonably by rejecting petitioner's proof of recovery letters. Both letters stated petitioner was able to "return to work," while agreeing with Dr. Mack's suggested conditions and accommodations. As a "reasonable possibility" of harm will justify a board decision, the Commissioner appropriately noted that given the interest of student safety, petitioner's letters were insufficient proof of recovery. Therefore, under our deferential scope of review,

> we find the Commissioner's decision to uphold respondent's actions was not arbitrary, capricious, or unreasonable.
>
> Petitioner further argues the Commissioner and ALJ erred because they granted summary decision for respondent based on disputed facts. According to petitioner, these disputed issues included whether she actually threatened student safety; whether she failed to comply with Dr. Mack's recommendations; the basis for Dr. Mack's conclusions; and the sufficiency of her doctors' conclusions. We decline to discuss this argument at length, as the ultimate resolution of these issues has no bearing on whether respondent's exercise of its statutory authority was reasonable. In other words, this case turned on whether respondent reasonably deemed petitioner ineligible for service based on Dr. Mack's report and reasonably rejected petitioner's proof of recovery letters. Here, because a "reasonable possibility" of harm warrants board action, we find the Commissioner's grant of summary decision was appropriate in this matter.
>
> [C.H. v. State-Operated Sch. Dist. of Camden, No. A-3383-15 (App. Div. August 23, 2017) (citations omitted), https://njlaw.rutgers.edu/collections/courts/.]

Petition II

While her appeal of Petition I was pending in the Appellate Division, Hayes visited another psychologist, Michael Ferenschak, Psy.D., for a fitness-for-duty evaluation on July 26 and July 27, 2016. Dr. Ferenschak administered several psychological tests, conducted a clinical interview and, in an August 4, 2016, report, concluded that Hayes was fit to teach. While Dr. Ferenschak diagnosed her with a depressive disorder and an anxiety disorder, he remarked that "Ms. Hayes' current symptoms are more transient and much less severe than they were when she was out of work for mental health reasons" and that "[s]he has not had a Major Depressive Episode in over a year, and she has not experienced a panic attack in six months."

According to Dr. Ferenschak,

> Ms. Hayes appears to be susceptible to flare-ups of her mental health issues when in highly stressful situations.

> Thus, if or when she returns to work, it is recommended that she work in a non-high stress environment that is supportive and collaborative. While teaching in a school can be considered a stressful job, Ms. Hayes showed she was able to psychologically handle such a job without incident for the first decade of her employment, when the perceived stressors were much lower. If Ms. Hayes does return to work, it is recommended that she seek psychotherapy to help her manage her work-related stress and guard against extreme emotional responses.
>
> Ms. Hayes is not currently experiencing an acute psychological issue that should prevent her from working, nor is she a danger to herself or others. It needs to be stated that these conclusions are not guarantees of her future work performance or mental response to a return to work, as psychological assessment cannot predict the future. However, from this evaluation, Ms. Hayes does not appear to possess any major current psychological barriers that should keep her from returning to full-time employment.

On August 12, 2016, after having received Dr. Ferenschak's report on August 9, 2016, the District's attorney informed Hayes' attorney that the report was "*not* satisfactory proof of recovery." The District rejected the report because Hayes failed to provide the District with Dr. Ferenschak's qualifications; the report did not indicate that Dr. Ferenschak was provided with or considered certain information, including a job description and Dr. Mack's report; the report indicated that Hayes stopped attending counseling sessions a year prior; and, Dr. Ferenschak's "statement that Ms. Hayes cannot work in a highly stressful environment shows she is unable to work as a teacher of the handicapped in the District." The District's attorney stated that "[t]he District takes the safety of its students and staff seriously and is willing to act reasonably concerning this difficult situation," and, "[i]f you would like to discuss, I am available to speak at your convenience."

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

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

On November 21, 2016, Hayes filed a petition of appeal and motion for emergent relief with the Commissioner alleging that the District violated N.J.S.A. 18A:16-4 by failing to reemploy her upon receiving proof of her recovery from Dr. Ferenschak and seeking an order compelling the District to reemploy her or allow her to provide the District with additional proof of her recovery ("Petition II"). On November 29, 2016, the Commissioner transmitted the motion for emergent relief and the underlying petition to the OAL. On December 9, 2016, Hayes' motion for emergent relief was denied pending a plenary hearing.

Cross-Motions for Summary Decision

On September 1, 2017, after the Appellate Division issued its opinion on Petition I, the District filed a motion for summary decision on Petition II, arguing that the District reasonably rejected Dr. Ferenschak's report as proof of recovery and that, pursuant to N.J.S.A. 18A:16-4's two-year time limit for submitting proof of recovery, the District was under no obligation to accept additional proof of recovery after August 11, 2016, or two years after Dr. Mack found Hayes unfit for duty.

According to the District,

> [t]he instant action must fail for the same reason as Petitioner's prior action. Her most recent purported proof of recovery submission, although longer than the previous one, fails to outline Petitioner's recovery efforts and also places qualifications on any return—i.e., must be in a "non-high stress environment that is supportive and collaborative." It also deficiently fails to outline the steps she has taken to recover from the conditions diagnosed in the initial report—

> which should have been the very purpose of the submission. Moreover, Petitioner admits she has not been attending counseling sessions and has not been evaluated for psychiatric medication, which the Commissioner already deemed necessary.
>
> . . . As to the time remaining for Petitioner to submit proof of recovery, it indisputably expired on August 11, 2016—two years following the issuance of [Dr. Mack's] report . . . .

On November 27, 2017, Hayes filed a brief in opposition to the District's motion and in support of a cross-motion for partial summary decision on the issue of whether she is entitled to provide additional proof of recovery. In opposition to the District's motion, Hayes argues that a hearing is necessary to determine genuine issues of material fact regarding the adequacy of Hayes' proof of recovery. In particular, Hayes submits that "[t]he issue of whether it is possible to recover from a sleep disorder, panic disorder and a personality disorder without weekly counseling remains an issue of fact," and that whether Hayes can work for the District "if she cannot work in a highly stressful environment is obviously a factual inquiry that requires testimony to determine what the teaching environment requires and whether that environment falls in the category of environments Dr. Ferenschak is warning against."

In support of her cross-motion for partial summary decision, Hayes maintains that the two-year period in which to submit proof of recovery under N.J.S.A. 18A:16-4 began to run "from the date Respondent told [her] she would be removed from payroll as a result of her services being discontinued," or May 3, 2015, and not the date on which Dr. Mack concluded Hayes was unfit for duty, August 11, 2014. Thus, according to Hayes, she should have had until May 3, 2017, to submit further proof of recovery.

Hayes essentially argues that she did not receive the benefit of the full two-year period under N.J.S.A. 18A:16-4 for two reasons. First, on August 22, 2016, the District informed Hayes that it "would [not] be willing to accept future proof of recovery submissions pursuant to N.J.S.A. 18A:16-4" because "the time has now expired for Ms. Hayes to apply for reinstatement pursuant to N.J.S.A. 18A:16-4, as her absence from the District has exceeded a period of two years."

Second, Hayes' motion for emergent relief seeking in part an order compelling the District to allow her to submit additional proof of recovery beyond Dr. Ferenschak's report was denied. The requested relief was denied in part upon a finding that she would not suffer irreparable harm if the District was not compelled to accept further proof of recovery pending a plenary hearing because the Commissioner could order the District to accept further proof of recovery if Hayes prevailed at a plenary hearing, and in part on a finding that Hayes had failed to show a likelihood of success on the merits because "it appears from the language of N.J.S.A. 18A:16-4 that Hayes had two years to provide satisfactory proof of recovery either from the date she was placed on paid leave by the District (December 16, 2013), or from the date of Dr. Mack's fitness-for-duty determination (August 11, 2014), and that, at the latest, the time for proof of recovery expired on August 11, 2016."

As a result, Hayes argues that partial summary decision in her favor is appropriate and that she should be given more time to submit further proof of recovery if Dr. Ferenschak's report is not sufficient.

LEGAL ANALYSIS

Under N.J.S.A. 18A:16-2(a), a school board "may require individual psychiatric . . . examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal . . . mental health." And under N.J.S.A. 18A:16-4,

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

The Commissioner has recognized that the right to reemployment under N.J.S.A. 18A:16-4 is conditioned upon a school board's satisfaction with the proof of recovery

offered by the employee, such that "N.J.S.A. 18A:16-4 instructs that if it has been determined that an employee manifests a mental abnormality, he or she 'shall be ineligible for further service until proof of recovery, satisfactory to the board[,] is furnished.'" Diaz v. Bd. of Educ. of the Twp. of Mahwah, EDU 1751-09, Final Decision (August 27, 2010), <njlaw.rutgers.edu/collections/oal>. A school board's "obligation to determine the fitness of teachers is a reflection of their duties to protect the students from a significant danger of harm, whether it be physical or otherwise. And they need not wait until the harm occurs; a reasonable possibility of its occurrence warrants such action." Gish v. Bd. of Educ. of Paramus, 145 N.J. Super. 96, 104–05 (App. Div. 1976) (citations omitted). Importantly, an "action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives." Kopera v. Bd. of Educ. of W. Orange, 60 N.J. Super. 288, 294 (App. Div. 1960) (citations omitted).

In Petition I, the Commissioner concluded, and the Appellate Division agreed, that, in the interest of student safety, the District had reasonably rejected the one-page letters from Dr. Ansari and Dr. Colopinto as proof of Hayes' recovery because neither letter adequately addressed the concerns raised by Dr. Mack in the report in which he concluded Hayes was psychologically unfit to teach. The Commissioner took issue with the fact that "neither letter references the multiple diagnoses made by Dr. Mack, nor do the letters describe petitioner's recovery efforts and/or any treatment regimen in place to address Dr. Mack's concerns," but "merely provide conditional recommendations that petitioner be permitted to return to work—with certain parameters in place, e.g., that she only be permitted to teach certain grade levels and student populations." The Appellate Division echoed those sentiments, and added that, "[a]s a 'reasonable possibility' of harm will justify a board decision, the Commissioner appropriately noted that given the interest of student safety, petitioner's letters were insufficient proof of recovery."

In Diaz, the Commissioner determined that a school board did not abuse its discretion in rejecting as proof of recovery two doctors' reports submitted by a teacher who had been declared psychologically unfit due to job-related anxiety and stress issues. In that decision, the Commissioner noted that the rejected reports: failed to address why "a return to work would not trigger a recurrence of petitioner's stress and

anxiety"; "found petitioner fit for work without identifying the means by which she had allegedly recuperated" or why "petitioner was prepared to handle the same stressors in the same work environment"; and "recommended the transfer [from high school to middle school] requested by petitioner, undermining somewhat [the doctors'] contentions that she was unconditionally fit for duty." The Commissioner also noted that petitioner "had not availed herself of therapeutic interventions" despite the fact that each doctor she saw in connection with the matter thought that "she could benefit from same."

Here, as in Petition I and Diaz, the District reasonably rejected Dr. Ferenschak's report as proof of Hayes' recovery. Like the rejected reports in Petition I and Diaz, Dr. Ferenschak's report neglects to mention any recovery efforts by Hayes, such as therapy or medication, and places conditions on her return to work, such that "if or when she returns to work, it is recommended that she work in a non-high stress environment that is supportive and collaborative."

And as in Diaz, Dr. Ferenschak's report fails to address why a return to work would not trigger a recurrence of Hayes' stress and anxiety. Importantly, Dr. Ferenschak noted that Hayes had had a "Major Depressive Episode" and a "panic attack" during her leave of absence, but nonetheless concluded that "Ms. Hayes does not appear to possess any major current psychological barriers that should keep her from returning to full-time employment." If she continued to have psychological issues while she was not working, it is difficult to see how, without any documented treatment efforts, such issues would not recur upon her return to work. These concerns represent "a 'reasonable possibility' of harm" that, "given the interest of student safety," justify the District's decision to reject Dr. Ferenschak's report as proof of Hayes' recovery and to decline to reinstate her employment.

While Hayes argues that a hearing is necessary to determine genuine issues of material fact regarding Dr. Mack's recommendations and the sufficiency of Dr. Ferenschak's conclusions, the Appellate Division rejected a similar argument in Petition I, stating that "the ultimate resolution of these issues has no bearing on whether respondent's exercise of its statutory authority was reasonable," and that "because a

'reasonable possibility' of harm warrants board action, we find the Commissioner's grant of summary decision was appropriate in this matter." Here, too, partial summary decision in favor of the District is appropriate despite Hayes' argument to the contrary, because a review of Dr. Ferenschak's report shows there remained a "reasonable possibility of harm" if Hayes returned to work and that, as such, the District reasonably rejected the report as proof of recovery.

However, partial summary decision in favor of Hayes is also appropriate because, even though the District reasonably rejected Dr. Ferenschak's report, Hayes should have been given more time to provide the District with further proof of her recovery in accordance with N.J.S.A. 18A:16-4. Under N.J.S.A. 18A:16-4, if a psychiatric examination shows that a teacher is unfit to work,

> the employee shall be ineligible for further service until proof of recovery, satisfactory to the board, is furnished, but if the employee . . . has tenure, he may be granted sick leave with compensation as provided by law and shall, upon satisfactory recovery, . . . be reemployed with the same tenure as he possessed at the time his services were discontinued, if he has tenure, unless his absence shall exceed a period of two years.

A reasonable reading of this provision leads to the conclusion that an employee has two years from the time he becomes "ineligible for further service," or "the time his services were discontinued" due to psychological unfitness, to provide satisfactory proof of recovery. Here, although Dr. Mack issued his report on August 11, 2014, the District, for whatever reason, did not notify Hayes that she was ineligible for further service until March 3, 2015. On that date, the District informed Hayes that, "pursuant to N.J.S.A. 18A:16-4, the State District Superintendent has determined that you are ineligible for further services with the District and shall be terminated from payroll effective sixty (60) days from receipt of this correspondence." The District also informed Hayes, "[y]ou will remain ineligible for service absent the submission of proof of recovery, satisfactory to the District," and that "[i]f you fail to submit such proof within (2) years from the beginning of your leave of absence, you will be permanently ineligible for service with the District."

Since the District did not notify Hayes that she was "ineligible for further services" until March 3, 2015, under N.J.S.A. 18A:16-4, Hayes should have had—at the earliest—until March 3, 2017, to prove to the District that she had recovered from her psychological issues.[2] That is also when the District notified her that she had two years to submit proof of recovery before her eligibility for reemployment would be foreclosed. Thus, it follows that Hayes should have had more time than she was given to submit satisfactory proof of recovery to the District.

However, due to the District's refusal to consider any further proof of recovery after receiving Dr. Ferenschak's report in August 2016, and because Hayes' request for emergent relief in the form of an order compelling the District to accept further proof of recovery was denied on December 9, 2016, Hayes did not get the full two years to which she was statutorily entitled to prove her mental fitness to the District. Upon reconsideration, Hayes' request for emergent relief was denied in part based on a misinterpretation of the two-year period for proof of recovery under N.J.S.A. 18A:16-4, and Hayes should now be given the opportunity to make up for the time that was lost.

Accordingly, Hayes' motion for partial summary decision should be granted and the District should permit Hayes to submit additional proof of recovery within a reasonable period of time. Sixty days should be sufficient to accomplish this.

While Hayes has not worked for the District in four years, and N.J.S.A. 18A:16-4 appears to limit the right to reinstatement to those employees who have been absent from work for two years or less, the clock should not start to run until the employee is notified in writing that she is ineligible for further service due to the results of a psychological or psychiatric exam. And although an order compelling the District to accept further proof of recovery for up to sixty days would still not provide Hayes with a

[2] Hayes argues that she should have had until May 3, 2017, or two years from the date she was terminated, to submit satisfactory proof of recovery. It would seem that under N.J.S.A. 18A:16-4, the two-year period should start to run from the date Hayes was notified that she was ineligible for further service, which would have been on or about March 3, 2015. Regardless, whether March 3 or May 3, it appears that Hayes did not get a full two years to submit proof of recovery in accordance with N.J.S.A. 18A:16-4.

cumulative two years, it would also not be fair at this point to compel the District to wait much longer for satisfactory proof of Hayes' recovery.[3]

Accordingly, the District's motion for summary decision should be granted in part and denied in part, and Hayes' motion for partial summary decision shall be granted.

ORDER

I hereby **ORDER** that the District's motion for summary decision is **GRANTED** in **PART** and **DENIED IN PART WITHOUT PREJUDICE**. Hayes' motion for partial summary decision is **GRANTED**. Within sixty days, Hayes shall submit medical records and evidence of her purported recovery to the District. The District shall have sixty days thereafter to decide whether Hayes has recovered the ability to hold a teaching position in the District. The parties shall advise the OAL at the conclusion of the 120-day period of the status of the matter, and, if necessary, the matter shall then be listed for further motions or hearing.

This order granting in part and denying in part respondent's motion for summary decision and granting petitioner's motion for partial summary decision is being submitted under N.J.A.C. 1:1-12.5(e) for immediate review. This recommended order may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION**, who by law is authorized to make the final decision in this matter. If the Commissioner of Education does not adopt, modify or reject this order within forty-five days and unless such time limit is otherwise extended, this recommended order shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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[3] At oral argument, Hayes' counsel indicated that, to his knowledge, Hayes had no current medical information to provide. Unless Hayes can demonstrate to the Board's satisfaction that she has recovered from her psychological issues, the previous determination of incapacity would not change. Dr. Mack provided specific recommendations, and no proof has been submitted to date to demonstrate that Hayes has complied with them to support her contention that she has recovered sufficiently to teach in the District. The passage of time is not sufficient to presume recovery.

Within thirteen days from the date on which this order was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF 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.

Susan Scarola

March 28, 2018
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency:

Date Mailed to Parties:

/lam

114-18R

LAURIE WARD,	:	
PETITIONER	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In 2014, petitioner appealed the determination of the respondent State Board of Examiners (SBE) that she had not met the requirements for issuance of a certificate of eligibility (CE) for the position of Teacher of Preschool through Grade Three. Petitioner had graduated from Baptist Bible College with a major in Bible; the SBE disqualified twelve liberal arts credits out of 125 credit hours which petitioner had completed at the college, leaving her short of the 60 liberal arts credits required under *N.J.A.C.* 6A:9B-10.1(a)(3) for the CE she sought. The matter was twice remanded to the OAL for factual findings and development of the record regarding which course credits the SBE counted and which were rejected, after the ALJ originally assigned to the case issued Initial Decisions reversing the SBE's decision and granting summary decision in favor of petitioner without factual findings supporting such decision.

On second remand, the ALJ now assigned to the case issued an Initial Decision withdrawing petitioner's appeal after receiving a letter from petitioner's counsel advising that the case was being withdrawn. Accordingly, pursuant to *N.J.A.C.* 1:1-19.2, the matter was returned to the Department of Education for appropriate disposition.

Upon review, the Commissioner adopted the ALJ's recommended decision for the reasons expressed therein. The petition was dismissed as withdrawn.

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 4/13/18

OAL DKT. NO. EDU 02378-16
(EDU 15958-15 ON REMAND)
(EDU 13688-14 PRIOR REMAND)
AGENCY DKT. NO. 234-8/14

LAURIE WARD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION ON REMAND
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 Administrative Law Judge's recommended decision for the reasons expressed therein. Accordingly, the petition is hereby dismissed as withdrawn.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/13/18
Date of Mailing: 4/13/18

*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
WITHDRAWAL
OAL DKT. NO. EDU 02378-16
AGENCY DKT. NO. 234-8/14
(Remand of EDU 15958-15)

LAURIE WARD,
Petitioner,
v.
NEW JERSEY STATE BOARD OF EXAMINERS,
Respondent.

Evan L. Goldman, Esq., for petitioner (Goldman, Davis & Gutfleish, attorneys)

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

Record Closed: February 28, 2018 Decided: March 2, 2018

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

Petitioner filed an appeal challenging the determination of respondent New Jersey State Board of Examiners (the Board) denying her application for issuance of a Teacher of Preschool through Grade Three Certificate of Eligibility. The matter was

transmitted to the Office of Administrative Law (OAL) where it was filed for determination under OAL Dkt. No. EDU 13688-14 and assigned to Tiffany M. Williams, Administrative Law Judge. On April 28, 2015, Judge Williams issued an Initial Decision reversing the Board's decision and granting summary decision in favor of petitioner. In a decision dated June 12, 2015, the Commissioner of Education (the Commissioner) remanded the matter to the OAL for further action and development of the record as more particularly described in the Commissioner's decision.

The matter was remanded to the OAL where it was filed under OAL Dkt. No. EDU 15958-15. On December 31, 2015, Judge Williams issued an Initial Decision. In a decision dated February 16, 2016, the Commissioner remanded the matter to the OAL for further action and development of the record as more particularly described in the Commissioner's decision.

The matter was remanded to the OAL where it was filed under OAL Dkt. No. EDU 02378-16 and assigned to the undersigned. Following the prior adjournment of hearing dates, at the parties' request, the hearing was scheduled for March 5, 2018. By letter dated February 28, 2018, counsel for petitioner advised that petitioner is withdrawing her appeal in the within matter.

ORDER

Based on the forgoing, I **ORDER** that, pursuant to N.J.A.C. 1:1-19.2, the matter be returned 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, 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 2, 2018
DATE

MARGARET M. MONACO, ALJ

Date Received at Agency: March 2, 2018

Date Mailed to Parties: MAR 5 2018
jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

J.G., on behalf of minor children, C.G. AND E.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Pro-se petitioner appealed the determination of the respondent Board that his children were not residents of Randolph Township during the 2016-2017 school year, and therefore were not eligible for a free public education in respondent's school district. The Board alleged that the children were not residing at the address provided by petitioner, but rather at a home in Mt. Olive, and accordingly sought repayment of tuition for the 2016-2017 school year.

The ALJ found, *inter alia*, that: petitioner enrolled his children in Randolph schools at the beginning of the 2016-2017 school year as non-residents, and was advised at the time that he was required to secure a residence in the school district within one month in order to avoid being assessed tuition; upon request, the Board granted petitioner an extension of an additional month to find a residence in Randolph; subsequently, petitioner rented an apartment in Randolph effective November 19, 2016 and provided rental payment receipts through January 2017; J.G. closed on a house in Mt. Olive on December 9, 2016, and began residing there effective January 7, 2017; pursuant to *N.J.S.A.* 18A:38-1(a) and *N.J.A.C.* 6A:22-3.1(a), children between the ages of five and twenty years old are entitled to a free public education in the district in which they reside; petitioner bears the burden to prove that his children were domiciled in Randolph for the 2016-2017 school year; here, the evidence shows that C.G. and E.G. have been domiciled in Mt. Olive while attending school in Randolph Township; and the Board provided a document stating that the per student tuition rate for the entire 2016-2017 school year was $13,921. The ALJ concluded that the petitioner's children have not been domiciled in the Randolph school district since January 7, 2017, and accordingly the Board is entitled to reimbursement from petitioner for the cost of tuition for his two children for the period from January 7, 2017 through the end of the 2016-2017 school year. The ALJ ordered the Board's residency determination be modified to reflect this time period; further, respondent is entitled to tuition reimbursement for that period, the exact amount to be determined by the Board for the period of ineligibility.

Upon review, the Commissioner concurred with the determination of the ALJ that petitioner's children were not eligible to attend school in respondent's district between January 7, 2017 and June 2017; however, the Commissioner also found that the Initial Decision does not adequately address the tuition costs due to the Board, as the record lacks the information necessary to properly calculate the amount of tuition owed to the school district – specifically the exact number of days of ineligible attendance by the minor children. Accordingly, the matter was remanded to the OAL for calculation of tuition due to the Board.

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

Issued 115-18 4/13/18

OAL DKT. NO. EDU 17578-17
AGENCY DKT. NO. 265-11/17

J.G., on behalf of minor children, C.G. AND E.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS 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 Randolph Board of Education (Board).[1] In this case, the petitioner is challenging the Board's determination that C.G. and E.G. were not entitled to attend school in the District during the 2016-2107 school year, and the Board's assessment of tuition costs. The Administrative Law Judge (ALJ) found that C.G. and E.G. were not eligible to attend school in the Randolph School District (District) between January 7, 2017 and June 2017. The ALJ also ordered the petitioner to reimburse the Board for tuition costs in an amount to be determined by the Board for the period of ineligibility.

Upon a review of the record, the Commissioner finds that the ALJ's determination that C.G. and E.G. were not eligible to attend school in the District between January 7, 2017 and

[1] The record did not include a transcript from the hearing that was held at the OAL on February 26, 2018.

June 2017 was not arbitrary, capricious or unreasonable.[2] The Commissioner, however, also finds that the Initial Decision does not adequately and completely address the tuition costs that the petitioner is required to reimburse the Board for C.G. and E.G.'s ineligible attendance in the District. The ALJ ordered the petitioner to reimburse the Board for tuition costs in an amount to be determined by the Board for the period of ineligibility; yet, there is no indication in the Initial Decision or in the record as to how many days C.G. and E.G. attended school in the District between January 7, 2017 and June 2017. Moreover, the Initial Decision did not provide the total sum of tuition costs owed to the Board for C.G. and E.G.'s ineligible attendance in the District.[3]

Accordingly, this matter is remanded to the OAL for a determination as to the exact amount of tuition costs that the petitioner owes the Board for C.G. and E.G.'s ineligible attendance in the District between January 7, 2017 and June 2017.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/13/18

Date of Mailing: 4/13/18

[2] The Commissioner is not persuaded by the argument advanced in the Board's exceptions that it is entitled to tuition costs for C.G. and E.G. for the entire 2016-2017 school year.

[3] The record does not include enough information that would enable the Commissioner to calculate the tuition costs that are owed to the Board at this juncture.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 17578-17
AGENCY DKT. NO. 265-11/17

J.G. ON BEHALF OF MINOR CHILDREN
C.G. & E.G.,
Petitioners,
v.

BOARD OF EDUCATION OF THE TOWNSHIP
OF RANDOLPH, MORRIS COUNTY,
Respondent.

J.G, petitioner, pro se

Marc H. Zitomer, Esq. for respondent, board of Education of the Township of Randolph (Schenck, Price, Smith & King, LLP)

Record Closed: February 28, 2018 Decided: March 5, 2018

BEFORE **JOANN LASALA CANDIDO,** ALAJ:

STATEMENT OF THE CASE

Petitioner J.G., the father of the minor children C.G. and E.G., appeals the determination of the Randolph Township Board of Education (the "Board"/respondent) that J.G. does not reside within the Randolph Township school district and that tuition reimbursement is required. The Board alleges that the minor children were not residing at the address provided by the petitioner but rather were residing in their home in Mt. Olive and seeks repayment of tuition.

PROCEDURAL HISTORY

On July 10, 2017, the Board notified J.G. that the children were ineligible to continue to attend school within the district and they were not domiciled in Randolph for the 2016-2017 school year. On or about November 15, 2017, the petitioner filed a timely notice of appeal after receiving a Notice of Residency Hearing Determination on August 16, 2017. The Board filed an answer on November 27, 2017. On November 30, 2017, 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 February 26, 2018, and following the receipt of the copies of rental receipts, the record closed on February 28, 2018.

FINDINGS OF FACT

Based on the credible testimonial and documentary evidence, I **FIND** the following as **FACTS** in this matter:

1. At the start of the 2016-2017 school year, C.G. and E.G. were enrolled in Randolph school district as non-residents.

2. J.G. was advised that he had to secure residence in Randolph within one month of the start of the school year to avoid being accessed tuition pursuant to District Policy 5111. J.G. was granted an additional month

extension to secure a Randolph residence. P-1 He had been residing in Westwood.

3. J.G. rented a one-bedroom apartment in Randolph, as a seven-month tenant effective November 19, 2016 and ending June 18, 2017, $1340.00 rent per month. Rental payment receipts have been provided by J.G. through January 2017.

4. J.G. closed on a home in Mt. Olive, New Jersey on December 9, 2016. Utility service was effective December 15, 2016 at the Mt. Olive residence.

5. Furniture was delivered to the Mt. Olive home on January 4 and 6, 2017. P-8 and 9. A home repair was done on January 7, 2017. P-11

6. A Default Judgement was entered in Special Civil Part, Superior Court of New Jersey, Morris County on March 24, 2017, for non-payment of rent at the Randolph apartment in the amount of $1600.00. R-1

7. J.G.'s Mt. Olive residence is effective January 7, 2017.

8. Non-resident student tuition rate for the 2016-2017 school year is $13,921.00 per child in Randolph school district.

Petitioner bears the burden to prove that his children were domiciled in the Township of Randolph for the 2016-2017 school year. Failure to sustain that burden leaves in place and effect the findings of Board at its hearing regarding domicile.

Any child between the ages of five and twenty years old is entitled to a free public education in the district in which he is a resident. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). A student is a resident of a school district if his parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it

when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1). A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

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

From the evidence submitted, C.G. and E.G. have been domiciled in Mt. Olive while attending school in Randolph Township from January 2017 through the end of the 2016-2017 school year. J.G. has provided no proof by a preponderance of the credible evidence to sustain his burden that the Randolph apartment was considered his and the children's true and fixed permanent residence even after he closed on his Mt. Olive home.

The Board asserts that it is entitled to be reimbursed for tuition for the period of C.G. and E.G.'s ineligible enrollment in its school. 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), which provides as follows:

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

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

Respondent provided a Resolution for the Residency Hearing of C.G. and E.G. that stated the per student tuition rate for the 2016-2017 school year is $13,921.00 per child. R-7.

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that C.G. and E.G. have not been domiciliary in the Randolph School District since January 7, 2017 and that respondent is entitled to reimbursement from petitioner for the costs of audited tuition, an amount to be calculated by the Randolph School District after that date.

DECISION AND ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's determination that petitioner, J.G. and his children are not residents and domiciliary in Randolph, New Jersey, and were not domiciled within its school district during the period of January 7, 2017 through June 2017 is hereby **MODIFIED** to reflect this time period. It is further **ORDERED** that respondent is entitled to reimbursement from petitioner for the cost of audited tuition for his two children in an amount determined by the Randolph 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.

March 5, 2018
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: March 5, 2018

Date Mailed to Parties: MAR 5 2018
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

LIST OF EXHIBITS

Joint:

J-1 Apartment Lease Contract

For Petitioner:

P-1 District Policy – 5111 – Eligibility of Resident/Nonresident Students

P-2 E-mail from petitioner to Fano dated September 19, 2016

P-3 E-mail to petitioner from Fano dated October 14, 2016

P-4 J.G. residency timeline

P-5 E-mail to Fano from Gerry Eckert dated February 2, 2017

P-6 Wells Fargo account

P-7 Optimum statement

P-8 Packing invoice dated 7-28-16 and Atlas moving invoice delivery signed 1-4-17

P-9 Home and Kids furniture delivery dated 1-6-17

P-10 Home Inspection Report dated October 28, 2016

P-11 Smart Home Solutions dated 1-7-2017

P-12 NJ Natural Gas invoice for Dec. 16 to January 25, 2017 in the amount of $333.03

P-13 JCP&L service start date 12-15-2016

P-14 Notice to Vacate Westwood apartment.

P-15 Cashier Checks to Center Grove

P-16 Renters Insurance Application effective date 11-16-2016

P-17 E-mail to Fano from Paul Bachrach dated 2-1-2017

P-18 E-mail payment confirmation from Randolph apartment to S.G.
dated January 7, 2017

For Respondent:

R-1 Default Judgement dated March 24, 2017

R-2 Notes dated 8-15-17

R-3 JCP&L dated 12-29-2016

R-4 JCP&L dated 1-31-2017

R-5 JCP&L dated 1-16-2017

R-6 Affidavit

R-7 Resolution for the Residency Hearing of C.G. & E.G.

R-8 Deed dated 12-9-2016

NEW JERSEY DEPARTMENT OF EDUCATION

In the Matter of The Tenure Charges Proffered by

THE SUSSEX COUNTY EDUCATIONAL SERVICES COMMISSION

"Petitioner"

-against-

CHRISTINE RUDINSKY

"Respondent"

Pursuant to the TEACHNJ Act

Agency Docket No. 217-9/17

APPEARANCES

FOR PETITIONER

SCHENCK, PRICE, SMITH & KING, LLP
Mark H. Zitomer, Esq.
Matthew J. Donohue, Esq.

FOR RESPONDENT

OXFELD COHEN, PC
Sanford R. Oxfeld, Esq.

BEFORE: Earl R. Pfeffer, Arbitrator

BACKGROUND

In Tenure Charges and a Written Statement of Evidence ("Charges"), sworn on August 20, 2017, Andrea Romano, Superintendent of the Sussex County Educational Services Commission ("the ESC" or "the District"), made allegations against Respondent, Christine Rudinsky, of employee inefficiency mandating her dismissal, and conduct unbecoming a teaching staff member, upon which the District asserts dismissal is warranted for just cause. The Commission, following its receipt from Respondent's counsel of her written Response to the Charges, certified the Charges on September 11, 2017, and suspended Respondent without pay for 120 days under N.J.S.A. 18A:6-14.

The Charges thereafter were submitted to the Commissioner of Education through the Bureau of Controversies and Disputes, on September 19, 2017, and the Commissioner, following receipt on October 11, 2017, of Respondent's Answer, found the Charges are subject to determination by an arbitrator, and on October 23, 2017, referred same to me for a hearing and decision. Respondent, in her answer, disputes the Charges, alleging that the allegations of inefficiency were brought against her because of her union activity, and that the alleged conduct unbecoming falls far short of just cause for her termination.

Following a Pre-Hearing Conference on November 7, 2017, hearings were scheduled for December 15, 2017, February 2, 2018,

and February 12, 2018. The December 15, 2017, hearing, by consent of the parties, was converted into a settlement conference, and when same did not result in a resolution of the dispute, hearings were convened on the other two scheduled dates. At the hearings, which were transcribed, the parties each presented evidence and argument in support of their respective positions.[1] Following completion of the proceedings, the parties on March 19, 2018, submitted post-hearing briefs. Following my receipt of same, the arbitration record was closed.

Many of the background facts are not in dispute. Respondent has been employed by the District since 1998, and commencing in 1999, as a Special Education Teacher, first at the Special Children's School, and since 2012 at Northern Hills Academy, in its pre-school program. From the 1998-1999 school year, through the 2006-2007 school year, Respondent was regularly deemed by her evaluators to be "very good," in both classroom observation reports and her yearly reviews. Respondent Exhibit 4. In fact, her performance reviews up through the 2012-2013 school year were routinely laudatory. Id.

Thereafter, although the teacher evaluation rubric changed following the School's adoption, under the TEACHNJ Act ("the Act"), of the Teacher Effectiveness Performance Evaluation System

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[1] Citations herein to the February 2, 2018, and February 12, 2018, hearing transcripts are denoted, respectively, as "2/2 at ___," and "2/12 at ___."

("TEPES") rubric, Respondent's commendatory observation reports and year-end Summative Performance Reports continued to reflect highly positive assessments from her supervisors.

Thus, for example, the first time she was evaluated under TEPES in the 2013-2014 school year, as required under the Act, a January 23, 2014, Formal Observation praised her for meeting the goals and objectives with each student's IEP, differentiating instruction and student materials, maintaining appropriate pacing, questioning students for understanding, reinforcing student responses and aligning goals and objectives with common core standards, and establishing effective routines. Respondent Exhibit 4 at CR 72-74. Consistent with that evaluation, she was rated effective in her 2013-2014 Summative Performance Report submitted and finalized by new District Superintendent Andrea Romano. Id. at CR 75-78. Respondent's positive assessments continued through the end of the 2015 calendar year.

Romano, who previously had been Director of Education at the Hunterdon County Educational Services Commission, and who also is

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The Act mandates each school district either to submit to the Commissioner of Education, for review and approval, the evaluation rubrics the district will use to assess the effectiveness of its teaching staff members, or, alternatively, use the model evaluation rubric established by the Commissioner. Evaluation rubrics are governed by standards promulgated through duly adopted regulations which minimally must include provisions and processes outlined in the Act. See N.J.S.A. 18A:6-123. Each board of education was required, beginning with the 2013-2014 school year, to adopt and implement an approved evaluation rubric.

an adjunct professor in the Special Education Department of William Paterson University, and in the undergraduate Humanities program at Raritan Valley Community College, testified that TEACHNJ required a more rigorous evaluation system. That assessment of the new law cannot be disputed, and is easily observed from the Act itself, in particular its detailed mandate for each school district's "adoption of evaluations that provide specific feedback to educators, inform the provision of aligned professional development, and inform personnel decisions," N.J.S.A. 18A:6-118(2)(a), and its establishment of precise minimum requirements for observing, evaluating and rating teaching staff. N.J.S.A. 18A:6-123.

The Act also requires each school shall convene a school improvement panel which, among other things, "shall oversee the mentoring of teachers and conduct evaluations of teachers, including an annual summative evaluation [and] shall also identify professional development opportunities for all instructional staff members that are tailored to meet the unique needs of the students and staff of the school." N.J.S.A. 18A:6-120. So, too, it requires that teaching staff members be provided "with ongoing professional development that supports student achievement and with an individual professional development plan." N.J.S.A. 18A:6-128.

The Act mandates that "additional professional development"

shall be provided to "any teaching staff member who fails or is struggling to meet the performance standards established by the board, as documented in the teaching staff member's annual summative evaluation." N.J.S.A. 18A:6-128. In the event a teacher is rated "ineffective" or "partially effective" on his or her annual summative evaluation, the teacher together with a supervisor must develop a corrective action plan ("CAP") that includes "timelines for corrective action and responsibilities of the teaching staff member and the school district for implementation of the school district for implementation of the plan." Id.

In the event a teacher who had been placed on a CAP following a rating of "ineffective or "partially ineffective" on an annual summative evaluation is rated "ineffective" in the CAP-year annual summative evaluation, the superintendent of the district is required to file with the secretary of the board of education a charge of inefficiency. N.J.S.A. 18A:6-17.3. If the board, following proper review, forwards the written charge of inefficiency to the Commissioner of Education, and if the Commissioner, upon review of the charge and the teacher's written response, if any, cannot determine the evaluation process was not followed, the Commissioner shall refer the case to arbitration and appoint an arbitrator to hear and decide the matter.

As noted above, Respondent's observations and evaluations in

calendar year 2015 were positive. The TEPES Classroom Observation Form documenting a classroom observation by Principal Jennifer Kaufman on April 17, 2005, states that Respondent "demonstrate[d] a clear understanding of the needs of the pre-school students she teaches," and that her "[i]nstruction was differentiated to student ability." Respondent Exhibit 4 at CR 84.

In the TEPES Teacher Summative Performance Report evaluating and rating Respondent for the 2014-2015 school year, Kaufman rated her "effective," based on a rubric score of 3 (out of 4) in all performance categories. The Report noted that she "has a strong understanding of the developmental stages of students." Id. at CR 86. It indicates Respondent's instruction was "well planned" and "differentiated to student ability." Id. at CR 87. It states that she "engage[d] students in age appropriate and developmentally appropriate activities," and "use[d] a variety of learning styles and modalities to meet student needs." Id. At 88. It was noted by Kaufman that Respondent "provide[d] students with ongoing questioning and feedback," and "use[d] positive reinforcement to encourage student learning." Id. at 89. Kaufman stated that Respondent's classroom was "caring" and "welcoming," and that it celebrated student diversity. Id. at CR 90. Her lesson plans were "aligned with Creative Curriculum." Id. at CR 91.

Thereafter, Respondent was observed by Kaufman on October 2, 2015. Once again, the formal TEPES observation report was positive. Joint Exhibit 2. Kaufman noted that she "provide[d] age and developmentally appropriate activities for her pre-school students in this integrated classroom." Id. She appropriately differentiated instruction, maintained her classroom in a manner conducive to a variety of learning modalities and provided positive feedback to her students. Respondent's lesson plans were submitted regularly and on time. Kaufman wrote, "The warm and nurturing atmosphere created by Ms. Respondent's tone and demeanor throughout the lesson created an environment conducive to learning for her pre-school students." Id.

Another TEPES Formal Observation of Respondent was conducted on January 5, 2016. The Report, Joint Exhibit 3, was submitted by Pamela Brillante, the District's newly hired Supervisor of Special Education, who also is Assistant Professor of Special Education at William Paterson University. 2/2 at 206-7. Dr. Brillante holds a Masters Degree in early childhood education from William Paterson University, and a Ph.D. in educational leadership and school administration from Rowan University. She previously worked for the State Department of Education as the Early Childhood Specialist in the Office of Special Education for twelve (12) years. 2/2 at 207. In that capacity, she provided training and technical assistance to school districts and their

classroom teachers about developing inclusive, high quality, early childhood programs. 2/2 at 208. She recently authored two books: The Essentials: Supporting Young Children with Disabilities in the Classroom (NAEYC 2017), and Universal Design for Learning in the Early Childhood Classroom (Routledge 2017).

Dr. Brillante commenced her work as the District's Supervisor of Special Education in the Fall of 2016. 2/2 at 206. That is when she conducted her initial observation of Respondent, one which did not go well for the Respondent. 2/2 at 210. Dr. Brillante recalls that "there was a disconnect between what I was expecting and what she was, you know, how she performed." Id. She told Respondent there was "nothing positive" she could say about the lesson. Id. However, rather than write the lesson up as ineffective, Dr. Brillante determined to review with Respondent what she observed, and how that departed from what she had expected. She offered Respondent a "do-over" and gave her a specific math standard to work on, and told her "[d]o something with your children." 2/2 at 210-211.

The "do-over" took place on January 5, 2016. Joint Exhibit 3. According to Dr. Brillante, Respondent did not teach to the math standard she had given the teacher. 2/2 at 212. The lesson was ineffective. She explained her assessment to Respondent in a post-observation meeting. 2/2 at 212-13. In her TEPES Formal Observation Report prepared by her and finalized by Kaufman,

Joint Exhibit 3, Dr. Brillante noted that the standard identified in the lesson plan was NJPTLS 4.1, which is to demonstrate an understanding of numbers and counting, but the activity covered by the lesson was more closely aligned with NJPTLS 4.1.1, which is count to 20 with minimal prompting. She observed that Respondent did not review concepts of counting and numbers prior to the start of the lesson, did not link the content with past and future learning experiences, and actually did not signal an end to the previous activity (snack) and the start of the math lesson. Joint Exhibit 3.

Further, according to Dr. Brillante's written report, there was no evidence of implementation of the curriculum, no plan for differentiated instruction, and no demonstration of lesson objectives. Learning goals were not reinforced, and there was no formal checking for understanding, except for the typically developing peer in the class.

Dr. Brillante observed that the physical environment was unstructured, and there was no evidence of formative or summative assessment, or of a formal system to collect data towards IEP goals. She determined the lesson was not up to acceptable standards. Joint Exhibit 3. She testified, "I specifically asked her to teach to a specific standard, and what she did wasn't to that standard. So it just wasn't up to any - it just wasn't logical. It wasn't developed correctly." Id.

Dr. Brillante rated Respondent's January 5, 2016, performance ineffective, and communicated that assessment in a post-observation review. Id. She counseled Respondent to review the NJ preschool mathematics and language arts standards, as well as the Creative Curriculum, and to "develop a plan to embed the standards throughout the rest of the year." Id. She advised Respondent to pick two math and two language arts standards to teach to and assess every day. She instructed her to teach the aides how to embed the standards into their play with the children. She told her to develop and implement a system for the formal collection of data.

Dr. Brillante thereafter performed a walkthrough observation of Respondent's classroom on May 31, 2016. Joint Exhibit 4. The performance she observed during that informal observation was ineffective, she recalls. 2/2 at 214. She testified, "[t]he children weren't engaged. They were watching other children do a developmentally inappropriate computer game." Id. In the TEPES Classroom Observation Report, Dr. Brillante observed that typically developing peers in the class were taking time away from the children with disabilities. Joint Exhibit 4.

Thereafter, Romano prepared and finalized Respondent's TEPES Teacher Summative Performance Report for the 2015-2016 school year. Joint Exhibit 5. Based on her review of Respondent's Teacher Documentation Log, the TEPES Observation Forms, the

Student Growth Objective ("SGO") Progress Forms, Respondent's lesson plans, the IEPs of her students and relevant progress reports, Romano gave Respondent an overall rating of "partially effective." Id. In the "Commendations" section of the 2015-2016 Summative Report, Romano wrote:

> **Mrs. Respondent has a significant number of years teaching and is seen as a veteran teacher within a young staff. She is in a leadership role as Union President and is often looked to for support by staff. This places her in a challenging role frequently, however she has been able to be supportive of staff and supportive of programming options that create dynamic programming. She has shared that this school year has been significantly challenging as revamping to the preschool program has begun. Mrs. Respondent has shared her frustrations yet maintains a professional attitude. She has not let the challenges impact the student learning process.**
>
> **As the district continues to program differently for preschool, Mrs. Respondent understands she plays a key role in the progress. Her willingness to see the change, play a part in the change and assume ownership of a revised curriculum/program will be essential to the success of this endeavor. A team player attitude will be needed to work with administration in making effective change. Mrs. Respondent can be that team player if she wants to. She saw significant growth in many students this year. Staying the line, focusing on both developmental and age appropriate tasks has supported students with significant needs.**

Joint Exhibit 5.[3]

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[3] Under Performance Standard 6, "Professionalism," Romano in the 2015-2016 Summative Performance Report gave Respondent a rating of "Effective" (rubric score 3 out of 4). For improvement, she identified "communication with administration" as an area for focus. Romano wrote: "As Union President and a Veteran Teacher, lack of communication with administration is

Following finalization of the 2015-2016 Summative Report on July 5, 2016, Romano met with Respondent for an Annual Summary Conference on July 21, 2016, and placed Respondent on a Corrective Action Plan, as required under TEACHNJ when an employee has been rated "ineffective" or "partially effective." N.J.S.A. 18A:6-128; 2/2 at 53-55. See Joint Exhibit 5 (Annual Summary Conference Form). Thereafter, on September 15, 2016, Respondent, together with Romano, Dr. Brillante and Jennifer Cook, the school's Principal, collaboratively created a CAP which identified Respondent's deficiencies, her goals for improvement, her responsibilities for achieving same, and the support and resources the District will offer to help her to meet those goals. 2/2 at 55-56. See N.J.S.A. 18A:6-119; 18A:6-128.

An interim CAP conference was convened on October 12, 2016. 2/2 at 60-61. See Joint Exhibit 6. The meeting generally reviewed with Respondent her expected CAP progress, following a list of agenda items previously identified by Romano in an October 5, 2016, email. 2/2 at 62-64; Petitioner's Exhibit 1.

On October 27, 2016, Respondent was observed by Cook and Dr.

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concerning. Although Mrs. Respondent always is willing to meet to discuss and participate in Union issues - communication about membership, communication about roles, and communication regarding Union issues remain a challenge. . . Several meetings have occurred where Mrs. Respondent has taken responsibility for communication issues and academic structure concerns. Communication issues have always led to an agreed upon approach." Joint Exhibit 5.

Brillante. 2/2 at 178. Dr. Brillante and Cook convened a pre-observation meeting, and Dr. Brillante and Romano met with her after the observation. Dr. Brillante characterized the observation as "ineffective." 2/2 at 218. She recalls Respondent did not demonstrate significant progress. Id. Dr. Brillante, in consultation with Cook, wrote the TEPES Observation Report, which was finalized on January 17, 2017. Joint Exhibit 7. Among its many observations, the Report stressed that "[i]ntentionality is key in planning for and executing high quality early childhood experiences and instruction." Id.

The Report recites, for example, that Respondent's lesson plan for October 27, 2016, stated that the current investigation was pumpkins, but there were no pumpkins, pumpkin seeds, gourds or any other pumpkin related REAL things in the classroom for the children to explore, especially in the science area. Id. Once again, as related in the Report, Respondent's lessons lacked intentionality. Under "instructional delivery evidence," the Report recalls that the lesson plan had stated the teacher was going to model putting the letters of the student's name in correct left to write order. And yet, Respondent neither reviewed previous knowledge nor taught any specific skills that were intended to model the instruction she wanted to reach that day.

One student, according to the Report, took his printed name

tag out and started putting the magnet letters onto the nametag in random order. The concept of lining up the letters in the left to right order in which they would be read was lost. There was no specific teaching of a skill or concept, nor was there modeling of the intentional instruction that had been planned. Joint Exhibit 7.

A post-observation meeting with Respondent was convened by Romano on November 7, 2016, to discuss the October 27, 2016, observation, Respondent's CAP and "administrative concerns." In a memorandum to Respondent dated November 14, 2016, Joint Exhibit 8, Romano summarized the November 7, 2016, meeting, highlighting several areas of concern: (1) Respondent's use and expectations of paraprofessionals in her classroom; (2) her failure to teach content areas in her schedule; (3) the continued absence of open-ended and student-centered materials in her classroom; (4) her need to develop professional knowledge on how children learn specific skills and on the instructional standards within the Creative Curriculum; (5) the lack of intentionality in her work with her preschoolers, and (6) the absence of connectedness in her curriculum. Joint Exhibit 8.

The meeting addressed Respondent's stated request she be given more assistance, with Romano reminding her of the substantial assistance Cook already had provided in modeling lessons, assisting in classroom setup, working with schedule and

labeling areas. Respondent was further reminded that she had been approved by Cook to attend a 10-workshop series on "High Quality Pre-Schools," taught by Dr Brillante, who also had worked directly with Respondent in her classroom. Romano reminded Respondent that Dr Brillante had shared resources in Creative Curriculum and GOLD Standard Assessment information. Romano and Dr. Brillante offered that they, as well as Cook, were available to "brainstorm." Joint Exhibit 8.

Thereafter, a meeting was convened with Romano, Cook and Respondent on November 29, 2016, to review Respondent's CAP performance. Joint Exhibit 14. Among the subjects discussed were (1) Respondent's continuing failure to complete the labeling areas of her room; (2) strategies for controlling student behavior to allow closer adherence to her daily schedule; (3) improving classroom management skills; (4) aligning the lessons to preschool standards; (5) how to collect and analyze data; (6) more support and education on the Gold Assessment, and SGOs more reflective of Gold Assessment Baselines. In short, the review stressed that while some areas of the CAP had been met, many other areas had not moved forward. It was noted that Cook had spend significant time in Respondent's classroom to model lessons, schedules and other components of the Creative Curriculum.

On January 6, 2017, Cook conducted a TEPES Formal

Observation in Respondent's classroom. It was a "poor lesson," she recalls. 2/2 at 181. There was no direct instruction. Lesson plans were not observed. Id. Respondent knew Cook would be coming in to conduct a TEPES Formal Observation, and yet the only activity during the planned observation period was snack. Id. And, even then, instead of using the snack time as an opportunity to work with her students on social skills, Respondent spent most of the 22 minutes chatting with her aides. Joint Exhibit 21. When questioned by Cook on why she was not following her lesson plan, Respondent merely said she was "off schedule." 2/2 at 182.

In the Formal Observation Report for the January 6, 2017, lesson, Cook stressed the absence of a purposeful planning of instruction. Joint Exhibit 21. The "letter of the week" pocket chart had the same letters, Tt and Nn, as it did the previous November. The Art Center was not displaying any current student work. There was no observable consistency in the daily routine. Her students' instruction goals remained unchanged even after they had been mastered. Respondent's planning instruction and assessments did not reflect any understanding of her curriculum or her students' specific needs. Id. Thus, for example, the objective that day for ELA was to identify and name letters, and to demonstrate knowledge of the alphabet. The assessment for that objective was to trace the letters.

Thus, there was no alignment of the objectives/standards, the instructional activity and the assessment during the January 6, 2017, lesson, according to Cook. Joint Exhibit 21. The classroom remained cluttered, and instruction materials were not academically appropriate, motivating or interesting. Id. Cook noted the absence of evidence that the professional feedback that was being given to Respondent was being incorporated into instructional practices and plans. Joint Exhibit 21. She advised her to be "proactive with changes," and "to study your curriculum and your assessment tools." Id. On that day, Cook observed, "there was no evidence of student progress." Id.

Four days after the January 6, 2017, observation, Cook, Dr. Brillante and Romano on January 10, 2018, met with Respondent for a mid-year CAP review. 2/2 at 65. Respondent's progress under the CAP was discussed, in particular the fact lesson plans consistently were either missing, incomplete or inappropriate. It was noted that Respondent had not sought assistance, despite the offers of support from the supervisory team. It was made clear to Respondent that such assistance continued to be available, including after-school work sessions.

At the mid-year CAP review, the supervisory team further noted the absence of direct instruction during formal observations and walk-throughs, because Respondent was not following her schedules. Cook repeated her previous offers to

meet with and assist Respondent in writing lessons, data collection and setting up investigations, although Respondent had not yet taken advantage of those offers. Respondent was reminded of the ongoing offers from Dr. Brillante to help her with the standards and from Cook regarding the Creative Curriculum. She was cautioned she must make progress to avoid an ineffective or partially effective rating for the school year, and the charges that would necessarily follow.

A month later, on February 10, 2017, after Cook received from Respondent her lesson plans for the week of February 13-17, 2017, she indicated her eagerness to come into the classroom and see any activities or particular lessons Respondent would like her to observe. Joint Exhibit 27. Respondent's response ignored Cook's offer. Id.

Subsequently, an observation was scheduled for March 30, 2017. This being the third observation of Respondent during the 2016-2017 school year, a pre-observation conference was not required. Nevertheless, because Respondent was on a CAP, and because Romano determined such a conference would benefit Respondent's preparation for the scheduled observation, a pre-observation conference was convened on March 22, 2017. 2/2 at 101-102.

On March 27, Romano sent Respondent a memorandum summarizing the conference. Petitioner Exhibit 2. It reflects discussion

regarding the activity that would be observed, the standards that would be applied, and in particular, the alignment of objectives, lesson plans and standards to assessments. Id. Romano encouraged Respondent to seek to showcase areas in the CAP in which she had improved, and to let her know in advance of the March 30th observation what she would like the supervisory team to observe. Id.; 2/2 at 103.[7]

The March 30, 2017, observation was "absolutely ineffective," according to Dr. Brillante. 2/2 at 220. "Nothing was being implemented," she recalled. Dr. Brillante recounted that Respondent had stated at the March 22, 2017, pre-observation conference she would be instructing two pre-school students. It was decided that the emphasis would be on math and on literacy. Petitioner Exhibit 2. Dr. Brillante testified that one of the students was absent on March 30, and that Respondent gave the one child who was present a math lesson, but skipped the English lesson. 2/2 at 220. In lieu of the English lesson, Respondent gave a science lesson that was not on her lesson plan. Id. at 220-21.

In her very detailed TEPES Classroom Observation Report on the March 30, 2017, lesson, Dr. Brillante noted the continuing

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[7]Romano explained that a pre-conference is an opportunity for a teacher to let the evaluators know what she wants them to notice, as well as for the evaluators to let the teacher know what they will be looking for. 2/2 at 100.

absence in Respondent's instruction of purposeful planning. She noted Respondent's failure to incorporate into her lesson preschool investigations, as opposed to preschool themes. Dr. Brillante explained that under the Creative Curriculum, investigations focus on giving children a chance to explore and make sense of experiences with concrete objects wherein they learn about properties of objects and how to interact with them and manipulate them in ways that are meaningful. Dr. Brillante concluded Respondent continued to lack the professional knowledge of what encompasses high quality early childhood education, and listed for her the Preschool Science Standards that are based on giving children instructional activities based on observations and investigations which are developmentally appropriate. Joint Exhibit 29.

Dr. Brillante further observed, with reference to specific examples drawn from the lesson, that Respondent continued to lack understanding of basic lesson design and preschool standards, even though Respondent claimed in her CAP documentation that she had taught them throughout the school year. The Report notes Respondent's ongoing failure to incorporate professional feedback into her lesson plans, or even to follow the plans as written. Dr. Brillante documented continuing weakness in the area of assessment and data collection, in particular Respondent's failure properly to align her assessments to the lesson

objectives. See generally Joint Exhibit 29.

Thereafter, following a three-hour observation of Respondent on April 25, 2017, utilizing the New Jersey Early Childhood Environmental Rating Scale ("ECERS"), Dr. Brillante prepared a Report rating Respondent a 1.82, which fell into the "inadequate range," on the ECERS scale. Joint Exhibit 30. Dr. Brilliant testified she is one of the few evaluators licensed by the publishers of the ECERS tool to conduct the ECERS evaluations, and she is one of only three (3) people in New Jersey who is qualified to train other evaluators on the tool. 2/2 at 221-222. She summed up the lesson as being "ineffective." Id. at 222.

Consistent with the TEPES observations performed under TEACHNJ, and summarized in detail above, the ECERS observation revealed that intentionality in planning for and in executing high quality instructions was undeveloped and a concern, particularly given the amount of professional support that had been provided to Respondent. Dr. Brillante documented the isolation of one of Respondent's disabled students, An, from classroom routines, which denied her an opportunity to play with her peers. There was no evidence of a planned effort to make play centers and materials accessible to her. Joint Exhibit 30.

Dr. Brillante noted Respondent's ongoing failure to follow her written lesson plans, and observed the absence of individualized adaptations or modifications to the lesson plans

for the two disabled students in her classroom. Further, notwithstanding previous observations and meetings, Respondent again failed to match the lesson's activity to its objective. She did not engage in data collection, nor did she demonstrate the use of a data collection system. Id.

Dr. Brillante noted the disorganization of the classroom, and while she observed the presence of some high quality materials in the science area, the materials (a collection of rocks and some tools) were still unopened in their sealed plastic bags. Dr. Brillante wrote, "[t]here has been minimal evidence that the specific feedback given to you over this school year has been incorporated into instructional practices or plans." Id. According to Dr. Brillante, student progress could not be measured, since Respondent had failed to align her lesson plans with NJ Preschool Teaching and Learning Standards and with Creative Curriculum objectives, despite the mandate of her CAP to do so. Id.

On June 23, 2017, Romano submitted Respondent's 2016-2017 TEPES Teacher Summative Performance Report. The Report was finalized by Cook on July 26, 2017. Joint Exhibit 31. Respondent was rated "ineffective" on three of the seven Performance Standards (professional knowledge, instructional delivery and assessment of/for student learning), and "partially effective" in the other four (instructional planning, learning

environment, professionalism and student progress). Id. The overall evaluation was "ineffective." Id. The Report, which recites in detail the issues and problems recorded in the Observation reports and in memos and letters sent to Respondent during the school year, recommended her for dismissal/non-renewal. Id.

Romano explained that the ineffective score for professional knowledge was based on Respondent's failure to implement the goals of the Creative Curriculum, and on the fact she had not met CAP time frames and activities. 2/2 at 78-79. Respondent did not take advantage of the Creative Curriculum resources made available to her under the CAP, and did not develop in her classroom a high quality inclusive preschool program. 2/2 at 79.

Concerning instructional planning, Romano testified Respondent was inconsistent with her materials and mode of instruction, and for that reason was only partially effective. Id. at 80. Romano stressed the ongoing problem of Respondent recycling old lesson plans. Id. at 81.

Concerning instructional delivery, Romano testified Respondent was rated ineffective because of her continuing failure to differentiate instruction and utilize the GOLD assessment tool. Id. at 82. Accordingly, she was also rated ineffective in assessment of and for student learning. Romano explained that Respondent failed to demonstrate her use of

assessment tools in her goals and objectives, or in a data system aligned to the curriculum or the standards. 2/2 at 83.

Regarding the learning environment in Respondent's classroom, Romano testified there were positives, like the fact she had upgraded three of her five learning centers, and her positive relationships with students and parents. However, according to Romano, Respondent failed to establish a classroom routine, or to follow her daily schedules. Romano testified Respondent should have planned and implemented more group work, and play should have been deliberate and intentional. Likewise, she noted, transitions were poor, and Respondent did not take advantage of her opportunities to order materials or curriculum supplies. 2/2 at 84-85. For those reasons, she was scored only partially effective for learning environment. Joint Exhibit 31.

For performance standard 6, Professionalism, Respondent was rated partially effective. Id. Romano explained Respondent was not supportive of the professional development Dr. Brillante designed for and provided to her. In particular, Romano noted the flippant remarks Respondent made to other staff enrolled in the ten-workshop series on highly effective preschool programs. 2/2 at 85-86. When Respondent commented to the attendees that the workshops had been created for her because she was on a CAP, it minimized the value of the workshops for the many teachers who were taking the courses as part of their normal professional

development. Id. At 87. Romano testified that Respondent failed to appreciate the effort by supervisory staff to help her become a better teacher and to succeed. Id.

Romano highlighted the evaluation summary in Respondent's 2016-2017 Summative Performance Report:

> **The teacher has failed to make progress on a Performance Improvement Plan, or the teacher consistently performs below the established standards, or in a manner that is inconsistent with the school's mission and goals.**

Joint Exhibit 31. Respondent's 2016-2017 Teacher Composite Score Report (SGP & Non-SGP)- SGO Rubric Score Report came to 1.57, which is "Ineffective," under the Composite Summative Rating. Joint Exhibit 31.

Thereafter, under the mandate of N.J.S.A. 18C:6-17.3, Romano filed with the Secretary of the Board of Education the instant charges of inefficiency against Respondent.

DISCUSSION

Positions of the Parties

The District asserts it has clearly established, by a preponderance of the evidence, the allegations supporting the charges against Respondent. Further, the District adds, since Respondent cannot and has not established that it acted with anti-union animus or that it failed to follow required procedures, I must sustain the charges and uphold her dismissal. According to the District, its rating of Respondent as partially effective in the 2015-2016 school year, and as ineffective the next school year, having been made through adherence to all protocols governing observations and evaluations, including "countless efforts" to assist Respondent, as mandated under the rigorous requirements of TEACHNJ, required that the instant charges be brought. It argues that its proofs it adhered to the teacher evaluation process, together with Respondent's failure to prove anti-union animus that materially affected the outcome of any evaluations, require a determination here in its favor.

The District points out that my review of this case is narrowly confined to whether a failure on its part to adhere substantially to the evaluation process or proved anti-union animus against Respondent had a material effect on the outcome of her evaluations. It contends that its proofs establish that Respondent's poor evalutions resulted from her failures to

incorporate into lesson plans and instruction the mandated curriculum, her failure to prepare and maintain student records necessary to measure student progress and her failure on many occasions to act professionally.

So, too, the District maintains Respondent in this proceeding failed to present any credible evidence her poor evaluations or the resulting charges of inefficiency were based on her union activity. Accordingly, the District argues, its actions were neither arbitrary, capricious nor unreasonable, and the charges must be upheld.

The District argues that Respondent exhibited abundant deficiencies in her classroom performance, which was documented over the course of two school years in substantial detail in both her observation reports and her year-end summative performance reports. The District contends it appropriately offered extensive opportunities for her to improve her teaching, not the least of which was a CAP. It asserts its administrators spent countless hours with Respondent, in meetings, conferences and professional development, to help Respondent with curriculum, planning and instruction. It specifically constructed a workshop designed around her difficulties and worked collaboratively with her in developing a CAP which set reasonable benchmarks and the means to reach them. In fact, the District argues, Respondent has not disputed that ample assistance was provided to help her

become an effective teacher.

Moreover, the fact she did not achieve the benchmarks and become an effective teacher, in the wake of the substantial assistance given to her, is not from any deficiency in the District's efforts on her behalf. Rather, it argues, Respondent simply did not fully avail herself of the professional opportunities presented to her. Further, the District adds, she simply refused to implement the directives and suggestions she had been given to improve her teaching, such as tracking student progress, using GOLD standard item in the curriculum, and adhering to a schedule.

The District, in addition, consistently communicated with Respondent regarding the problem areas in her teaching. It stresses that it did so through its supervisors' written reports, but also through meetings, memoranda and emails. It argues, therefore, that the administrative staff went above and beyond what is minimally required to help a teacher improve her effectiveness. According to the District, the totality of its actions served to place Respondent on notice her performance was unacceptable and her failure to improve might lead to the filing of tenure charges. And yet, despite the District's efforts on Respondent's behalf, and its warnings of the severe consequences of an inefficient rating, her classroom performance continued to deteriorate.

Against this history of effective counseling and opportunities for remediation, the District argues there is no validity to Respondent's allegation her negative observations and ratings are due to her actions as Union President. Because Respondent is unable or unwilling to accept responsibility for her poor evaluations, she has pointed her finger in every direction except inward in her effort to assign blame to someone other than herself. Such blame shifting must fail, the District argues, because the raw truth is that she was provided consistent and varied support to help her succeed as a teacher.

Nor, the District argues, is there an evidentiary basis to conclude that Respondent's ineffective ratings were on account of her position and actions as Union President. The District points out that the only mention in any report of Respondent's position as Union President was in fact a commendation that recognized her leadership role among her peers.

So, too, the District argues, Respondent has failed entirely to show a nexus between the grievance and/or the Unfair Practice filed in February 2018, and her subsequent ratings a year (and more) later. She was even given an opportunity to "re-do" a negative observation. Thus, according to the District, the record strongly demonstrates its commitment to Respondent's success as a teacher, rather than a campaign to get rid of her, as she alleges.

The District asserts the arbitration record supports a finding it followed proper teacher evaluation protocols in its observations and ratings of Respondents classroom performance. In order to assist her development of the knowledge and skills to succeed under the TEACHNJ standards, if offered her substantial support, including a CAP designed collaboratively to help her improve her teaching in the areas of weakness identified in her performance reviews. According to the District, there is not one iota of credible evidence any supervisor charged with evaluating Respondent ever purposely lowered her evaluations or ratings at the behest of Moscatello, or to curry favor with the Board in order to receive a favorable tenure recommendation. On the contrary, according to the District, it was Respondent's deficiencies alone that caused her partially effective overall rating for the 2015-2016 school year, and her ineffective rating for the 2016-2017 school year. If anything, the District argues, Respondent's role as Union President was consistently treated by supervision as a positive factor.

In short, the District argues Respondent's inefficient and incompetent performance as a teacher, standing alone, is sufficient to warrant her dismissal, which should be upheld regardless of my ruling on the conduct unbecoming charges.

Regarding the foregoing, however, the District asserts Respondent's unbecoming conduct, standing alone, is sufficiently

serious to warrant her dismissal. It argues that Respondent, as a teacher to whom people have entrusted the care and custody of school children, is required to demonstrate a degree of self restraint and controlled behavior rarely necessary in other industries. According to the District, behaviors by Respondent that are documented in the hearing record, betrayed levels of insubordination and conduct unbecoming that mandates her disissal.

The District argues that Respondent was insubordinate in her repeated failures to follow administrative directives and Commission procedures. It asserts she consistently failed to follow directives when she refused to implement curriculum, follow her own lesson plans, provide direct instruction, measure and record student progress, or to achieve the benchmarks of her CAP. This all constituted insubordination, according to the District.

It additionally asserts that several occurrences of unprofessional behavior by Respondent constitute conduct unbecoming which independently constitute grounds for her dismissal. It highlights Respondent's rude and uncooperative interactions with therapists and other support personnel; her interference with the in-class therapy sessions, her comments comparing ESC to a daycare center, her referral to Principal Cook as an "asshole" because the Principal would not authorize her to

attend a Northern Hills Academy talent show, and her comment on a public social media site, "I am surrounded by assholes." Joint Exhibit 35.

Her behavior "does not portend" a harmonious, working relationship with her supervisors. The District argues that if each of these incidents is not by itself conduct unbecoming that is grounds for termination, then the totality of Respondent's actions, must be. It contends Respondent has not adhered to standards of conduct fairly required in a profession that is inextricably linked to the shaping and teaching of young minds. Accordingly, the District argues, there is just cause for her dismissal.

Respondent, on the other hand, asserts the tenure charges against her must be dismissed and she should be awarded back pay and reinstatement to her tenured teaching position. According to Respondent, this is not a complicated case, as demonstrated by two undisputed facts which require a ruling in her favor. The first, she argues, is the plain truth that her observations and evaluations before she became President of her local Education Association were uniformly "outstanding." The second is the obvious fact that it was only after Respondent's run-in with Moscatello that she received for the first time in her long career, any negative observations or evaluations.

According to Respondent, her run-in with Moscatello at the

February 23, 2014, negotiation session "caused a dramatic shift in the way the District viewed [her] performance." Respondent Brief at 3. Yet, she argues, it is not possible that shift had anything to do with her actual performance, since her approach to her work and the quality of her instruction did not suddenly change, as is reflected in the fact that previously, for more than two years under the new TEACHNJ protocols and rubrics, she had been deemed efficient. The only thing that changed before the onset of her negative observations and evaluations was that she assumed the presidency of her local union, and in that capacity took a position in bargaining that offended Moscatello.

Respondent acknowledges my analysis of this dispute does not end upon a finding the charges against her would not have been brought but for considerations of her union activity. I still must consider and decide if the anti-union animus affected the outcome of the evaluation process. According to Respondent, because of the clear impact her run-in with Moscatello had on her subsequent evaluations and ratings, I must conclude the charges against her have nothing to do with actual performance.

She asserts that Moscatello's hostility towards her on account of her union activity was on full display during the February 23, 2014, negotiations session. She recalls vividly that he yelled at her about the fact the Union had just filed an unfair practice charge against the District on account of its

negotiations tactics. Moscatello made his frustration with the progress of negotiations clear to everyone in attendance, according to Respondent, a fact that was confirmed by Romano, who also was in attendance at the negotiations session.

It is significant, Respondent argues, that she never was found to be anything less than an effective/satisfactory teacher until after her run-in with Moscatello. The 2015-2016 school year was the first time her teaching was deemed to be less than acceptable. She argues that the District cannot credibly argue that her lower ratings are due to the rigors of the TEACHNJ evaluation and rating system. Indeed, for the 2014-2015 school year, after TEACHNJ came into effect and after the District had adopted the STRONGE Evaluation System, she had been deemed under the more rigorous protocols to be an effective teacher. In fact, Respondent points out, she did not have a single negative observation during the 2014-2015 school year.

So, too, in an observation of Respondent on October 2, 2015, by then-principal Kaufman, everything was appropriate, she argues. There were no problems in connection with her meeting any of the TEPES standards. With respect to professional knowledge, Respondent points out there is not so much as one negative comment about her performance during the October 2, 2015, observation. See Joint Exhibit 2. And yet, she points out, in her year end Summative Performance Report, Romano found

her only partially effective in that category.

Similarly during the October 2, 2015, lesson, Kaufman determined Respondent had differentiated her instruction according to the level of the students. Joint Exhibit 2. Yet, just three months later, Dr. Brillante and Kaufman claimed she had no plans for differentiated instruction. Joint Exhibit 3. In the Summative Review, she was rated only partially effective for the standard of instructional delivery. Respondent insists "there is no logical way" her achievement of the standards could have deteriorated suddenly, as reflected in the conflicting observations. Respondent argues it is "simply impossible" she could "have been such a wonderful teacher and then become such a lousy teacher in the space of [a few] months." Respondent Brief at 15.

Noting that her "partially effective" rating for the 2015-2016 school year contributed to the filing of the instant tenure charges, Respondent argues that the tie-in which explains the inconsistency is her union activity. She argues that the fact Romano made comments about her Union leadership activities in the comments section of the 2015-2016 Summative Performance Report confirms her role with the Union was a factor which was on Romano's mind when she rated her. Respondent adds that the mere mention of Respondent's Union activity in her year-end review "is so odd and unique as to be bewildering." Respondent Brief at 8.

Respondent points out that until her second observation of the 2015-2016 school year, on January 5, 2016, she had never been found less than effective - ever - in every category of review in every observation and evaluation. She asserts there previously was never any indication whatsoever any aspect of her classroom performance was substandard or unacceptable, even in reviews performed under the STRONGE System. She now asks, how is it possible whe went from being a stellar teacher to "a pariah to the educational community?" Respondent Brief at 9. Is it not more likely, she asks, that it was not she who changed, but that the supervisors who reviewed her under the direction of Board President Moscatello did an about face and suddenly found what previously was excellent to be less than effective?

Respondent adds that it is within the context of the District's retaliation against her that the charges of conduct unbecoming must be scrutinized. She admits she made the "asshole" comment to Building Secretary Marion Doyle. However, she argues, it was not grounds for disciplinary charges, and certainly not grounds for her dismissal. She made the comment over the phone, and no one other than Doyle heard it. No students or parents were in the area. She contends it was, at worst, a one-time misstep by a teacher with no prior disciplinary record.

She points out she made the comment in the wake of learning she would not be hired for summer session, nor be given tickets to a talent show in which her students would be performing. Looked at through the lens of her frustration, the singular misstep she made with Doyle falls profoundly short of the kind of record and/or misconduct that might justify her termination.

Concerning the allegation she posted to a Facebook chat the comment, "I'm surrounded by assholes!!", Respondent argues the statement had nothing to do with the school or with persons at the school with whom she worked. Rather, she testified, the posted comment relating only to her divorce and the state of her marriage.

In sum, Respondent asks,

> **How can a person who is at the top of the list, even among special education teachers, who received only uniformly fine evaluations for her entire tenure in the District, all of a sudden become a horrible teacher? And can it be mere coincidence that this turning of the screw occurred only subsequent to her assuming the presidency of the Education Association and having a blow-up with the President of the Board of Education about an unfair labor practice charge that she caused to be filed against the School District?**

Respondent Brief at 20.

Finally, Respondent raises the issue of the propriety in this proceeding of the District ignoring the skills, understanding and epathy she has acquired over her thirty-five (35) years of teaching, especially with respect to preschool

children with disabilities. She asserts that social and emotional skills are far more important to a child at age three or four than math or language arts. She acknowledges lesson plans are important, but she contends learning oftentimes occurs outside them. She observes,

> **[a]ll children learn lessons by a moment of discovery that is not written in a plan. Science, for instance, may be learned outside on the playground during playtime. When a child asks a question about something he sees in nature, the answer given by the teacher is a teaching moment for that child. Just because the lesson is not written in a lesson plan does not make it any less important. Good activities can and do meet more than one standard. . . Sometimes the thing your students need most has nothing to do with what's on your lesson plan!!**

Respondent Brief at 22.

In sum, Respondent asks that the tenure charges against her be dismissed and that she be returned to service with full back pay.

Opinion

As arbitrator of this dispute, I have a very restricted scope of review. My jurisdiction is expressly circumscribed by Section 23(a) of the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-17.2(a), which states, in pertinent part:

> **a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act,**

> in rendering a decision the arbitrator shall only consider whether or not:
>
> (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
> (2) there is a mistake of fact in the evaluation;
> (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State of federal law, or other conduct prohibited by State of federal law; or
> (4) the district's actions were arbitrary and capricious.

Further, under Section 23(b) of the Act,

> In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this secion are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

N.J.S.A. 18A:6-17.2(b). Section 23(c) of the Act additionally provides:

> The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.

N.J.S.A. 18A:6-17.2(c).

These restrictive terms are plain and not subject to alternative constructions. They squarely provide that with respect to the instant charges of inefficiency against Respondent, I am allowed initially only to determine whether

Respondent has demonstrated the applicability of any of the four considerations listed in Section 23(a), N.J.S.A. 18A:6-17.2(a). If none of them are applicable, I must uphold the inefficiency charges and sustain Respondent's dismissal under Section 9 of the Act, N.J.S.A. 18A:28-5.

If, however, Respondent can demonstrate that any one of the statutory considerations applies here, I still am required to uphold the charges if I determine its presence (in this case, anti-union animus) did not materially affect the outcome of the evaluation.

Moreover, in conducting this analysis, I am precluded from reviewing any evaluator's determination of the quality of Respondent's classroom performance, including the findings and conclusions in the observation reports and the annual summative performance reports upon which the District has based its charge of inefficiency against her. As previously noted, if I sustain the charges, I also must sustain Respondent's dismissal.

With respect to the four considerations within my purview, Respondent asserts that the charges would not have been brought but for her union activity. She alleges "that the motivating factor for the substandard observations and evaluations subsequent to [her] assuming the presidency of her Education Association was the shouting match (really not a match, only the Board President yelled) that she had with the Board President

immediately before her evaluations became unacceptable." Respondent Brief at 19.

Respondent asserts that the nexus between her "run-in" with Board President Moscatello, Respondent Brief at 3, and her negative observations and evaluations is demonstrated through the immediacy of the change in her performance reviews after the incident with Moscatello, by the fact that prior to the run-in, she never previously received a negative review, and by the fact the District's assessment of her value and performance as a teacher shifted dramatically after the Moscatello incident.

Indeed, it is undisputed that prior to the 2015-2016 school year, Respondent had never previously been deemed less than efficient, and for most of her career under an earlier set of teacher evaluation rubrics, whe was found to be a "very good" teacher. She argues, therefore, that her negative performance reviews and summative evaluations for the 2015-2016 and the 2016-2017 school years are tainted by the Board's negative response to her actions as President of the Union on behalf of its members, and the findings and conclusions in her observation reports and year-end evaluations are unreliable and not credible. She insists, therefore, the District's bias against her union activity did materially affect her evaluations.

I have carefully considered the evidence and argument presented by Respondent in support of her contention the instant

charges have nothing to do with her performance and everything to do with her actions as Union President, and I find the hearing record does not support that claim. Starting with her description of what she calls her "run-in" with Board President Moscatello, I do not find in that interaction any indicia of anti-union animus, or bias against Respondent because of actions she took as Union President.

My careful review of the hearing record reveals that Union counsel, on February 9, 2015, filed an Unfair Practice Charge with the Public Employment Relations Commission which alleged that the District violated the New Jersey Employer-Employee Relations Act on or about February 1, 2015, by unilaterally changing health insurance carriers, in violation of its contractual obligation to continue to provide health and dental insurance, and its contractual promise to maintain health benefits "substantially equivalent to those in place on December 17, 1992." Respondent Exhibit 6 at CR 113-14. The charge alleged that the new plan did not provide District employees with no-cost dental insurance, and had diminished coverage that was not equal to or better than the previously provided. Id. at CR 114. The charge stated that the parties were in negotiations for a successor agreement, and the next contract negotiations session was scheduled for February 23, 2015. Id.

Thereafter, on or about February 13, 2014, Respondent, on

behalf of the Union, filed an "informal" grievance that claimed a contract violation by the District in connection with the change of health insurance carriers. Respondent Exhibit 6 at CR 97. As in the unfair practice charge, the Union asserted in the grievance that the new insurance was not substantially equivalent to the existing insurance. The grievance stated that some staff had indicated their doctors did not participate in the new plan, and their out of pocket costs went up. In addition, according to the grievance, staff had to pay a portion of their dental coverage, while previously they did not. Id.

The Union and the District subsequently convened a bargaining session on February 23, 2015. 2/12 at 91. Board President Moscatello was spokesperson for the District's negotiations team. Respondent, as the newly chosen Union President, was attending her first negotiations session. She was joined by Nancy Richeda, the NJEA Representative. According to Respondent, following the flag salute, Moscatello "stood up and looked right directly at me and he yelled very loudly, 'are you going to drop the ULP?'" 2/12 at 90.

Respondent recalls she was "very shocked," and after looking at Richeda, told Moscatello "no." Id. Respondent testified that he then explained how "passionate" he was about the new insurance because the District had looked into a lot of other options and the new insurance was "the best," and was going to save them

money. 2/12 at 90-91. According to Respondent, Moscatello continued to yell, even as she tried to explain to him that some members had complained their doctors were not in network, and their co-pays had gone up. She contends Moscatello did not care, and "just kept yelling." Id. at 91.

Although initially insisting that Moscatello's yelling had been directed at her, Respondent conceded that when the Board President said, "are you going to drop the ULP?" he might have been addressing the Union's entire "team." 2/12 at 91 (emph. supp.). Moreover, on this record, I find it is most likely true, that Moscatello was "passionate" about the insurance, just as he claimed, and was not inflamed about Respondent's Union activity. It is true that after the Union submitted a formal grievance on February 25, 2015, Respondent Exhibit 6 at CR 100, the parties staked out positions. Id. at CR 98-99; Respondent Exhibit 4 at CR 98-99. That is commonplace labor relations. However, what is more significant is the fact they rather quickly, in late March or early April, settled both the unfair practice charge and the grievance. 2/12 at 95; Respondent Exhibit 6 at CR 115. There is no record evidence the dispute in any manner festered, or that bad feelings between the parties lingered after the dispute amicably was resolved. There is no evidence Moscatello had any further involvement with the unfair practice, the Union's grievance or the settlement agreement.

Respondent nevertheless insists that the filing of the February 9, 2015, Unfair Practice by Union counsel caused the District, on Moscatello's insistence, to mount a years-long campaign to vilify her abilities as a teacher, and ultimately, through a persistent barrage of false, negative observations and evaluations, to fabricate a record of ineffective teaching and give the District a pretextual foundation to dismiss her from her teaching position. According to Respondent, this disparagement of her professional abilities was all simply because the Union brought a routine unfair practice charge and a related grievance that were settled through compromise approximately six weeks after being filed.

In support of this claim, Respondent asserts one need only look at the timing of her first negative performance review to know there was a nexus between her February 23, 2015, "run-in" with Moscatello and the negative performance reviews between January 2016 and June 2017 which led to these charges seeking her dismissal. She contends that following the "run-in," her observations and evaluations "all of a sudden" began to be unacceptable. It turns out, however, Respondent's negative performance reviews were not "all of a sudden," as she contends.

Indeed, following the negotiations incident on February 23, 2015, Respondent was observed by Kaufman on April 17, 2015, and given a positive review. Respondent Exhibit 4 at CR 84.

According to Kaufman, "Ms. Respondent is an experiencd high school teacher who demonstrates a clear understanding of the needs of the pre-school students she teaches." Kaufman subsequently, in July 2015, submitted Respondent's TEPES Teacher Summative Performance Report for the 2014-2015 school year, and found that she was "efficient" in all seven performance categories. Respondent Exhibit 4 at CR 86.

Thus, for the balance of the 2014-2015 school year, through the spring and summer, Respondent continued to receive positive evaluations from her supervisors, despite her "run-in" with Moscatello the previous February. Thereafter, her positive reviews continued, even extending into the Fall. A TEPES Formal Observation of Respondent was performed by Romano and Kaufman on October 2, 2015, and written up by them on December 3, 2015. The TEPES Observation Report contains an overall positive assessment of Respondent's teaching.

According to Respondent, the first negative findings regarding her instruction, were made during an Observation by Dr. Brillante on November 15, 2015. In her hearing testimony, Dr. Brillante stated Respondent's performance had no positives. 2/2 at 210-11. Yet, rather than start to build a case against her, in further retaliation for her having filed an unfair practice some nine (9) months earlier, Dr. Brillante noted Respondent's lack of experience under the new rubric, and determined to give

her a "do-over." 2/2 at 211. In reality, therefore, Respondent did not receive her first negative observation until January 5, 2016. Joint Exhibit 3. This was nearly eleven (11) months after her conversation with Moscatello on February 23, 2015.

This timeline hardly demonstrates a "sudden" and "dramatic" shift which might allow an inference the District's reassessment of Respondent's teaching performance was driven by Moscatello, who had nothing to do with her ratings and who, in any case, has no demonstrated bias against unions or their role in negotiating contracts with employers.

Respondent argues that I should not give weight to the positive reports and evaluations prepared and/or finalized by Kaufman. She suggests, by innuendo, that Kaufman insisted on being fair in her evaluations of Respondent, and paid for that with her own subsequent dismissal. Respondent Brief at 9. In making this argument, Respondent has missed or ignored the fact that Kaufman was the supervisor who finalized Respondent's first negative performance report, following the January 5, 2016, observation. Joint Exhibit 3.

Nor, do I find anything suspicious in the fact Respondent's negative assessments start in January 2016, after a 18-year period in which she received constant positive feedback and laudatory reviews from her supervisors. See generally, Respondent Exhibit 4. The rollout of the TEACHNJ rubrics for

evaluating teachers was not immediate. The Stronge System was first introduced in the 2013-2014 school year as a "pilot" program. 2/2 at 22. It did not officially "kick in" until the 2014-2015 school year. Id. The Act and the corresponding regulations indicate there are detailed legal and regulatory requirements for the introduction of approved evaluation rubrics. See Section 17 of the Act, N.J.S.A. 18A:6-123. The requirements in the law and the regulations for ongoing training of evaluators, and the monitoring and calibration of their observations to ensure observation protocols are being implemented correctly and consistently, see, e.g., Section 17 of the Act, N.J.S.A. 18A:6-123, demonstrates the recognition that the successful adoption and implementation of the evaluation rubrics mandated under TEACHNJ is a process over time. It simply is not surprising that the District's review of Respondent's classroom performance became more rigorous during the three-year period after the TEPES System was introduced.

It must be noted, moreover, that Dr. Brillante joined the District staff as Supervisor of Special Education in the fall of 2015, for the 2015-2016 school year. 2/2 at 206. She brought expertise and rigor to the District's utilization of evaluation tools and adherence to observation protocols. Indeed, her academic credentials and her 12 years as the Early Childhood Specialist in NJ Department of Education cannot be minimized in

assessing the impact of her arrival to the District. The change in the school's assessments of Respondent's classroom performance coincides with that arrival.

Dr. Brillante initially observed Respondent on November 15, 2015, and found "nothing positive" about the lesson. 2/2 at 210. Although Dr. Brillante had not worked for the District the previous school year, Respondent argues that negative assessment was at the bidding of Moscatello and supervisors he deputized to carry on his anti-union campaign at Respondent's expense. Yet, despite the poor quality of Respondent's performance on November 15, 2015, Dr. Brillante decided against writing up a report to document the failed lesson. She instead gave Respondent another chance, a "do-over." There was no hint of animus in her conduct.

When Dr. Brillante performed the replacement observation on January 5, 2016, Joint Exhibit 3, she again determined that Respondent's performance was ineffective. 2/2 at 212; Joint Exhibit 3. She conducted a walkthrough observation of Respondent on May 31, 2016, which similarly was ineffective. 2/2 at 214. This record persuades me that the precipitous decline in Respondent's performance evaluations and ratings eleven months after her "run-in" with Moscatello was not due to anti-union animus resulting from an unfair practice and a grievance long-since settled, but most likely was due to Dr. Brillante's presence in the District, starting in the Fall of 2016, and the

rigor she introduced to the District's adoption of the TEACHNJ standards. This record simply does not persuade me there is any connection between Respondent's union activity and her negative performance evaluations starting in late 2015.

I have considered Respondent's claim that written comments by Romano in the 2015-2016 Summative Performance Report, Joint Exhibit 5, betray anti-union animus, or support a finding Respondent's union activity, in particular her activities as local union President, influenced negatively the Report, or the evaluations and ratings contained therein. I do not find that nexus. On the contrary, I find Romano's comments were (1) a good faith and reasonable request on her part for more open and fluid communication with Respondent; and (2) a "commendation" signifying Romano's recognition of the respect and admiration Respondent received from her colleagues, and her acknowledgment that the high regard in which Respondent, a veteran teacher, was held by the teaching staff put her in a role wherein she could be helpful in encouraging and supporting the curriculum and program changes facing the school and its "young" staff. Joint Exhibit 5.

There is no hint of any hostility in what Romano wrote, and her comments do not support even an inference Respondent's rating had anything to do with her union activities. I further find there is no record evidence of any connection between the events

at the February 23, 2015, negotiations session sixteen (16) months earlier and the comments Romano made in the 2015-2016 year-end Report. There is no record evidence Respondent, at the time, read Romano's comments as related to her union activity, except in the constructive and commendatory tone in which they are written. There is no record basis to conclude the comments had any material effect on the outcome of the Report, the findings and conclusions of which are squarely grounded in the details of classroom observations conducted during the covered school year.

Nor do I find in this case the presence of any of the other three factors under Section 23(a) of the Act that are subject to my scrutiny. Under the statutory limits on my authority to review Respondent's observations and evaluations, I have conducted a thorough review of the evaluation process applied to Respondent through the date of the instant charges, as well as her CAP, see discussion, above, at pp. 7-26, and I find no substantial departure from the statutory and regulatory requirements. Likewise, this record does not present for my proper review any mistakes of fact in Respondent's evaluations. The District's actions, I find, were grounded in its careful and painstaking observations and written assessments of Respondent's performance under the adopted rubric, and I find no persuasive demonstration by Respondent that the District was arbitrary and

capricious. On the contrary, the record in this proceeding shows that Respondent received and was evaluated under multiple observations conducted over the course of the 2015-2016 and 2016-2017 school years; and she was provided more than ample opportunity (much of which she did not take) to improve her effectiveness based on evaluation feedback.

By law, this must be the end of my analysis. As I do not find evidence of any of the considerations listed in Section 23(a) of the Act, N.J.S.A. 18A:6-17.2(a), I am precluded from conducting any additional inquiry into the District's evaluations of Respondent's classroom performance. I am required to render a decision in favor of the District, which through its extensive documentation and the truthful testimony of its witnesses, has demonstrated that the statutory criteria for tenure charges have been met.

I note that the charges against Respondent contain additional allegations of conduct unbecoming a teaching staff member. Because I am required, having sustained the inefficiency charges, to uphold Respondent's dismissal, the conduct unbecoming charges against her are moot.

AWARD

1. The charges of inefficiency against Respondent, Christine Rudinsky, are sustained.

2. Pursuant to the requirements under Section 23 of the Act, N.J.S.A. 18A:6-17.2, I uphold her dismissal.

April 12, 2018.

Earl R. Pfeffer, Arbitrator

STATE OF NEW JERSEY)
) ss.:
COUNTY OF ESSEX)

On this _____th day of April 2018, before me personally came and appeared EARL R. PFEFFER, Arbitrator, to me known and known by me to be the individual described herein, and who executed the foregoing instrument and who acknowledged to me that he executed the same.

Sworn to and subscribed before me this 12 day of April 2018.

Notary Public

JOYCE L RUDIN
My Comm. Exp. 10-26-2022
NOTARY PUBLIC
No. 50070820
NEW JERSEY

OAL DKT. NO. EDU 14169-16
AGENCY DKT. NO. 223-8/16

JOAN STRASSMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION 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 Board shall make a payment to the petitioner within 30 days of the signing of the Agreement by both parties. 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: 4/13/18

Date of Mailing: 4/13/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 14169-16
AGENCY DKT. NO. 223-8/16

JOAN STRASSMAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

Stephen B. Hunter, Esq., for petitioner (Detzky, Hunter & DeFillippo, LLC, attorney)

Christopher J. Turano, Esq., for respondent (DeCotiis, Fitzpatrick & Cole, LLP, attorneys)

Record Closed: February 28, 2018 Decided: February 28, 2018

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

This matter was transmitted to the Office of Administrative Law on September 19, 2016 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof. A copy of the settlement agreement and Board Resolution is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

February 28, 2018
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: MAR 5 2018

Mailed to Parties: 3-5-18

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/sej

2018 FEB 28 A 9:44

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT and Mutual Release ("Settlement Agreement" or "Agreement") is made on this 20 day of ~~November~~ December, 2017, by and between the Elizabeth Board of Education ("the Board"), and Joan Strassman ("Strassman") (collectively the "Parties") to resolve Strassman's 2013-2014 salary and adjustment increment withholding in an amicable and mutually satisfactory manner.

The Parties hereby set forth their full and complete agreement as follows:

WHEREAS, the Elizabeth Board of Education is charged with the operation of the public schools of the Elizabeth School District, County of Union, a K-12 school system, pursuant to Title 18A of the New Jersey Statutes; and

WHEREAS, Strassman has been employed by the District as a teaching staff member, and

WHEREAS, the Elizabeth Board of Education voted to withhold Strassman's salary and adjustment increments for the 2013-2014 school year based on her classroom performance during the 2012-2013 school year; and

WHEREAS, Strassman's instructional observations and overall performance as a teaching staff member during the 2013-2014,

2014-2015, 2015-2016 and 2016-2017 school years demonstrated that Strassman has satisfactorily performed all of her assigned job duties and responsibilities; and

WHEREAS, the Parties desire to amicably settle this matter;

NOW, THEREFORE, in consideration of the mutual promises contained herein, and for good and valuable consideration, receipt of which is hereby acknowledged, the Parties hereby agree as follows:

1. Restoration of Salary and Adjustment Increments

The Board shall Strassman's salary and adjustment increments, retroactive to the start of the 2017-2018 school year. Ms. Strassman shall therefore be placed at Step 12 of the Masters' Degree Guide providing her with an $89,596.00 base salary.

The Board of Education shall also remit to Ms. Strassman the amount of $7,700.00 in back salary payments for both the 2015-2016 and 2016-2017 school years within thirty (30) days of the signing of this Agreement by both parties. The Board shall also provide Ms. Strassman with retroactive salary payments for the 2017-2018 school year within thirty (30) days of the signing of this Agreement by both parties.

2. No Admission of Liability

The Parties understand and agree that this Settlement Agreement is the compromise of disputed claims and that the payment and consideration set forth herein is not to be construed as an admission of liability on the part of any Party hereto. All Parties deny liability and have agreed to settle this matter and pay the amount referenced herein solely to avoid the expense and burden of litigation.

3. Release by Strassman and the Elizabeth Board of Education

In exchange for the above stated consideration Strassman waives, releases and discharges any claims or rights, whether known or unknown, which she has, or may have, against the Board, personally and officially, individually and collectively against past and present Board members, administrators, agents and their successors regarding the subject matter of this Commissioner of Education litigation.

The Board of Education likewise waives, releases and discharges any claims or rights, whether known or unknown, which the Board may have had against Strassman, personally and officially, individually and collectively regarding the subject matter of this Commissioner of Education litigation.

This Settlement Agreement fully and completely resolves the Commissioner of Education litigation titled Joan Strassman vs. City of Elizabeth Board of Education, Union County, OAL Docket No. EDU-14169-2016N, Agency Reference No: 223-8/16.

4. Execution of Release

All Parties have consulted with their respective attorneys regarding the terms and conditions of this Settlement Agreement, have carefully read the same and know and understand its contents. The Parties expressly acknowledge that they execute this Settlement Agreement of their own free will.

5. Effective Date

This Settlement Agreement shall be effective when the last party shall have executed the same and provided a copy of all other Parties.

6. Counterparts

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

7. Full and Complete Agreement

This Settlement Agreement constitutes the full and complete agreement between the Parties with respect to its subject matter. Except as otherwise expressly provided herein, this Settlement Agreement supersedes all prior agreements, arrangements or understandings, and discussions relating to the claims raised. There are no representations, agreements, arrangements or understandings, oral or written, concerning the subject matter between the Parties which are not fully expressed or incorporated by reference herein. This Settlement Agreement may be amended, modified or waived only by an agreement in writing signed by all Parties hereto.

8. Authority to Execute Agreement

All signatories hereto state and affirm that they have the authority to execute this Settlement Agreement and Release and do hereby bind the Party which they represent.

9. Severability

If any term, provision or section of this Settlement Agreement is unlawful, invalid or unenforceable, the remainder of this Settlement Agreement shall remain in full force and effect

and shall remain binding on the Parties to this Settlement Agreement.

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Settlement Agreement on the date specified below.

ELIZABETH BOARD OF EDUCATION

Witness: _____ By: _____
~~Board of Education President~~

Date: 12.20.17

Witness: _____ By: _____
Joan Strassman

Date: 11/10/17

2018 FEB 28 A 9:44

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT and Mutual Release ("Settlement Agreement" or "Agreement") is made on this 20 day of ~~November~~ December, 2017, by and between the Elizabeth Board of Education ("the Board"), and Joan Strassman ("Strassman") (collectively the "Parties") to resolve Strassman's 2013-2014 salary and adjustment increment withholding in an amicable and mutually satisfactory manner.

The Parties hereby set forth their full and complete agreement as follows:

WHEREAS, the Elizabeth Board of Education is charged with the operation of the public schools of the Elizabeth School District, County of Union, a K-12 school system, pursuant to Title 18A of the New Jersey Statutes; and

WHEREAS, Strassman has been employed by the District as a teaching staff member, and

WHEREAS, the Elizabeth Board of Education voted to withhold Strassman's salary and adjustment increments for the 2013-2014 school year based on her classroom performance during the 2012-2013 school year; and

WHEREAS, Strassman's instructional observations and overall performance as a teaching staff member during the 2013-2014,

2014-2015, 2015-2016 and 2016-2017 school years demonstrated that Strassman has satisfactorily performed all of her assigned job duties and responsibilities; and

WHEREAS, the Parties desire to amicably settle this matter;

NOW, THEREFORE, in consideration of the mutual promises contained herein, and for good and valuable consideration, receipt of which is hereby acknowledged, the Parties hereby agree as follows:

1. **Restoration of Salary and Adjustment Increments**

The Board shall Strassman's salary and adjustment increments, retroactive to the start of the 2017-2018 school year. Ms. Strassman shall therefore be placed at Step 12 of the Masters' Degree Guide providing her with an $89,596.00 base salary.

The Board of Education shall also remit to Ms. Strassman the amount of $7,700.00 in back salary payments for both the 2015-2016 and 2016-2017 school years within thirty (30) days of the signing of this Agreement by both parties. The Board shall also provide Ms. Strassman with retroactive salary payments for the 2017-2018 school year within thirty (30) days of the signing of this Agreement by both parties.

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2. No Admission of Liability

The Parties understand and agree that this Settlement Agreement is the compromise of disputed claims and that the payment and consideration set forth herein is not to be construed as an admission of liability on the part of any Party hereto. All Parties deny liability and have agreed to settle this matter and pay the amount referenced herein solely to avoid the expense and burden of litigation.

3. Release by Strassman and the Elizabeth Board of Education

In exchange for the above stated consideration Strassman waives, releases and discharges any claims or rights, whether known or unknown, which she has, or may have, against the Board, personally and officially, individually and collectively against past and present Board members, administrators, agents and their successors regarding the subject matter of this Commissioner of Education litigation.

The Board of Education likewise waives, releases and discharges any claims or rights, whether known or unknown, which the Board may have had against Strassman, personally and officially, individually and collectively regarding the subject matter of this Commissioner of Education litigation.

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This Settlement Agreement fully and completely resolves the Commissioner of Education litigation titled Joan Strassman vs. City of Elizabeth Board of Education, Union County, OAL Docket No. EDU-14169-2016N, Agency Reference No: 223-8/16.

4. **Execution of Release**

All Parties have consulted with their respective attorneys regarding the terms and conditions of this Settlement Agreement, have carefully read the same and know and understand its contents. The Parties expressly acknowledge that they execute this Settlement Agreement of their own free will.

5. **Effective Date**

This Settlement Agreement shall be effective when the last party shall have executed the same and provided a copy of all other Parties.

6. **Counterparts**

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

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7. Full and Complete Agreement

This Settlement Agreement constitutes the full and complete agreement between the Parties with respect to its subject matter. Except as otherwise expressly provided herein, this Settlement Agreement supersedes all prior agreements, arrangements or understandings, and discussions relating to the claims raised. There are no representations, agreements, arrangements or understandings, oral or written, concerning the subject matter between the Parties which are not fully expressed or incorporated by reference herein. This Settlement Agreement may be amended, modified or waived only by an agreement in writing signed by all Parties hereto.

8. Authority to Execute Agreement

All signatories hereto state and affirm that they have the authority to execute this Settlement Agreement and Release and do hereby bind the Party which they represent.

9. Severability

If any term, provision or section of this Settlement Agreement is unlawful, invalid or unenforceable, the remainder of this Settlement Agreement shall remain in full force and effect

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and shall remain binding on the Parties to this Settlement Agreement.

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Settlement Agreement on the date specified below.

ELIZABETH BOARD OF EDUCATION

Witness: _____ By: _____

~~Board of Education President~~

Date: 12.20.17

Witness: _____ By: Joan Strassman

Joan Strassman

Date: 11/10/17

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COPY

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education, J. S., and the Elizabeth Education Association have negotiated a Settlement and Release Agreement regarding OAL Docket No. EDU-14169-2016N; and

WHEREAS, the Board has reviewed the Settlement and Release Agreement; and

WHEREAS, the Board has reviewed the Agreement and determined that it is in its best interest for cost efficiency and in lieu of litigation to settle this matter.

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby agrees and approves the terms of the Settlement and Release Agreement, a copy of which shall be kept on file by the Board; and

IT IS FURTHER RESOLVED, that the Board authorizes the Superintendent to execute the Agreement on behalf of the Board.

IT IS FURTHER RESOLVED, that the Business Administrator and/or the Superintendent are authorized to take such further necessary steps to effectuate the terms of the Agreement.

Elizabeth, New Jersey
January 18, 2018

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AGENCY DKT. NO. 63-2/18

MITCHELLE DRULIS V. ANNA FALLON,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
FLEMINGTON-RARITAN REGIONAL	:	DECISION
SCHOOL DISTRICT, HUNTERDON COUNTY	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC). The SEC found that respondent violated *N.J.S.A.* 18A:12-26(a)(4) of the School Ethics Act (SEA) for failure to disclose her spouse's "interest" in the Asset and Wealth Management Group, LLC, in Question 3, Section III of the Personal/Relative and Financial Disclosure Statements (Disclosure Statements). The SEC declined to issue a penalty in this matter, finding that respondent's omission was inadvertent and a mistake, and such failure to disclose her spouse's "interest" was technical and *de minimis*. The Commissioner has also considered the exceptions filed by petitioner, and respondent's reply thereto.[1]

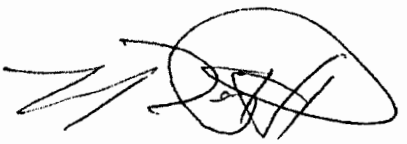
Upon review, the Commissioner concurs with the SEC's recommended decision not to issue a penalty on respondent, as the failure to disclose her spouse's "interest" in the Asset and Wealth Management Group, LLC, was *de minimis*. It is evident from the record that respondent did not seek to conceal such information from the public as she disclosed in Question 1, Section III of the Disclosure Statements that the Asset and Wealth Management Group, LLC, was a source of income for her spouse. Therefore, the Commissioner is satisfied that respondent's omission was inadvertent. However, respondent is reminded of her duty to properly honor the obligations placed upon her by law as a school board member. Respondent is further

[1] The exceptions – while reflecting petitioner's obvious disagreement with the findings and conclusions contained within the SEC decision – are unpersuasive for the reasons thoroughly set forth in the SEC decision and supported by the record in this matter. The Commissioner also clarifies that contrary to petitioner's assertions, the SEC may decline to issue a penalty when it has found a violation to be *de minimis*. *See N.J.A.C.* 6A:28-10.12(a).

admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is not issued a penalty in this matter for her failure to respond to Question 3 of Section III of the Disclosure Statements, as such omission of information on the Disclosure Statements – in light of all the circumstances in this matter – was a *de minimis* violation of the SEA.

IT IS SO ORDERED.[2]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/13/18

Date of Mailing: 4/13/18

[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)

MITCHELLE DRULIS	:	BEFORE THE SCHOOL ETHICS COMMISSION
v.	:	
	:	DOCKET NO.: C61-17
ANNA FALLON, *FLEMINGTON-RARITAN REGIONAL BOARD OF EDUCATION*, HUNTERDON COUNTY	:	FINAL DECISION
	:	SUMMARY DISPOSITION

PROCEDURAL HISTORY

This matter arises from a Complaint filed on July 5, 2017, by Mitchelle Drulis (Complainant) alleging that Anna Fallon (Respondent), a member and then President of the Flemington-Raritan Regional Board of Education (Board), violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. More specifically, the Complaint alleges that Respondent violated N.J.S.A. 18A:12-26(a)(4) in Count 1, N.J.S.A. 18A:12-25(b) and N.J.S.A. 18A:12-25(c) in Count 2, and violated N.J.S.A. 18A:12-22 in Count 3.

On July 27, 2017, and following a failed attempt on July 10, 2017, the Complaint was served on Respondent via regular and certified mail, notifying her that charges were filed against her with the School Ethics Commission (Commission), and advising that she had twenty (20) days to respond to the Complaint. On August 16, 2017, Respondent, through counsel, requested an extension of time to respond. Ultimately, on August 31, 2017, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and also alleged that the Complaint was frivolous. On September 11, 2017, Complainant filed a written response to the Motion to Dismiss, and to the allegation of a frivolous Complaint.

The parties were notified by correspondence dated September 18, 2017, that this matter would be placed on the Commission's agenda for its meeting on September 26, 2017, in order for the Commission to make a determination regarding the Motion to Dismiss and allegation of frivolous filing. At its meeting on September 26, 2017, the Commission considered the filings and, at its meeting on October 31, 2017, the Commission voted to grant the Motion to Dismiss in part (as to the alleged violations of N.J.S.A. 18A:12-25(b) and N.J.S.A. 18A:12-25(c) in Count 2, as well as N.J.S.A. 18A:12-22 in Count 3); deny the Motion to Dismiss in part (as to the alleged violation of N.J.S.A. 18A:12-26(a)(4) in Count 1); find the Complaint not frivolous; and to direct the filing of an Answer to Complaint as to the remaining allegation in the Complaint (Count 1). Respondent filed her Answer to Complaint (Answer) on November 21, 2017, as directed.

By correspondence dated November 21, 2017, the parties were notified that this matter would be placed on the Commission's agenda for its meeting on November 28, 2017, in order for the Commission to make a determination regarding probable cause for the remaining allegation in the Complaint (Count 1). At its meeting on November 28, 2017, the Commission considered the filings, and at its meeting on December 19, 2017, the Commission voted to find probable cause for the alleged violation of N.J.S.A. 18A:12-26(a)(4) in Count 1, and to decide this matter by summary decision pursuant to N.J.A.C. 6A:28-10.7(c)(1). The Commission also directed Respondent to file, within

twenty (20) days, a statement setting forth the reasons she should not be found in violation of the Act. Respondent filed a statement on January 10, 2018, as directed.

At its meeting on January 23, 2018, the Commission reviewed the entire record in this matter, and at its meeting on February 27, 2018, the Commission voted to find that Respondent violated N.J.S.A. 18A:12-26(a)(4), but declined to issue a penalty due to the totality of the circumstances.

SUMMARY OF THE RECORD

Following the Commission's dismissal of the alleged violations of N.J.S.A. 18A:12-25(b) and N.J.S.A. 18A:12-25(c) in Count 2, and the dismissal of the alleged violation of N.J.S.A. 18A:12-22 in Count 3, the remaining charge before the Commission is the alleged violation of N.J.S.A. 18A:12-26(a)(4) as detailed in Count 1. More specifically, Complainant contends that Respondent violated N.J.S.A. 18A:12-26(a)(4) because she failed to disclose her spouse's "interest" in a "business organization" in response to Question 3 (Section III) on her 2017 Personal/Relative and Financial Disclosure Statements (Disclosure Statements).

The record shows that Respondent is a member of the Board, and has been since January 2012. The record also shows that Respondent served as President of the Board from January 4, 2016, until the Board's most recent reorganization meeting (in January 2018).

School officials are required to file, on an annual basis, Disclosure Statements with the Commission. N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1. Disclosure Statements have four (4) Sections. Section I of the Disclosure Statements requires a school official to provide personal information, including her name and address, as well as the name of her spouse (if applicable). Section II requires a school official to disclose "relative information," including whether any relative of the school official or any other person related to her by marriage is employed by the school district with which the school official holds office (Question 1); whether a school official or her relative is a party to a contract with the school district with which the school official holds office (Question 2); and whether a school official or her relative is employed by, receives compensation from, or has an interest in any business which is a party to a contract with the school district with which the school official holds office (Question 3).

Section III of the Disclosure Statements requires a school official to disclose "financial information," including each source of income, earned or unearned, exceeding two thousand dollars ($2,000.00) received by the school official or a member of her immediate family during the preceding calendar year (Question 1); each source of fees/honorariums, or gifts/reimbursements or prepaid expenses, having an aggregate amount exceeding two hundred fifty dollars ($250.00) received by the school official or a member of her immediate family during the preceding calendar year (Question 2); and the name and address of all business organizations in which the school official or a member of her immediate family had an interest during the preceding calendar year (Question 3). Section IV of the Disclosure Statements requires a school official to certify that the Disclosure Statements "contain no willful misstatement or omission of material fact and constitute a full disclosure," and to indicate an understanding that the filing of information that the school official knows to be false shall subject the school official to disciplinary action, up to and including removal pursuant to N.J.S.A. 18A:12-29.

In her 2017 Disclosure Statements, Respondent disclosed her spouse's business organization, Asset and Wealth Management Group, L.L.C., as a source of income in response to Question #1 (in

Section III), but did not disclose that she or her spouse had an interest in any business organization (in response to Question #3, Section III). Complainant contends that, although this information was withheld from Respondent's 2017 Disclosure Statements, Respondent's spouse does, in fact, have an "interest" in Asset and Wealth Management Group, L.L.C. because he is listed as a "General Partner" on State records. By not properly disclosing this information, Complainant contends that Respondent violated N.J.S.A. 18A:12-26(a)(4).

In her Statement, Respondent acknowledges that she did not list Asset and Wealth Management Group, L.L.C. "under question 3 of the Financial Disclosure Statement, which speaks to business organizations in which [she] or a member of [her] family held an interest." Respondent further admits, "[t]his omission was a mistake, rather than an attempt to conceal [her] connection to [Asset and Wealth Management Group, L.L.C.]." As for why she should not be found in violation of the Act, Respondent notes that Asset and Wealth Management Group, L.L.C. is a limited liability corporation without assets, she has always disclosed Asset and Wealth Management Group, L.L.C. as a source of income to her and her spouse, and an ethics complaint has never previously been filed against her with the Commission.

FINDINGS OF FACT

The Commission finds the following facts to be undisputed:

1. Respondent has been, and continues to be, a duly elected member of the Board.

2. When Complainant filed her Complaint with the Commission, Respondent served as President of the Board.

3. Respondent has a spouse.

4. According to "New Jersey Business Gateway Business Entity Information and Records Service," Asset and Wealth Management Group, L.L.C. is a domestic limited liability company, and its charter documents were originally filed in 2002.

5. According to "New Jersey Business Gateway Business Entity Information and Records Service," Respondent's spouse, along with two others, is a "General Partner" of Asset and Wealth Management Group, L.L.C.

6. On January 24, 2014, Respondent filed her 2014 Disclosure Statements.

7. In her 2014 Disclosure Statements, Respondent disclosed Asset and Wealth Management Group, L.L.C. as a source of income (for her spouse) in response to Question 1 (Section III).

8. In her 2014 Disclosure Statements, Respondent did not disclose Asset and Wealth Management Group, L.L.C. as a business organization in which she or her spouse had an interest in the preceding calendar year in response to Question 3 (Section III).

9. On February 12, 2015, Respondent filed her 2015 Disclosure Statements.

10. In her 2015 Disclosure Statements, Respondent disclosed Asset and Wealth Management Group, L.L.C. as a source of income (for her spouse) in response to Question 1 (Section III).

11. In her 2015 Disclosure Statements, Respondent disclosed Asset and Wealth Management Group, L.L.C. as a business organization in which her spouse had an interest in the preceding calendar year in response to Question 3 (Section III).

12. On February 24, 2016, Respondent filed her 2016 Disclosure Statements.

13. In her 2016 Disclosure Statements, Respondent disclosed Asset and Wealth Management Group, L.L.C. as a source of income (for her spouse) in response to Question 1 (Section III).

14. In her 2016 Disclosure Statements, Respondent did not disclose Asset and Wealth Management Group, L.L.C. as a business organization in which she or her spouse had an interest in the preceding calendar year in response to Question 3 (Section III).

15. On March 15, 2017, Respondent filed her 2017 Disclosure Statements.

16. In her 2017 Disclosure Statements, Respondent disclosed Asset and Wealth Management Group, L.L.C. as a source of income (for her spouse) in response to Question 1 (Section III).

17. In her 2017 Disclosure Statements, Respondent did not disclose Asset and Wealth Management Group, L.L.C. as a business organization in which she or her spouse had an interest in the preceding calendar year in response to Question 3 (Section III).

ANALYSIS/CONCLUSIONS OF LAW

As an initial matter, the Commission finds that Respondent, as a member of the Board, is a "school official" within the meaning of the Act. N.J.S.A. 18A:12-23. As a school official, Respondent is required, among other things, to file Disclosure Statements on an annual basis. N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1.

With regard to her 2017 Disclosure Statements, Complainant alleges that Respondent violated N.J.S.A. 18A:12-26(a)(4) because she failed to disclose her spouse's "interest" in Asset and Wealth Management Group, L.L.C. and, thereby, violated N.J.S.A. 18A:12-26(a)(4). N.J.S.A. 18A:12-26(a)(4) provides:

> a. Each school official shall annually file a financial disclosure statement with the School Ethics Commission. All financial disclosure statements filed pursuant to this act shall include the following information which shall specify, where applicable, the name and address of each source and the school official's position:
>
> (4) The name and address of all business organizations in which the school official or a member of his immediate family had an interest during the preceding calendar year.

The Act defines a "member of immediate family" as "the *spouse* or dependent child of a school official residing in the same household." N.J.S.A. 18A:12-23 (emphasis added). Therefore, the Commission finds that Respondent's spouse clearly falls within the Act's definition of "member of immediate family."

The Act further defines "business" as "any *corporation*, partnership, firm, enterprise, franchise, association, trust, sole proprietorship, union, political organization, *or other legal entity* but shall not include a local school district or any other public entity." N.J.S.A. 18A:12-23 (emphasis added). Because Asset and Wealth Management Group, L.L.C. is a limited liability company that has been registered with the State of New Jersey since at least 2002, the Commission finds that Asset and Wealth Management Group, L.L.C. is a "business organization" within the meaning of the Act.

In addition, the Act 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. Based on the record, including (a) the nature of Asset and Wealth Management Group, L.L.C., (b) the fact that Asset and Wealth Management Group, L.L.C. provides Respondent's spouse with income in excess of two thousand dollars ($2,000.00), and (c) the fact that Respondent's spouse is one of three individuals who serve as a "General Partner" of the company, the Commission finds that Respondent's spouse has an "interest" in Asset and Wealth Management Group, L.L.C.

Based on the above, and because Respondent candidly acknowledges that she failed to list Asset and Wealth Management Group, L.L.C. in response to Question 3 (Section III) in connection with her 2017 Disclosure Statements, the Commission finds, based on the undisputed evidence, that Respondent violated N.J.S.A. 18A:12-26(a)(4). However, the Commission has determined, by majority vote, not to issue a penalty because Respondent's failure in this regard is both technical and *de minimis*.

It is irrefutable that Respondent listed Asset and Wealth Management Group, L.L.C. as a "source of income" in her 2017 Disclosure Statements (in response to Question 1, Section III), and that she also consistently disclosed this information as part of her 2014, 2015, and 2016 Disclosure Statements. In this way, Respondent has never attempted to conceal or otherwise withhold from the public the fact that she, and her spouse, benefit financially from Asset and Wealth Management Group, L.L.C. The Commission also finds important the fact that Respondent properly disclosed her spouse's interest in Asset and Wealth Management Group, L.L.C. as part of her 2015 Disclosure Statements. Nonetheless, whether due to carelessness or negligence, Respondent did not properly disclose Asset and Wealth Management Group, L.L.C. when she filed her 2017 Disclosure Statements. However, the Commission cannot find, based on the record, that Respondent's failure to disclose her spouse's interest in Asset and Wealth Management Group, L.L.C. in connection with her 2017 Disclosure Statements was intentional or willful, such that she should be subjected to a penalty. Instead, the Commission accepts Respondent's representation that this omission was a mistake, and inadvertent.

Although the Commission has declined to issue a penalty in this matter, the Commission cautions Respondent that failure to properly complete all aspects of her Disclosure Statements in future filings may result in the Commission recommending a penalty. In addition, the Commission reminds all board secretaries and charter school designees that they are required, pursuant to N.J.A.C. 6A:28-3.2(g)(1), to review each school official's Disclosure Statements. To the extent that a school official may fail to answer a question(s) or omit responsive information, board secretaries and charter school designees can assist in ensuring accuracy and completeness.

DECISION

This decision shall be forwarded to the Commissioner of Education (Commissioner) for review of the Commission's finding of a violation of the Act, and the decision not to issue a penalty. Parties may either: 1) file exceptions to the decision not to issue a penalty; 2) file an appeal of the Commission's finding of a violation; or 3) file exceptions to the decision not to issue a penalty and an appeal of the Commission's finding of a violation.

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

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

Robert W. Bender
Chairperson

Mailing Date: February 28, 2018

RESOLUTION ADOPTING DECISION – C61-17

WHEREAS, at its meetings on November 28, 2017, and December 19, 2017, the School Ethics Commission (Commission) voted to find probable cause to credit the allegation that the Respondent violated N.J.S.A. 18A:12-26(a)(4) of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq.; and

WHEREAS, at its meetings on November 28, 2017, and December 19, 2017, the Commission voted to resolve this matter by summary decision, pursuant to N.J.A.C 6:28-10.7(c)1; and

WHEREAS, the Commission has considered the record, including Respondent's Statement; and

WHEREAS, at its meeting on January 23, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-26(a)(4), but determined, by majority vote, not to issue a penalty because Respondent's failure in this regard is both technical, and *de minimis*; and

WHEREAS, at its meeting on February 27, 2018, the Commission reviewed and voted to approve the within decision memorializing its findings from January 23, 2018; and

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

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on February 27, 2018.

Kathryn A. Whalen

Kathryn A. Whalen, Director
School Ethics Commission

113-18SEC

AGENCY DKT. NO. 64-3/18

JUANITA HYMAN V. LAWRENCE TONY DAVENPORT, BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY.	:	
	:	COMMISSIONER OF EDUCATION
PAUL MOORE AND JUANITA HYMAN V. JEROME PAGE, BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY.	:	DECISION
GARNELL BAILEY V. LAWRENCE TONY DAVENPORT, JEROME PAGE, MICHAEL BRIGHT, AND DORIS ROWELL, BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY.	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondents Davenport and Bright violated provisions of *N.J.S.A.* 18A:12-24.1 of the School Ethics Act (SEA), and dismissing the complaints against respondents Page and Rowell.[1] With regard to respondent Davenport, the SEC found that he violated *N.J.S.A.* 18A:12-24.1(e), (g), (i), and (j) in connection with three separate incidents over the course of several months; specifically, Davenport: approached and questioned a building principal regarding a personal matter, which led the building principal to visit her doctor and contact law enforcement; made an inappropriate gesture and used a racial epithet during an encounter with a District employee; and blatantly disregarded the Board's policies regarding

[1] With regard to Page, the SEC noted that the Administrative Law Judge (ALJ) did not discuss the alleged violation of *N.J.S.A.* 18A:12-24.1(a) and (b), nor did the petitioners file exceptions to the ALJ's apparent dismissal of those claims. The SEC, therefore, dismissed those allegations, to the extent that the ALJ did not find violations pertaining to those claims and there were no objections filed regarding same. With regard to Rowell, the SEC noted that the ALJ did not discuss the alleged violation of *N.J.S.A.* 18A:12-24.1(g) and (h), nor did the petitioner file exceptions to the ALJ's apparent dismissal of those claims. The SEC, therefore, dismissed those allegations, to the extent that the ALJ did not find violations pertaining to those claims and there were no objections filed regarding same. Additionally, with regard to Rowell, although the SEC did not specifically dismiss *N.J.S.A.* 18A:12-24.1(f), it is the Commissioner's understanding – based on the SEC's reasoning for dismissing the other subsections – that the SEC's intent was to likewise dismiss the allegation pertaining to *N.J.S.A.* 18A:12-24.1(f). Therefore, *N.J.S.A.* 18A:12-24.1(f) is also deemed dismissed.

the use of facilities.[2] With regard to respondent Bright, the SEC found that he violated *N.J.S.A.* 18A:12-24.1(j) when he questioned, reprimanded, and coerced action by a District employee, relative to personnel matters that were beyond his purview as a Board member.[3]

The SEC's decision was forwarded – pursuant to *N.J.S.A.* 18A:12-29 – for the Commissioner's final determination on the following recommended penalties: suspension for sixty days for Davenport; and censure for Bright. No exceptions were filed by any of the parties in this matter, nor have they instituted an appeal pursuant to *N.J.A.C.* 6A:4 *et seq.*

Upon review, the Commissioner concurs with the penalties recommended by the SEC in consequence of the inappropriate conduct of respondents Davenport and Bright, respectively. Accordingly, having been found to have violated *N.J.S.A.* 18A:12-24.1(e), (g), (i), and (j) of the SEA, respondent Davenport is hereby suspended for sixty days from the date of this decision; respondent Bright, having been found to have violated *N.J.S.A.* 18A:12-24.1(j) of the SEA, is hereby censured for his conduct.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/13/18
Date of Mailing: 4/13/18

[2] The SEC dismissed the allegations that Davenport violated *N.J.S.A.* 18A:12-24.1(a) and (f) on the basis that the ALJ did not find violations of the SEA for those claims, and because there were no objections on the record from the petitioners pertaining to same.

[3] The SEC dismissed the allegation that Bright violated *N.J.S.A.* 18A:12-24.1(d) on the basis that the ALJ did not find violations of the SEA relating to the claim, and because there was no objection on the record from the petitioner pertaining to same. Although the SEC did not specifically dismiss *N.J.S.A.* 18A:12-24.1(e) and (f), it is the Commissioner's understanding – based on the SEC's reasoning for dismissing the other subsection – that it was the intent of the SEC to likewise dismiss the allegations pertaining to *N.J.S.A.* 18A:12-24.1(e) and (f). Therefore, *N.J.S.A.* 18A:12-24.1(e) and (f) are also deemed dismissed

[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)

JUANITA HYMAN v.	:	**BEFORE THE SCHOOL**
LAWRENCE TONY DAVENPORT AND	:	**ETHICS COMMISSION**
PLEASANTVILLE BOARD OF EDUCATION,	:	
ATLANTIC COUNTY	:	**OAL DKT. NOS.:**
	:	**EEC-15043-13 /**
PAUL MOORE AND JUANITA HYMAN v.	:	**12755-14 / 4386-14,**
JEROME PAGE AND PLEASANTVILLE	:	**4330-14 / 12752-14**
BOARD OF EDUCATION,	:	**4388-14, and 4387-14**
ATLANTIC COUNTY	:	
	:	**SEC DKT. NOS.:**
GARNELL BAILEY v.	:	**C31-13, C28-13, C45-13,**
LAWRENCE TONY DAVENPORT,	:	**C41-13, C43-13,**
JEROME PAGE, MICHAEL BRIGHT,	:	**C42-13, and C44-13,**
DORIS ROWELL, AND PLEASANTVILLE	:	
BOARD OF EDUCATION,	:	***CONSOLIDATED***
ATLANTIC COUTY	:	
	:	**FINAL DECISION**

I. PROCEDURAL HISTORY

This consolidated matter arises from seven (7) different, but factually related, Complaints against four (4) Respondents. The first Complaint, **C28-13**, was filed with the School Ethics Commission (Commission) on June 3, 2013, by Paul Moore, Jr. and Juanita Hyman, and alleged that Jerome Page (Respondent Page), a member of the Pleasantville Board of Education (Board), violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. More specifically, Complainants Moore and Hyman asserted that Respondent Page violated N.J.S.A. 18A:12-24.1(a) and (b). After the Commission dismissed Respondent Page's Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and Respondent Page filed an Answer to Complaint (Answer), the matter was transmitted to the Office of Administrative Law (OAL) on or about September 17, 2014.

The second Complaint, **C31-13**, was filed with the Commission on June 17, 2013, by Complainant Hyman, and contended that Lawrence Tony Davenport (Respondent Davenport), a member of the Board, violated N.J.S.A. 18A:12-24.1(a), (e), (f), (g), (i), and (j). On or about October 3, 2013, and following the Commission's receipt of an Answer, this matter was also transmitted to the OAL.

On August 26, 2013, Garnell Bailey, a former Superintendent for the Pleasantville School District (District), filed five (5) different Complaints with the Commission. In **C41-13**, Complainant Bailey asserted that Respondent Davenport violated N.J.S.A. 18A:12-24.1(e), (f), (g), (i), and (j); in **C42-13**, Complainant Bailey alleged that Respondent Davenport violated N.J.S.A. 18A:12-24.1(c), (e), and (f); in **C43-13**, Complainant Bailey contended that Respondent Page violated N.J.S.A. 18A:12-24.1(f); in **C44-13**, Complainant Bailey asserted that Doris Rowell (Respondent Rowell) a member of the Board, violated N.J.S.A. 18A:12-24.1(f), (g), and (h); and in **C45-13**, Complainant Bailey alleged that Michael Bright (Respondent Bright), a

member of the Board, violated N.J.S.A. 18A:12-24.1(d), (e), and (f). Each of these matters, with the exception of C43-13, was transmitted to the OAL on or about March 25, 2014, following receipt of each Respondent's Answer. On or about September 17, 2014, and following the Commission's receipt of Respondent Page's Answer, C43-13 was also transmitted to the OAL.

All of the foregoing Complaints were heard together on September 5, 2017, by Administrative Law Judge John S. Kennedy (ALJ Kennedy), and subsequently consolidated by Order dated November 22, 2017. On October 10, 2017, and after receipt of closing briefs, the record closed in this consolidated matter.

In an Initial Decision issued on December 21, 2017, ALJ Kennedy found that none of the Respondents violated any subsection of N.J.S.A. 18A:12-24.1 in creating, passing, discussing, and/or voting on a petition of public interest during the Board's executive session; that Respondent Page did not violate N.J.S.A. 18A:12-24.1(e), (f), (g), (i), or (j) when he voted to place Complainant Bailey on administrative leave and then voted to approve the Board's legal bills, including those that related to an action/proceeding that Complainant Bailey had filed against him; that Respondent Bright violated N.J.S.A. 18A:12-24.1(j) because he utilized his position as a Board member to usurp the authority of the Superintendent; and that Respondent Davenport violated N.J.S.A. 18A:12-24.1(e), (g), (i), and (j) when he (1) approached and questioned a building principal about a personal matter which, ultimately, led the building principal to visit her doctor and contact law enforcement, (2) had an encounter with a District employee during which he made an inappropriate gesture and used a racial epithet, and (3) blatantly disregarded the Board's policies regarding the use of facilities. Based on these findings, ALJ Kennedy recommended that Respondent Bright be censured, and that Respondent Davenport be suspended for thirty (30) days.

The Commission acknowledged receipt of ALJ Kennedy's Initial Decision on December 21, 2017; therefore, the forty-five (45) day statutory period for the Commission to issue a Final Decision was February 5, 2018. Prior to February 5, 2018, the Commission requested a forty-five (45) day extension of time to issue its decision so as to allow the Commission, which only meets monthly, the opportunity to receive and review the full record, including the parties' Exceptions (if any). Pursuant to N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.8, and for good cause shown, the Commission was granted an extension until March 22, 2018.

At its meeting on January 23, 2018, the Commission considered the record in this matter. At its meeting on February 27, 2018, and for the reasons more fully detailed below, the Commission voted to adopt all of ALJ Kennedy's findings of fact; to adopt the legal conclusion that none of the named Respondents violated any subsection of N.J.S.A. 18A:12-24.1 in creating, passing, discussing, and/or voting on a petition of public interest during the Board's executive session; to adopt the legal conclusion that Respondent Page did not violate N.J.S.A. 18A:12-24.1(e), (f), (g), (i), or (j) when he voted to place the former Superintendent on leave and then voted to approve the legal bills relating to the action/proceeding that the former Superintendent filed against him; to adopt the legal conclusion that Respondent Bright violated N.J.S.A. 18A:12-24.1(j) when he, in his capacity as a Board member, questioned, reprimanded, and coerced action by a District employee relative to personnel matters; to adopt the legal conclusion that

Respondent Davenport violated N.J.S.A. 18A:12-24.1(e), (g), (i), and (j) when he (1) approached and questioned a building principal about a personal matter which, ultimately, led the building principal to visit her doctor and contact law enforcement, (2) had an encounter with a District employee and, in the course thereof, made an inappropriate gesture and used a racial epithet, and (3) blatantly disregarded the Board's policies regarding the use of facilities; to recommend a penalty of censure for Respondent Bright; and to revise the recommended penalty for Respondent Davenport from a suspension of thirty (30) days, to a suspension of sixty (60) days.

II. INITIAL DECISION

In his Initial Decision, ALJ Kennedy issued the following findings of fact:

1. [Respondent] Davenport was a member of the [Board]. He engaged in conversation with [the building principal] in the elevator at the Middle School on June 5, 2013, on a topic of personal concern and business. He wanted to address the upset of his wife for a comment made by the principal's mother at a meeting two weeks prior.

2. [Respondent] Davenport's demeanor, tone and attitude in the course of that encounter was authoritative and caused her visible emotional upset. The conversation resulted in the principal being physically shaken and resulting in an emergency appointment with her maternity doctor. The principal's assigned training session was also interrupted.

3. [Respondent] Davenport encountered [a District employee] on July 10, 2013, and in response to [the District employee's] inappropriate statement, gave him the middle finger and called him a "stupid nigger." [Respondent] Davenport did that at the school facility while being a Board member and present on the property to discuss school business.

4. [Respondent] Davenport was a Board member at the public and executive session of the Board on August 13, 2013. He signed a political petition circulated within the executive session room. The petition and the topic was not part of the Board's agenda nor any legitimate business of the [Board]. He acknowledges that he was signing the petition to support and express a personal political view.

5. [Respondent] Davenport admits that he was at the Pleasantville High School gym with others on August 17, 2013, without any Board permission and without following any of the Board's policies in use of school facilities. Other than the fact that he had done it before, [Respondent] Davenport offered no other explanation.

6. [Respondent] Page signed the political petition regarding the public question in Pleasantville in the course of the [Board] executive session.

7. [Respondent] Rowell signed the political petition regarding the public question in Pleasantville in the course of the [Board] executive session.

8. [Respondent] Bright signed the political petition regarding the public question in Pleasantville in the course of the [Board] executive session.

9. In February 2013, [Respondent] Page voted to place [Complainant] Bailey on administrative leave. [Complainant] Bailey filed suit against [Respondent] Page. [Respondent] Page seconded a motion to have bills paid which included his legal bills. The legal bills were ultimately approved and paid at the direction of the State appointed monitor.

10. [Respondent] Bright contacted the District's Director of Public Safety...on several occasions in an attempt to have [him] hire individuals that [Respondent] Bright wanted hired without following District policy and procedure.

Based on the facts as set forth above, ALJ Kennedy issued several conclusions of law. First, regarding the political question petition that was distributed during the Board's Executive Session on August 13, 2013, he noted that all of the named Respondents admitted and acknowledged that the petition did not constitute Board business. Each Board member also testified that neither the petition, nor the contents of the petition, was discussed during executive session. Because the petition did not have any effect on, and was not related to what was discussed or occurred during either Executive Session or the public portion of the Board's meeting, ALJ Kennedy concluded that none of the Respondents violated any subsection of N.J.S.A. 18A:12-24.1. Because the allegations against Respondent Rowell solely related to creating, passing, discussing, and/or voting on a petition of public interest during the Board's executive session, and ALJ Kennedy found that this conduct did not violate the Act, the complaint against Respondent Rowell was dismissed.

Second, with regard to Respondent Page, and his vote to place Complainant Bailey on administrative leave and then to approve the Board's legal bills, including those related to an action/proceeding between Respondent Page and Complainant Bailey, ALJ Kennedy concluded that **a** violation of the Act had not occurred. Instead, ALJ Kennedy noted that the legal bills were ultimately approved and paid at the direction of the State appointed monitor and, therefore, there was no evidence that Respondent Page violated N.J.S.A. 18A:12-24.1(e), (f), (g), (i), or (j). Based on this determination, as well as the determination that Respondent Page's involvement in creating, passing, discussing, and/or voting on a petition of public interest during the Board's executive session did not violate any subsection of N.J.S.A. 18A:12-24.1, the complaint against Respondent Page was also dismissed.

Third, regarding Respondent Bright's communication with the District's Director of Homeland Security on July 9, 2013, ALJ Kennedy found that Respondent Bright called, questioned, and berated a school official about his performance, and also discussed with him who should be hired, and where they should be assigned. Because Respondent Bright utilized his position on the Board to usurp the authority of the Superintendent, and was not attempting to

support and protect school personnel, but rather to question, reprimand, and coerce action by an employee, ALJ Kennedy found that Respondent Bright violated N.J.S.A. 18A:12-24.1(j). In light of the fact that Respondent Bright is no longer a Board member, ALJ Kennedy recommended a penalty of censure.

Finally, with regard to Respondent Davenport, the ALJ found that he admitted that he approached and questioned a building principal about a "private issue," namely Respondent Davenport's belief that the building principal's mother had engaged in disrespecting conduct toward Respondent Davenport's wife at a public meeting. According to ALJ Kennedy, Respondent Davenport "had no board member duty or justification to pursue that personal issue as a public board concern," and there is "no justification for [Respondent's] statements or demeanor" which ultimately caused the building principal to visit her doctor and contact law enforcement. Based on his conduct, ALJ Kennedy found that Respondent Davenport violated N.J.S.A. 18A:12-24.1(e), (g), (i) and (j) because he knew that if there was an issue to be addressed with the building principal it was to be addressed to/through the Superintendent; Respondent Davenport has no individual power or authority and must only act through Board action; he took "private action" under the auspices of Board authority against a District employee; and Respondent Davenport's conduct needlessly injured the building principal.

In addition, ALJ Kennedy found that Respondent Davenport's interaction with another District employee on July 10, 2013, was "equally egregious," and the "resulting gesture and racial epithet is unbecoming for an individual" who serves as a Board member. Board members are charged with supporting and protecting school personnel, and his interaction with this District employee violated this ethical obligation. As such, Respondent Davenport's conduct on that date violated N.J.S.A. 18A:12-24.1(i).

The ALJ further concluded that Respondent Davenport engaged in personal action that compromised the Board when he violated the Board's policies and regulations regarding the use of the District's facilities. The ALJ rejected Respondent Davenport's contention that he was "grandfathered" with permission to use the District's facilities, finding instead that Respondent Davenport's actions simply demonstrated his belief that the Board's policies and regulations do not apply to him. ALJ Kennedy concluded that Respondent Davenport's actions violated N.J.S.A. 18A:12-24.1(e).

As for the recommended penalty for Respondent Davenport, ALJ Kennedy indicated that, based on the "quantity and quality of ethical violations," he has demonstrated a "consistent theme of conduct and action" that cannot be tolerated. Therefore, ALJ Kennedy concluded that a penalty of suspension for thirty (30) days was appropriate.

Finally, the Commission notes that the ALJ did not specifically discuss each alleged violation of the Act that was transmitted to the OAL. Specifically, the ALJ did not discuss the alleged violation of N.J.S.A. 18:12-24.1(a) or N.J.S.A. 18:12-24.1(f) by Respondent Davenport as articulated in C31-13; did not discuss the alleged violation of N.J.S.A. 18A:12-24.1(d) by Respondent Bright as set forth in C45-13; did not discuss the alleged violation of N.J.S.A. 18A:12-24.1(g) or N.J.S.A. 18A:12-24.1(h) by Respondent Rowell as articulated in C44-13; and did not discuss the alleged violation of N.J.S.A. 18A:12-24.1(a) or N.J.S.A. 18A:12-24.1(b) by

Respondent Page as set forth in C28-13. The Commission also notes that Petitioners did not file Exceptions to the ALJ's apparent dismissal of those claims. To the extent that the ALJ did not find violations of the Act for those claims, and because there is no objection in the record from Petitioners, the Commission dismisses those allegations.

III. EXCEPTIONS

Neither party filed Exceptions to the Initial Decision with the Commission.

IV. ANALYSIS

Upon careful and independent review of the record, the Commission adopts ALJ Kennedy's findings of fact as set forth above. Based on ALJ Kennedy's findings of fact, the Commission adopts ALJ Kennedy's legal conclusion that none of the named Respondents violated any subsection of N.J.S.A. 18A:12-24.1 in creating, passing, discussing, and/or voting on a petition of public interest during the Board's executive session; to adopt the legal conclusion that Respondent Page did not violate N.J.S.A. 18A:12-24.1(e), (f), (g), (i), or (j) when he voted to place the former Superintendent on leave and then voted to approve the legal bills relating to the action/proceeding that the former Superintendent filed against him; to adopt the legal conclusion that Respondent Bright violated N.J.S.A. 18A:12-24.1(j) when he, in his capacity as a Board member, questioned, reprimanded, and coerced action by a District employee relative to personnel matters; and to adopt the legal conclusion that Respondent Davenport violated N.J.S.A. 18A:12-24.1(e), (g), (i), and (j) when he (1) approached and questioned a building principal about a personal matter which, ultimately, led the building principal to visit her doctor and contact law enforcement, (2) had an encounter with a District employee and, in the course thereof, made an inappropriate gesture and used a racial epithet, and (3) blatantly disregarded the Board's policies regarding the use of facilities.

V. DECISION

The Commission determines to adopt the ALJ's Initial Decision dismissing the Complaints against Respondent Rowell and Respondent Page, and finding that Respondent Bright and Respondent Davenport violated the Act.

VI. PENALTY

Based upon the conclusion that Respondent Bright violated N.J.S.A. 18A:12-24.1(j) when he, in his capacity as a Board member, questioned, reprimanded, and coerced action by a District employee relative to personnel matters, matters which clearly do not fall within the purview of an individual Board member, the Commission concurs with ALJ Kennedy's recommended penalty of **censure**.

However, based upon the conclusion that Respondent Davenport violated N.J.S.A. 18A:12-24.1(e), (g), (i), and (j) in connection with three separate incidents over the course of several months, the Commission disagrees with ALJ Kennedy's recommended penalty of suspension for thirty (30) days. The Commission does not believe, based on the frequency of the

violations and the completely inappropriate conduct involved, that a thirty (30) day suspension is sufficient to impress upon Respondent Davenport the critical importance of abiding by the ethics rules and regulations that apply to all Board members. A suspension for thirty (30) days could result in missing only one (1) Board meeting.

Because the record is clear that Respondent Davenport exercised wholly unacceptable decision making in at least three separate incidents, the Commission recommends a penalty of **suspension for sixty (60) days**. The Commission is hopeful that a suspension for this duration will convey to Respondent Davenport that he must always be mindful of the ethical rules and regulations that apply to him, and that he must always be mindful of these obligations in all interactions, whether with District personnel, staff, students, or the public.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education (Commissioner) for review of the Commission's recommended sanctions. Parties may either: 1) file exceptions to the recommended sanctions; 2) file an appeal of the Commission's findings of violations of the Act; or 3) file both exceptions to the recommended sanctions and an appeal of the Commission's findings of violations of the Act.

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

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

Robert W Bender (RWB)

Robert W. Bender, Chairperson
School Ethics Commission

Mailing Date: February 28, 2018

RESOLUTION ADOPTING DECISION – C28-13, C31-13, C41-13, C42-13, C43-13, C44-13, and C45-13

WHEREAS, pursuant to N.J.A.C. 6A:28-10.8, the School Ethics Commission (Commission) voted to transmit the above matters to the Office of Administrative Law for a plenary hearing; and

WHEREAS, by Order dated November 22, 2017, Administrative Law Judge John S. Kennedy (ALJ Kennedy) consolidated the above matters; and

WHEREAS, ALJ Kennedy issued his Initial Decision on December 21, 2017; and

WHEREAS, in his Initial Decision, ALJ Kennedy found that none of the Respondents violated any subsection of N.J.S.A. 18A:12-24.1 in creating, passing, discussing, and/or voting on a petition of public interest during the Board's executive session; Respondent Page did not violate N.J.S.A. 18A:12-24.1(e), (f), (g), (i), or (j) when he voted to place Complainant Bailey on administrative leave and then voted to approve the Board's legal bills, including those that related to an action/proceeding that Complainant Bailey had filed against him; Respondent Bright violated N.J.S.A. 18A:12-24.1(j) because he utilized his position as a Board member to usurp the authority of the Superintendent; and Respondent Davenport violated N.J.S.A. 18A:12-24.1(e), (g), (i), and (j) when he (1) approached and questioned a building principal about a personal matter which, ultimately, led the building principal to visit her doctor and contact law enforcement, (2) had an encounter with a District employee and, in the course thereof, made an inappropriate gesture and used a racial epithet, and (3) blatantly disregarded the Board's policies regarding the use of facilities; recommended that Respondent Bright be censured; and recommended that Respondent Davenport be suspended for thirty (30) days; and

WHEREAS, neither party filed Exceptions; and

WHEREAS, at its meeting on January 23, 2018, the Commission reviewed and discussed the record, including the Initial Decision, and

WHEREAS, at its meeting on January 23, 2018, the Commission discussed adopting the findings of fact from the Initial Decision; adopting the legal conclusion that none of the named Respondents violated any subsection of N.J.S.A. 18A:12-24.1 in creating, passing, discussing, and/or voting on a petition of public interest during executive session; adopting the legal conclusion that Respondent Page did not violate N.J.S.A. 18A:12-24.1(e), (f), (g), (i), or (j) when he voted to place the former Superintendent on leave and then voted to approve the legal bills relating to the action/proceeding that the former Superintendent filed against him; dismissing the Complaint against Respondent Rowell; dismissing the Complaint against Respondent Page; adopting the legal conclusion that Respondent Bright violated N.J.S.A. 18A:12-24.1(j) when he, in his capacity as a board member, questioned, reprimanded, and coerced action by an employee relative to personnel matters; adopting the legal conclusion that Respondent Davenport violated N.J.S.A. 18A:12-24.1(e), (g), (i), and (j) when he (1) approached and questioned a building principal about a personal matter which, ultimately, led the building principal to visit her doctor and contact law enforcement, (2) had an encounter with a District employee and, in the course

thereof, made an inappropriate gesture and used a racial epithet, and (3) blatantly disregarded the Board's policies regarding the use of facilities; recommending a penalty of censure for Respondent Bright; and recommending a penalty of suspension of sixty (60) days for Respondent Davenport; and

WHEREAS, at its meeting on February 27, 2018, the Commission voted to approve the within decision; and

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

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at its public meeting on February 27, 2018.

Kathryn A. Whalen

Kathryn A. Whalen, Director
School Ethics Commission

OAL DKT. NO. EDU 09448-17 (Consolidated with EDE 10580-17)
AGENCY DKT. NO. 106-5/17

DAVID RAFFO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed Consent Order, and the Initial Decision issued by the Office of Administrative Law have been reviewed.

Pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), the fully executed Consent Order is deemed to be the final decision in this matter, as the agency is a party herein.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/13/18

Date of Mailing: 4/13/18

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ATTORNEY GENERAL OF NEW JERSEY
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	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
IN THE MATTER OF THE CERTIFICATES OF DAVID C. RAFFO	OAL DOCKET NO. EDE 1620-16
DAVID RAFFO Appellant vs. New Jersey Department of Education, State Board of Examiners, Respondent	OAL DOCKET NO. EDU 9448-17 **CONSENT ORDER**

WHEREAS, Petitioner, New Jersey Department of Education, State Board of Examiners ("Examiners") and Respondent, David C. Raffo ("Respondent"), have mutually agreed to settle the above-captioned consolidated matters, with Christopher S. Porrino, Attorney General of New Jersey, by Lori Prapas, Deputy Attorney

General, appearing on behalf of the Examiners, and Pauline M.K. Young, Esq., appearing on behalf of David Raffo ("Raffo"); and

WHEREAS, OAL DOCKET NO. EDE 1620-16 arose from the Examiners' Order to Show Cause of April 6, 2017, asking Raffo to show cause why his Teacher of Social Studies Certificate of Eligibility, and Teacher of Social Studies certificate should not be revoked; and

WHEREAS, OAL DOCKET NO. EDU 9448-17 arose from Raffo's appeal of the Department of Education's refusal to issue a Supervisor Certificate to Raffo.

WHEREAS, the settlement of these matters shall not constitute precedent in other pending or future litigation.

NOW, THEREFORE, the parties hereto agree to settle the above-captioned matters upon the following terms:

1. Raffo acknowledges that he holds a Teacher of Social Studies Certificate of Eligibility issued in August 2009.

2. Raffo acknowledges that he holds a Teacher of Social Studies certificate, issued in June 2012.

3. Raffo agrees to a suspension of the certificates listed in Paragraphs one (1) through two (2) above, commencing upon the acceptance of this offer by the Examiners and concluding six months thereafter, as reflected in his Affidavit, the terms of which are incorporated herein by reference.

4. Raffo agrees to submit his original Teacher certificates listed in Paragraphs one through two above to the Examiners within ten days of the execution of this Order.

5. The Examiners, upon acknowledgement of receipt of Raffo's certificates, will withdraw their Order to Show Cause issued against Raffo.

6. By consenting to the suspension of his certificates, Raffo agrees to waive any and all hearings to which he is entitled pursuant to N.J.S.A. 18A:6-38 and N.J.A.C. 6A:9-17.7, and Raffo further agrees that he will not oppose the suspension of his certificates in any forum.

7. The Examiners do not concede that the allegations in the Order to Show Cause in this matter were not justified, nor does Raffo admit or concede the truth of the allegations in the Order to Show Cause filed in this matter, and both parties have entered into this agreement for the purposes of settlement only.

8. Examiners agree that Mr. Raffo's Teaching Certificates shall be reinstated and returned to Mr. Raffo upon expiration of 6 months (approximately June 8, 2018), and that Mr. Raffo is not required to submit any documentation or request, or meet any additional requirements in order for these certifications to be returned immediately upon the expiration of the suspension period.

9. Examiners understand and agree that Mr. Raffo may apply for teaching positions which require Certification prior to June of 2018 as long as the expected start date for such positions are after June 8, 2018.

10. The Parties agree that Mr. Raffo's application for a Supervisor Certification was blocked on or about March 3, 2017 for the same reasons that the Examiners sought to revoke Raffo's Teaching Certificates. Those reasons include allegations of improper conduct in relation to the PARCC testing procedures in April of 2016.

11. The parties agree that Mr. Raffo may reapply for his Supervisor Certification at any time.

12. The parties agree that this Consent Order fully resolves all issues between them arising from the Examiners' April 6, 2017, Order to Show Cause.

13. The parties acknowledge that this Consent Order is subject to the approval of the Examiners.

David C. Raffo
Raffo

Date: 12/4/2017

Lori Prapas, D.A.G.
Attorney for State Board of Examiners

Date: 12/18/17

CHRISTOPHER S. PORRINO
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IN THE MATTER OF THE CERTIFICATES OF DAVID C. RAFFO	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDE 10580-17 AND EDU 9445-17 (CONSOLIDATED) **AFFIDAVIT OF DAVID C. RAFFO**

DAVID C. RAFFO, of full age, being duly sworn upon his oath, deposes and says:

1. I am the holder of a Teacher of Social Studies Certificate of Eligibility, issued in August 2009.

2. I am the holder of a Teacher of Social Studies certificate, issued in June of 2012.

3. I agree to a suspension of the certificates listed in Paragraphs one (1) through two (2) above, commencing upon the acceptance of this offer by the Examiners and concluding six months thereafter.

4. In consenting to the suspension of these certificates, I agree to waive any and all hearings to which I am entitled pursuant to N.J.S.A. 18A:6-38 and N.J.A.C. 6A:9-17.7, and I further agree that I will not oppose the suspension of this certificate.

5. In signing this affidavit, I neither admit nor concede the truth of the allegations in the Order to Show Cause issued to me by the New Jersey Department of Education, State Board of Examiners, on April 6, 2017.

6. I acknowledge that in signing this affidavit I understand the terms of this agreement.

7. I understand that the suspension of my certificate shall not take effect until the State Board of Examiners has voted to accept it.

David C. Raffo

Sworn and Subscribed
before me this 4th day
of DECEMBER, 2017



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
(CONSOLIDATED)
OAL DKT. NO. EDU 09448-17

DAVID RAFFO,

Appellant,

vs.

NEW JERSEY DEPARTMENT OF EDUCATION,
STATE BOARD OF EXAMINERS,

Respondent.

IN THE MATTER OF CERTIFICATE(s) OF DAVID C. RAFFO.

OAL DKT. NO. EDE 10580-17

Pauline M.K. Young, Esq., for Appellant David Raffo (McLaughlin & Nardi, LLC, attorneys)

Nicole T. Castiglione, Deputy Attorney General, for Respondent, New Jersey Department of Education, State Board of Examiners (Christopher S. Porrino, Attorney General of New Jersey, attorneys)

Record Closed: January 10, 2018 Decided: January 11, 2018

BEFORE **JOHN P. SCOLLO**, ALJ:

STATEMENT OF THE CASE

David Raffo, a schoolteacher, while involved in several days of PARCC testing, spoke with colleagues about the content of the PARCC test. He self-reported this to his superiors. Thereafter, the State Board of Examiners, believing that Raffo violated test security, filed an Order to Show Cause why his Teacher of Social Studies Certificate and his Social Studies Certificate of Eligibility should not be revoked. This resulted in the filing of EDE-10580-2017. The Board also voted to block Raffo's application for a Supervisor's Certificate, which resulted in the filing of EDU-09448-2017.

PROCEDURAL HISTORY

The Board of Examiners transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on July 26, 2017.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on July 6, 2017.

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

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

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

ORDER

It is hereby **ORDERED** that the parties comply with the terms of the consent order; and

It is further **ORDERED** that petitioner's appeal is withdrawn with prejudice.

I hereby **FILE** this 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**, who/which by law is authorized to make the final decision on all issues within the scope of its predominant interest. 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 on all of the issues within the scope of predominant interest shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Pursuant to N.J.A.C. 1:1-17.8, upon rendering its final decision **STATE BOARD OF EXAMINERS** shall forward the record, including this recommended decision and its final decision, to **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** 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.

January 11, 2018
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: 1-17-18

Date Mailed to Parties: JAN 17 2018

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW

FAX TRANSMITTAL SHEET
Education Health and Human Services
SECTION

FAX NUMBER: 609-777-4036 **DATE: January 10, 2018**

****

TO: Honorable John Scollo **Fax:** 973-648-2358

FROM: Lori Prapas, Deputy Attorney General

FAX NUMBER:

NUMBER OF PAGES INCLUDING COVER SHEET: 9

MESSAGE: IMO: Certificates of David Raffo

****

PLEASE NOTIFY SENDER IMMEDIATELY
IF ANY PAGES ARE RECEIVED IMPROPERLY

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO Box 112
TRENTON, NJ 08625-0112

CHRISTOPHER S. PORRINO
Attorney General

MICHELLE L. MILLER
Acting Director

January 3, 2018

Via Fax and Regular Mail
Hon. John Scollo, ALJ
Office of Administrative Law
33 Washington St.
Newark, NJ 07102
F: (973) 648-2358

Re: IMO the Certificates of David Raffo
OAL Dkt. Nos. EDU 9448-17 and EDE 10580-17
(consolidated)

Dear Judge Scollo,

I represent Petitioner, New Jersey Department of Education, State Board of Examiners ("Board"), in the above referenced matter. On December 8, 2017, the Board voted to accept Respondent, David Raffo's, proposed suspension of his certificates as a resolution of the consolidated cases referenced above. Enclosed are the Consent Order, Affidavit, and Order of Suspension requested by Your Honor. Please kindly dispose of this matter in accordance with the settlement.

Sincerely yours,

CHRISTOPHER S. PORRINO
ATTORNEY GENERAL OF NEW JERSEY

By: _____
Lori Prapas
Deputy Attorney General

cc: via regular mail and email to Pauline.Young@esqnj.com
Pauline M.K. Young, Esq.

CHRISTOPHER S. PORRINO
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Department of Education,
State Board of Examiners
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625-0112

By: Lori Prapas
Deputy Attorney General
(609) 292-6120

IN THE MATTER OF THE CERTIFICATES OF DAVID C. RAFFO	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDE 10580-17 AND EDU 9445-17 (CONSOLIDATED) **AFFIDAVIT OF DAVID C. RAFFO**

DAVID C. RAFFO, of full age, being duly sworn upon his oath, deposes and says:

1. I am the holder of a Teacher of Social Studies Certificate of Eligibility, issued in August 2009.

2. I am the holder of a Teacher of Social Studies certificate, issued in June of 2012.

3. I agree to a suspension of the certificates listed in Paragraphs one (1) through two (2) above, commencing upon the acceptance of this offer by the Examiners and concluding six months thereafter.

4. In consenting to the suspension of these certificates, I agree to waive any and all hearings to which I am entitled pursuant to N.J.S.A. 18A:6-38 and N.J.A.C. 6A:9-17.7, and I further agree that I will not oppose the suspension of this certificate.

5. In signing this affidavit, I neither admit nor concede the truth of the allegations in the Order to Show Cause issued to me by the New Jersey Department of Education, State Board of Examiners, on April 6, 2017.

6. I acknowledge that in signing this affidavit I understand the terms of this agreement.

7. I understand that the suspension of my certificate shall not take effect until the State Board of Examiners has voted to accept it.

David C. Raffo

Sworn and Subscribed
before me this 4th day
of DECEMBER, 2017

CHRISTOPHER S. PORRINO
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Department of Education,
State Board of Examiners
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625-0112

By: Lori Prapas
Deputy Attorney General
(609) 292-6120

IN THE MATTER OF THE CERTIFICATES OF DAVID C. RAFFO	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDE 1620-15
DAVID RAFFO Appellant vs. New Jersey Department of Education, State Board of Examiners, Respondent	OAL DOCKET NO. EDU 9448-17 **CONSENT ORDER**

WHEREAS, Petitioner, New Jersey Department of Education, State Board of Examiners ("Examiners") and Respondent, David C. Raffo ("Respondent"), have mutually agreed to settle the above-captioned consolidated matters, with Christopher S. Porrino, Attorney General of New Jersey, by Lori Prapas, Deputy Attorney

General, appearing on behalf of the Examiners, and Pauline M.K. Young, Esq., appearing on behalf of David Raffo ("Raffo"); and

WHEREAS, OAL DOCKET NO. EDE 1620-16 arose from the Examiners' Order to Show Cause of April 6, 2017, asking Raffo to show cause why his Teacher of Social Studies Certificate of Eligibility, and Teacher of Social Studies certificate should not be revoked; and

WHEREAS, OAL DOCKET NO. EDU 9448-17 arose from Raffo's appeal of the Department of Education's refusal to issue a Supervisor Certificate to Raffo.

WHEREAS, the settlement of these matters shall not constitute precedent in other pending or future litigation.

NOW, THEREFORE, the parties hereto agree to settle the above-captioned matters upon the following terms:

1. Raffo acknowledges that he holds a Teacher of Social Studies Certificate of Eligibility issued in August 2009.

2. Raffo acknowledges that he holds a Teacher of Social Studies certificate, issued in June 2012.

3. Raffo agrees to a suspension of the certificates listed in Paragraphs one (1) through two (2) above, commencing upon the acceptance of this offer by the Examiners and concluding six months thereafter, as reflected in his Affidavit, the terms of which are incorporated herein by reference.

4. Raffo agrees to submit his original Teacher certificates listed in Paragraphs one through two above to the Examiners within ten days of the execution of this Order.

5. The Examiners, upon acknowledgement of receipt of Raffo's certificates, will withdraw their Order to Show Cause issued against Raffo.

6. By consenting to the suspension of his certificates, Raffo agrees to waive any and all hearings to which he is entitled pursuant to N.J.S.A. 18A:6-38 and N.J.A.C. 6A:9-17.7, and Raffo further agrees that he will not oppose the suspension of his certificates in any forum.

7. The Examiners do not concede that the allegations in the Order to Show Cause in this matter were not justified, nor does Raffo admit or concede the truth of the allegations in the Order to Show Cause filed in this matter, and both parties have entered into this agreement for the purposes of settlement only.

8. Examiners agree that Mr. Raffo's Teaching Certificates shall be reinstated and returned to Mr. Raffo upon expiration of 6 months (approximately June 8, 2018), and that Mr. Raffo is not required to submit any documentation or request, or meet any additional requirements in order for these certifications to be returned immediately upon the expiration of the suspension period.

9. Examiners understand and agree that Mr. Raffo may apply for teaching positions which require Certification prior to June of 2018 as long as the expected start date for such positions are after June 8, 2018.

10. The Parties agree that Mr. Raffo's application for a Supervisor Certification was blocked on or about March 3, 2017 for the same reasons that the Examiners sought to revoke Raffo's Teaching Certificates. Those reasons include allegations of improper conduct in relation to the PARCC testing procedures in April of 2016.

11. The parties agree that Mr. Raffo may reapply for his Supervisor Certification at any time.

12. The parties agree that this Consent Order fully resolves all issues between them arising from the Examiners' April 6, 2017, Order to Show Cause.

13. The parties acknowledge that this Consent Order is subject to the approval of the Examiners.

David C. Raffo
Raffo

Date: 12/4/2017

Lori Pfapas, D.A.G.
Attorney for State Board of Examiners

Date: 12/18/17

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
DAVID C. RAFFO	:	ORDER OF SUSPENSION
_____	:	DOCKET NO. 1617-190

This matter was opened by the Board of Examiners (Board) by way of an Order to Show Cause issued to David C. Raffo as to why his teaching certificates should not be revoked. Raffo currently holds a Teacher of Social Studies Certificate of Eligibility, issued in August 2009 and a Teacher of Social Studies certificate, issued in June 2012. After the teaching certification matter was transmitted to the Office of Administrative Law for hearing, Raffo presented a proposal to the Board in which he would agree to a six-month suspension of his certificates. Raffo did not admit or concede the truth of the allegations in the Order to Show Cause. After reviewing the proposal, at its meeting of December 8, 2017, the Board voted to accept it. Accordingly, on this 8th day of December 2017, David C. Raffo's Teacher of Social Studies Certificate of Eligibility and his Teacher of Social Studies certificate are hereby SUSPENDED for six months, effective immediately. It is further ORDERED that Raffo return the above-mentioned certificates to the Secretary of the State Board of Examiners, Office of Certification and Induction, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of the decision.

Robert R. Higgins, Secretary
State Board of Examiners

RRH/MZ/th

Date of Mailing: 12/15/17
via certified and regular mail

Appeals may be made to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-38.4.

119-18

EDWARD HENDRICKSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY AND RAY LOPEZ, BOARD MEMBER,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

On September 27, 2017, petitioner appealed the respondent Board's decision not to renew his annual contract as Buildings and Grounds Manager at the end of the 2016-2017 school year. Petitioner was notified by letter dated June 9, 2017 that his employment would be discussed and acted on at one of two June Board meetings. Subsequently, on June 28, 2017, petitioner was notified that the Board had voted not to renew his contract for the upcoming school year, and he was relieved of his duties that day. Petitioner's appeal asserted, *inter alia*, that the June 27, 2018 Board vote on his employment renewal was improper; he requested that the Board reconvene to vote on a motion to extend his employment contract and to pay his salary pending a vote on the motion. The Board filed a motion for summary decision, contending that petitioner's appeal was filed out of time, and that the petition failed to state a valid claim for relief.

The ALJ found, *inter alia,* that: there are no material facts at issue herein, and the matter is ripe for summary decision; petitioner had notice of the Board's decision to non-renew his contract no later than June 28, 2017; pursuant to *N.J.A.C.* 6A:3-1.3(i), petitioner was required to file his appeal within ninety days of final notice of the Board's action, or no later than September 26, 2017; in this case, the petitioner filed his appeal on September 27, 2017, thereby failing to comply with the ninety-day rule; and petitioner has failed to establish exceptional circumstances or a compelling reason to relax the statutory deadline for filing. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and 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.

April 13, 2018

119-18

OAL DKT. NO. EDU 14934-17
AGENCY DKT. NO. 229-9/17

EDWARD HENDRICKSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY AND RAY LOPEZ, BOARD MEMBER,	:	DECISION
RESPONDENTS.	:	

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 review, the Commissioner concurs with the ALJ's determination – for the reasons stated in the Initial Decision – that the petition of appeal was time barred under *N.J.A.C.* 6A:3-1.3(i). The Commissioner, likewise, concurs that petitioner has failed to set forth any compelling reason to relax the timely filing requirement. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/13/18
Date of Mailing: 4/13/18

* 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 14934-17
AGENCY DKT. NO. 229-9/17/1

EDWARD HENDRICKSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY AND RAY LOPEZ, BOARD MEMBER,
Respondents.

David Rostan, Esq., for petitioner (Law Office of David Rostan, attorneys)

Fred Shahrooz-Scampato, Esq., for petitioner (Law Offices of Fred Shahrooz-Scampato, attorneys)

Margaret A. Miller, Esq., for respondents (Weiner Law Group, attorneys)

Record Closed: February 15, 2018 Decided: March 5, 2018

BEFORE **SUSANA E. GUERRERO,** ALJ:

Respondents, the Board of Education of the City of Rahway ("Board") and Board Member Ray Lopez (collectively "respondents") filed a motion seeking summary decision on the basis that Edward Hendrickson's ("petitioner" or "Hendrickson") petition was

untimely filed; and that the Board's vote that resulted in not renewing Hendrickson's employment was proper and fully in accordance with applicable law. Petitioner opposes the motion.

FACTUAL BACKGROUND

Petitioner was employed by the Board as a Building and Grounds Manager for the Rahway Public Schools ("District") beginning in February 2011. His contract of employment extended for the remainder of the 2011/2012 school year. In May 2011, he was reappointed for the 2012/2013 school year, and was subsequently reappointed for employment by the Board in May of every year through the 2016/2017 school year. Petitioner's contract of employment for the 2016/2017 school year was due to expire on June 30, 2017. By letter dated June 9, 2017, Rahway's Superintendent of Schools advised petitioner that his employment would be discussed at the June 13, 2017 Board meeting and that action would be taken at that meeting or at the June 27, 2017 meeting.

On June 27, 2017, the Board considered Hendrickson's employment and the Superintendent's recommendation that petitioner be reappointed for a six-month period (July 1, 2017 through December 31, 2017) rather than a one-year term. The Board consisted of nine members, and the motion to reappoint petitioner for six months resulted in a vote of three ayes, three nays; with the additional three Board Members absent. Board member Ray Lopez was one of the three members who voted not to renew petitioner's employment contract.

On June 28, 2017, the day following the Board's vote, the Board's Secretary/Business Administrator informed Hendrickson of the Board's vote. Petitioner was relieved of his duties at that time, and turned in his keys to the District buildings and vehicle. He did not return to work for the District after June 28, 2017 and his contract of employment expired on June 30, 2017.

On September 27, 2017, petitioner filed his Petition of Appeal with the Commissioner of Education, and served it on the Board. The Petition asserts: that the June 27, 2017 vote did not constitute a recorded roll call of the majority vote of the full

membership of the Board pursuant to N.J.S.A. 18A:27-4.1; that another vote should have taken place to break the deadlock; that respondent Ray Lopez should have recused himself from the June 27 vote; and that the Board's decision not to renew the petitioner's contract was arbitrary and capricious. The petitioner requests that the Board reconvene to vote on the motion to extend petitioner's contract of employment and to pay his salary pending a vote on the motion.

Respondents' Motion for Summary Decision

Respondents filed a motion for summary decision on December 13, 2017. The basis for the motion is two-fold. First, respondents assert that summary decision is appropriate here because petitioner failed to file the petition within ninety days of the Board's decision, as required by N.J.A.C. 6A:3-1.3. Petitioner was advised by letter dated June 9, 2017, that the Board would be discussing his employment status at the Board's regularly scheduled June 13, 2017 meeting, and that action would be taken at that meeting or at the following meeting on June 27, 2017. The Board voted on the motion to reappoint petitioner on June 27, 2017, and while petitioner may not have been aware of the result of this vote on that day, he was informed of the outcome of the vote the following day, June 28, 2017, by the Board's Secretary/Business Administrator. Respondents maintain that petitioner knew or should have reasonably known of any claims that he may have had against the Board regarding its failure to appoint him on June 27, when the Board's final "action" occurred. Respondents assert that petitioner was, therefore, required to file his Petition of Appeal with the Commissioner of Education by September 25, 2017, or by September 26, 2017 at the latest if Hendrickson could not be deemed to have known or reasonably known of the Board's action until he spoke with the Board Secretary/Business Administrator on June 28, 2017.

Second, respondents maintain that summary decision is also appropriate because there is no legal basis for awarding petitioner's requested relief—i.e., that the Board reconvene and conduct a new vote on the motion to reappoint petitioner. The Board's June 27 vote on the motion to reappoint Hendrickson was a proper roll call vote of the Board, in complete accord with N.J.S.A. 18A:27-4.1, and it resulted in Hendrickson not receiving the necessary five affirmative votes for reappointment. Despite petitioner's

contention, the Board had no legal obligation to take a second vote on the motion in order to "break the tie."

N.J.S.A. 18A:27-4.1, which addresses a Board of Education's procedures for taking certain personnel actions, states in part:

> Notwithstanding the provisions of any law, rule or regulations to the contrary,
>
> a. 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.

Finally, respondents add that even if respondent Board member Ray Lopez had recused himself from the June 27 vote, as petitioner claims he should have, petitioner would still not have the five affirmative votes required to support his appointment.

Petitioner's Response to the Motion for Summary Decision

Petitioner opposes respondents' motion for summary decision, asserting that there are genuine issues of fact in dispute. One such genuine issue of fact is when Hendrickson became aware of the Board's final decision not to renew his contract, and when the ninety-day period began to run. Hendrickson asserts that the ninety-day limitations period did not start until the end of August because that is when a final decision regarding his employment status was made or communicated to him and when he stopped receiving payments and medical insurance from the District. According to petitioner's certification, he was told by a Board member on June 27, 2017 that the Board had a tie vote concerning his employment, and that his employment status would be revisited in July because "there was not a majority of the full board voting" to renew the contract.[1] Hendrickson's

[1] Petitioner declined to identify the Board member who he claims told him this despite respondents' request, and the undersigned's direction to do so by February 12, 2018. Petitioner was advised by the undersigned that his failure to disclose the name of this Board member would result in an adverse inference being drawn against him regarding his assertions concerning the Board member.

certification also states that he was told by the same board member after a July 14, 2017 board meeting (at which time petitioner's employment was not addressed, nor scheduled to be addressed) that the Board was "not sure as to what they were going to do" with him, but that "no final decision was made." No one advised him of his employment status with the District after that conversation. According to petitioner, since he continued to receive payments from the District through the end of August, he was under the impression that he was still employed by them and that a final decision concerning his employment had not been made.[2]

Petitioner asserts in his brief that even if the petition was filed one day late, the deadline should be relaxed given the "multiple misleading actions which respondent undertook toward Mr. Hendrickson." He argues that the Board failed to apprise him of "some facts that he had a right to know . . . that the communicating party had a duty to communicate," and that the respondents failed to communicate a final determination that Hendrickson would no longer be employed as of June 30, 2017. Petitioner maintains respondents should be estopped from asserting that the petition is time-barred because it had an affirmative obligation to communicate to the petitioner that as of June 27, he would have to seek civil redress if he wanted to appeal its decision.

Finally, petitioner argues that the Board acted in bad faith in relying on an unsubstantiated anonymous complaint in deciding not to renew his contract, and that the Board's vote was calendared in a manner to foreclose votes by supportive board members. This, according to petitioner, demonstrates a genuine question of fact as to whether respondents acted for arbitrary and capricious reasons.

Respondents' Reply

Respondents filed a reply to petitioner's opposition, stressing that petitioner failed to present any reliable or competent evidence to substantiate his claim that there is a genuine issue of material fact in dispute here. Petitioner does not dispute that the vote

[2] Respondents explain that the payments received by Hendrickson after he was released of his duties at the end of June 2017 constituted a payout of his accumulated vacation time.

took place on June 27, 2017 and that no Board action took place after this date. Anything that occurred after the vote, according to respondents, is of no consequence since this is the date that triggered the ninety-day period. Since petitioner was an at-will employee appointed for a fixed term contract extending from July 1, 2016 through June 30, 2017, his employment with the District automatically ceased on June 30 regardless of the result of the June 27 vote. Moreover, the District had no obligation to further communicate with petitioner about his employment status as the Board's vote on June 27 constituted the Board's only action taken with respect to petitioner. Petitioner's unsubstantiated claims that he was advised by a Board member that further action would be taken on his employment is insufficient to create a genuine issue of material fact.

Respondents maintain that there is no justification for relaxing the application of the ninety-day rule, and there is no basis for equitable estoppel to bar the Board from asserting the statute of limitations defense. Petitioner does not specify what the Board's alleged "multiple misleading" actions were that warrant relaxation of the ninety-day rule or that support an equitable estoppel argument. Petitioner also does not specify what information the Board failed to disclose or communicate to Hendrickson that was legally required. Respondents cite several cases, including Kaprow v. Berkeley Twp. Bd. of Educ., 131 N.J. 572 (1993), to support their position that the statute of limitations period is strictly applied, and argues that there are no compelling circumstances here that justify relaxation of the rule, even if for just one day.

Oral Argument

Oral argument on the respondents' motion for summary decision was held on February 15, 2018. Counsel for respondents repeated the arguments raised in the motion for summary decision and reply brief, arguing that summary decision is appropriate here because petitioner's appeal was not filed within ninety days of the June 27, 2017 hearing, the only day the Board took any action concerning Hendrickson's employment for the 2017–2018 school year.

Counsel for respondent, Ms. Miller, also argued that since petitioner refused to disclose the identity of the Board member who allegedly led him to believe that his

employment status would be determined sometime after June 27, there is no basis to support petitioner's position that the ninety-day period began at the end of August 2017. Despite petitioner's assertion that it was not until late August 2017 that he became aware that he was no longer employed by the District, his own answers to interrogatories undercut this position because they reveal that petitioner requested a Statement of Reason for the Board's decision sometime before July 1, 2017. The fact that petitioner requested an explanation of the Board's decision at that time confirms that he was aware in late June that the Board's decision concerning his employment was a final one.

Mr. Scampato, counsel for petitioner, argued that the focus here should not be on the date triggering the ninety-day rule, but on equity, justice and petitioner's entitlement to have a hearing. He argued that Hendrickson was not given enough information to lead him to know that his employment was not renewed in June 2017.

ANALYSIS

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." N.J.A.C. 1:1-12.5(b). To survive a 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/decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995).

The Commissioner of Education has jurisdiction to hear and determine all controversies arising under the school laws. N.J.S.A. 18A:6-9. N.J.A.C. 6A:3-1.1 to -1.17 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. N.J.A.C. 6A:3-1.1. To initiate a contested case pursuant to these rules, petitioner must prepare a petition of appeal and serve such petition upon each respondent. N.J.A.C. 6A:3-1.3(a). The petition must state the allegations and facts giving rise to the appeal, and the specific relief sought. N.J.A.C. 6A:3-1.4(a).

N.J.A.C. 6A:3-1.3(i), known as the ninety-day rule, provides that:

> [t]he 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.
>
> [N.J.A.C. 6A:3-1.3(i).]

The ninety-day rule has been strictly followed and applied almost without exception. D.Q. o/b/o S.Q. v. Sch. Dist. of Newark, 2009 N.J. AGEN LEXIS 640 (Jan. 21, 2009). In Dreher v. Jersey City Bd. of Educ., a petition filed only two days after the ninety-day period was dismissed as untimely. 1987 S.L.D. 1706, aff'd, 1988 S.L.A. 2439 (State Bd. of Educ. 1988), rev'd on other grounds, A-6120-82 (App. Div. 1989), cert. denied, 117 N.J. 138 (1989).

The Commissioner, however, has discretion to relax these rules pursuant to N.J.A.C. 6A:3-1.16 "under exceptional circumstances or if there is a compelling reason to do so." Snow v. Bd. of Educ. of the Twp. of Moorestown, 2007 N.J. AGEN LEXIS 312 (April 20, 2007). "Such authority is rarely invoked unless strict adherence to the rule would be inappropriate, unnecessary or where injustice would occur, or where the Commissioner finds the presence of a substantial constitutional issue or other issue of fundamental public interest beyond that of concern only to the parties themselves." Ibid. In fact, 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. AAA School LLC v. Passaic Cnty. Educ. Servs. Comm'n, Passaic Cnty, 2014 N.J. AGEN LEXIS 397 (June 18, 2014).

In this matter, there is no dispute that on June 27, 2017 the Board voted on a motion to reappoint Hendrickson for a six-month term extending from July 1, 2017 through December 31, 2017, as his employment contract with the District was set to expire on June 30, 2017. Of the nine sitting board members, only three of the required five members voted in the affirmative to approve Hendrickson's six-month contract, and the

motion to reappoint failed. The Board took no further action on petitioner's employment after the June 27, 2017 vote.

On June 28, 2017, the day following the Board meeting, Hendrickson met with the Business Administrator/Board Secretary who informed him of the result of the Board's vote. Petitioner does not dispute that he had this meeting and that he was informed of the Board's vote. While petitioner maintains that he was under the impression that the "tie vote" did not constitute the District's final action concerning his employment and that they would meet again to vote again on his contract, it is undisputed that Hendrickson was dismissed by the Business Administrator/Board Secretary on that day, he did not return to work for the district any time after June 28, and he was never given any official notice that his employment would be addressed by the Board again at some later date. Moreover, prior to 2017, petitioner had had his previous employment contracts with the District approved at around the same time every year and he was aware that his contract for the 2017–2018 school year had not been renewed when addressed by the Board in June 2017. **I FIND**, therefore, that petitioner received sufficient notice of the Board's final decision not to renew his employment contract on June 28, 2017, when he met with the Business Administrator/Board Secretary. While petitioner maintains that it was not until the end of August 2017 that he realized his employment with the District ended, he knew full well that his most recent employment contract expired on June 30, 2017 and that the Board did not renew his contract on June 27, 2017.

Petitioner did not file his appeal with the Commissioner of Education and the Board until September 27, 2017. Based on the foregoing, I **FIND** that petitioner was required to file the Petition of Appeal by September 26, 2017 to comply with the ninety-day filing requirement; and I further **FIND** that petitioner's petition is time-barred as it was filed past the ninety-day statutory deadline. I also **FIND** that petitioner has not presented any exceptional circumstances or compelling reasons for the Commissioner of Education to relax this deadline.

CONCLUSION AND ORDER

As the moving party, respondent Board carries the burden of proof to demonstrate, by a preponderance of the credible evidence, that summary decision should be entered in favor of respondents, and specifically that summary decision is appropriate because petitioner failed to comply with the ninety-day rule. After considering all of the proofs and arguments relative to the motion, I **CONCLUDE** that respondents have met their burden by establishing that petitioner's appeal was filed beyond the ninety-day deadline established by N.J.A.C. 6A:3-1.3(i), and that petitioner has failed to establish exceptional circumstances or a compelling reason to relax this statutory deadline.

Based on the foregoing, I **CONCLUDE** that the respondents' motion for summary decision should be **GRANTED**.

It is, therefore, **ORDERED** that the motion for summary decision filed by the Board of the City of Rahway and Ray Lopez, Board Member, is **GRANTED** for the reasons stated herein.

In light of the above findings of fact and conclusions, it is unnecessary to address respondents' additional arguments in support of the motion to dismiss—specifically that there is no legal basis for the Board to conduct a new vote on the motion to reappoint petitioner.

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

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

3/5/18
DATE

SUSANA E. GUERERO, ALJ

Date Received at Agency: 3/5/18

Date Mailed to Parties: 3/5/18

jb

118-18

JENNY NEUHOFF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Pro-se petitioner appealed the decision of the respondent State Board of Examiners (SBE) denying her application for a standard certificate as a Teacher of Theater. Petitioner acknowledged that she lacked 6 of the required 30 semester hour credits in theater courses, but requested credit for other educational courses to satisfy the requirements for issuance of the standard certificate. The SBE filed a motion to dismiss.

The ALJ found, *inter alia*, that: the SBE's motion to dismiss was considered as a motion for summary decision; there is no genuine issue as to material fact here, and the matter is ripe for summary decision; petitioner contended that English courses and a music course are appropriate to satisfy the requirements of *N.J.A.C.* 6A:9B-9.1, and that the English courses should have been accepted by the SBE because a theater minor is available through the English department of the college she attended; further, the music course should have counted toward her theater credits because the Praxis exam for theater teachers may test knowledge of vocal production, along with dramatic literature and major playwrights; the SBE exercised its discretion pursuant to *N.J.A.C.* 6A:9B-4.12(b) when it found that the courses offered by petitioner as alternative education were not the one-to-one equivalent of theater courses; likewise, the SBE thoughtfully and reasonably chose to give credit to the petitioner for her alternative experience in community theater; the SBE exercised its discretion honestly and upon due consideration in this matter; and the SBE's refusal to accept petitioner's alternate coursework in lieu of the six additional credits required for her standard certification as a Teacher of Theater was not arbitrary, capricious, or otherwise contrary to the law. Accordingly, the ALJ granted the respondent's motion for summary decision.

Upon review, the Commissioner concurred with the findings 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.

April 13, 2018

118-18
OAL DKT. NO. EDU 11780-17
AGENCY DKT. NO. 134-7/17

JENNY NEUHOFF,	:	
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.

Upon such review, the Commissioner agrees with the Administrative Law Judge (ALJ) that the New Jersey State Board of Examiners did not act in an arbitrary, capricious, or unreasonable manner when it denied petitioner's application for a Teacher of Theater Standard Certificate, as she lacked 6 of the 30 semester-hour credits in theater courses required under *N.J.A.C.* 6A:9B-9.1.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter – for the reasons expressed therein – and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/13/18

Date of Mailing: 4/13/18

[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 11780-17

AGENCY DKT. NO. 134-7/17

JENNY M. NEUHOFF,

Petitioner,

v.

NEW JERSEY STATE BOARD OF EXAMINERS,

Respondent.

Jenny M. Neuhoff, petitioner, pro se

Eric L. Apar, Deputy Attorney General, for respondent, (Gurbir S. Grewal, Attorney General, attorney)

Record Closed: January 23, 2018 Decided: March 6, 2018

BEFORE **ELAINE B. FRICK,** ALJ:

STATEMENT OF THE CASE

The New Jersey Department of Education, State Board of Examiners (the Board) denied petitioner's request for the issuance of a Teacher of Theater standard

certification, because she lacked the required semester hour credits in theater courses. Petitioner appeals the Board's decision and requests credit for other educational courses to satisfy the required semester hour credits to be issued the certification.

PROCEDURAL HISTORY

The Board rendered its written decision May 12, 2017, denying petitioner's request. The petitioner filed a petition with the Bureau of Controversies and Disputes on July 11, 2017. Respondent's counsel filed a motion to dismiss on August 8, 2017. The matter was transmitted to the Office of Administrative Law (OAL) and filed on August 16, 2017, to be heard as a contested case as per N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13.

A briefing schedule was set regarding the respondent's pending motion to dismiss, to be considered as a motion for summary decision. Petitioner filed a letter response on November 16, 2017. Respondent's request for an extension of time to file a reply was granted, but nothing further was submitted, and the record closed on January 23, 2018. Oral argument was not requested.

This decision is being rendered on the papers submitted: respondent's letter brief dated August 7, 2017; petitioner's letter response dated November 9, 2017; and the petition by petitioner, received by Controversies and Disputes on July 11, 2017, and transmitted to the OAL on August 16, 2017. The petitioner did not submit an affidavit with her letter response for purposes of this motion, but she executed her petition as an affidavit, and thus it was considered for this motion decision.

FACTUAL DISCUSSION

Petitioner seeks the issuance of a Teacher of Theater certificate. Petitioner is aware one of the requirements to attain the certificate is to have completed thirty semester hour credits in theater courses. (Petition paragraph 1).

When petitioner was advised she needed nine additional semester credits to satisfy the thirty-credit requirement, she requested that the Board credit her for her experience in Community Theater. The Board did approve that experience for three semester credits. (Respondent's letter brief page 2).

Petitioner also requested credit for English courses she completed in college, because that college offers a minor in theater through the English department. She sought credit for "ENG 325 Shakespeare" and "ENG 225 Literary Genres: Drama & Poetry". (Petition paragraph 1). She also requested credit for a course offered through the music department, "MUS 112 Beginning Vocal Skills I." Id. She contends that the theater teacher Praxis examination may test an applicant on knowledge of vocal production and technique, dramatic literature, and major playwrights, such as Shakespeare, so her alternate English courses and music course should be credited as theater courses. (Petition paragraph 2). The Board did not accept those alternative education courses, finding they were not adequate substitutes for the subject of theater.

I **FIND** as **FACTS** the following: petitioner lacks six of the required thirty semester credits in theater courses to satisfy a requirement to be issued a Teacher of Theater certificate; the courses the petitioner wants the Board to approve as alternate semester credits are two English courses and one music department course; and the Board chose not to accept those courses as the one to one equivalent of theater courses.

LEGAL ANALYSIS AND CONCLUSION

In an administrative law action, summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The non-moving party will prevail if they are able to "set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Id.

This standard is also set forth in New Jersey Court Rule 4:46-2, regarding a motion for summary judgment, which is the equivalent to an administrative law summary decision motion. In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995), the New Jersey Supreme Court stated:

> [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.
>
> Brill at 540.

The "judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill at 540, citing Anderson v Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Summary judgment, like summary decision, "is designed to provide a prompt, businesslike and inexpensive method of disposing of any case which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at trial." Brill at 530, citations omitted. "An evidentiary hearing is mandated only when the proposed administrative action is based on disputed adjudicatory facts." Contini v. Board of Education of Newark, 286 N.J. Super. 106, 120 (App. Div. 1995), cert. denied, 145 N.J. 372 (1996), citations omitted.

An applicant seeking to be issued an instructional teaching certification pursuant to N.J.A.C. 6A:9B-8, must satisfy the requirements outlined in N.J.A.C. 6A:9B-9.1. One of the requirements is that the applicant shall:

> 1. Complete one or more of the following coursework requirements for the subject area in which the candidate is seeking the endorsement:

> i. Complete an undergraduate major in the subject area . . .;
>
> ii. Hold a graduate degree in the subject area; or
>
> iii. Complete at least 30 credits in a coherent sequence of courses appropriate to the subject area as documented by an official transcript from a regionally accredited college or university, of which 12 semester-hour credits must be at the advanced level of study, including junior-, senior-, or graduate-level study as documented by the official transcript of a four-year, regionally accredited college or university . . .

N.J.A.C. 6A:9B-9.1(a).

The Board of Examiners is responsible for determining if an instructional teaching certificate may be issued to an applicant. N.J.S.A. 18A:6-38. If an applicant for a teaching certificate has been advised of a deficiency in their certification requirements, they "may provide the Board of Examiners with evidence of alternative education and/or experience that he or she believes is equivalent to the area(s) of deficiency." N.J.A.C. 6A:9B-4.12(b). The Board is not permitted to waive any requirements, but can consider alternative education if the petitioner demonstrates, by a preponderance of the credible evidence, that the alternative education is the one-to-one equivalent with the statutory requirements. Hutchinson v. New Jersey State Board of Examiners, EDU16373-12, Initial Decision (April 5, 2013), aff'd, Commissioner (May 15, 2013), <http://njlaw.rutgers.edu/collections/oal/>.

When a decision by the Board has been appealed, the Commissioner "shall ascertain whether the decision is supported by sufficient credible evidence in the record and shall not disturb the decision unless the appellant has demonstrated the State Board of Examiners . . . acted in a manner that was arbitrary, capricious, or contrary to law." N.J.A.C. 6A:4-4.1(a). "Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or

capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewerage Co. v Dep't of Environmental Protection, 122 N.J. Super. 184, 199 (App. Div. 1973), citations omitted.

The issue presented here is whether there is a genuine issue of material fact in dispute that the Board's decision was arbitrary and capricious, when it chose not to accept the petitioner's proposed alternative education courses to satisfy the semester credits in theater courses she needs to receive a Teacher of Theater certificate. N.J.A.C. 6A:9B-9.1(a). The facts are viewed most favorably to the non-moving party. The petitioner does not have the required credits in theater to be issued the certificate. She proffered English courses and a music course to be alternative education courses to satisfy the requirements of N.J.A.C. 6A:9B-9.1.

The petitioner contends that the English courses should have been accepted by the Board because a theater minor is available at the college she attended, through the school's English department. She further offers that the English courses and music course should have been the equivalent of theater courses because the Praxis examination for theater teachers may test one's knowledge of vocal production, dramatic literature, and major playwrights. The Board exercised its discretion pursuant to N.J.A.C. 6A:9B-4.12(b), and found that the courses offered as alternative education, were not the one-to-one equivalent of theater courses.

Petitioner has not alleged any "willful and unreasoning action without consideration and in disregard of circumstances" by the Board. Bayshore, 122 at 199. Simply because the English department of a college offers a theater minor, does not make all their English courses the equivalent of theater courses. Similarly, just because the Praxis examination may test an applicant on vocal production, dramatic literature, and playwrights, does not convert English courses and a music course to the equivalent of theater courses. The Board exercised its discretion honestly and upon due consideration. It thoughtfully and reasonably chose to give credit to the petitioner for her

alternative experience in community theater. Likewise, the Board thoughtfully and reasonably chose not to give credit to the petitioner for her alternative English courses and music course, to replace the statutorily required theater courses.

I **CONCLUDE** that the motion for summary decision shall be granted. Upon a review of the papers submitted, looked upon most favorably to the petitioner, there is no genuine issue of material fact in dispute that the Board's decision was arbitrary and capricious, or otherwise contrary to the law.

ORDER

Based upon the foregoing, I hereby **ORDER** that respondent's motion for summary decision shall be **GRANTED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 6, 2018
DATE

ELAINE B. FRICK, ALJ

Date Received at Agency: 3-6-18

Date Mailed to Parties: 3.6.18

mph

APPENDIX

EXHIBITS

For petitioner:

Petition signed by petitioner and notarized July 10, 2017

Petitioner's letter response to the motion, dated November 9, 2017

For eespondent:

Respondent's letter brief dated August 7, 2017

121-18

AGENCY DKT. NO. 83-4/18

IN THE MATTER OF THE TENURE	:	
HEARING OF MARC MARINOFF,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH	:	DECISION
OF KEANSBURG, MONMOUTH COUNTY.	:	

For Petitioner: Daniel R. Roberts, Esq.

No appearance by or on behalf of respondent

The tenure charges at issue in this matter were filed with the Commissioner on April 4, 2018. An acknowledgment of the charges, requesting an answer, was sent to respondent by regular and certified mail on the same date. The certified mail return receipt card indicates that respondent received the acknowledgement on April 9, 2018.

By letter dated April 11, 2018, counsel for petitioner forwarded a copy of a Superior Court Order for Forfeiture of Public Office Pursuant to *N.J.S.A.* 2C:51-2, entered by the Hon. Ellen Torregrossa-O'Connor, J.S.C. on April 9, 2018, wherein she recited that as a result of having pled guilty to one count of second degree Endangering the Welfare of a Child (Distribution of Child Pornography), in violation of *N.J.S.A.* 2C:24-4(b)5(a)iii, Marc Marinoff has permanently forfeited his position as a teacher with the Keansburg School District; further, he shall be forever disqualified from holding any other office or position of honor, trust, or profit under this State or any of its administrative or political subdivisions.

In view of the foregoing, the Commissioner concludes that this matter is moot and no further proceedings are necessary in regard to the pending tenure charges. This matter is therefore dismissed with prejudice.

A copy of this decision will be forwarded to the State Board of Examiners for whatever action it deems appropriate.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/18/18

Date of Mailing: 4/18/18

125-18

S.A. AND C.A., ON BEHALF OF MINOR CHILD, G.A.,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONERS,		
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,	:	
	:	
RESPONDENT.		
	:	

SYNOPSIS

Pro se petitioners challenged the determination of the respondent Board that G.A. was not the victim of harassment, intimidation or bullying (HIB) under the provisions of the New Jersey Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 to -32.1 (the Act). Petitioners – the parents of G.A., a sixth grade student in respondent's school district during the 2015-2016 school year – alleged that their daughter had experienced several incidents of HIB at the hands of her special education teacher. G.A. was eligible for special education services based on her Attention Deficit Hyperactivity Disorder (ADHD), and had an Individualized Education Plan (IEP). Petitioners alleged that the teacher, Ms. Levin, repeatedly pulled G.A.'s papers from her hands in view of the class, and sought their daughter out at the end of the period to give her special study guides, which actions embarrassed G.A. and made her uncomfortable. The Board filed a motion for summary decision, contending that Levin's alleged conduct did not meet the statutory definition of HIB set forth at *N.J.S.A.* 18A:37-14, and that the subject interactions with G.A. were part of her responsibilities as a special education teacher.

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 Act applies to any gesture, or any written, verbal or physical act, or any electronic communication that is reasonably perceived as being motivated either by an actual or perceived characteristic, such as, *inter alia*: race, color, religion, national origin, gender, sexual orientation, or any other distinguishing characteristic; in this case, the allegations involved separate incidents wherein G.A. purportedly experienced HIB at the hands of her special education teacher; G.A. was classified on the basis of her diagnosis of ADHD; her IEP required that she be provided with in-class support in her academic classes, including checks of her work; the IEP did not specify the manner in which teachers were required to deal with any discomfort G.A. felt with having her work checked; as the special education teacher assigned to provide support for G.A., Levin conducted in-class checks of G.A.'s work and test scores; Levin's performance of her duties caused G.A. discomfort and upset, which was communicated to Levin and other District staff; however, the facts herein – even when viewed in the light most favorable to petitioner – do not lead to the conclusion that Levin was motivated by G.A.'s disability other than their relationship as special education teacher and student, and her actions could not be reasonably perceived as motivated by the student's disability within the statutory meaning of an HIB violation. Accordingly, the ALJ concluded that the Board did not act in an arbitrary, capricious or unreasonable manner when it determined that no HIB had occurred in this case, and granted summary decision in favor of the respondent.

Upon review, the Commissioner – finding the petitioners' exceptions to be unpersuasive – concurred with the ALJ's findings and conclusions. The Initial Decision 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.

April 23, 2018

OAL DKT. NO. EDU 09703-16
AGENCY DKT. NO. 161-6/16

S.A. AND C.A., ON BEHALF OF MINOR CHILD, G.A.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

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

In their exceptions, petitioners argue that the Administrative Law Judge (ALJ) erred in granting summary decision for the Board and finding that G.A. was not the subject of Harassment, Intimidation and Bullying (HIB) because the ALJ relied upon facts that are in dispute. With respect to the ALJ's finding that the alleged conduct was not motivated by G.A.'s Attention Deficit Hyperactivity Disorder (ADHD), petitioners argue the ALJ ignored much of the evidence that was submitted, specifically evidence of what transpired before and after the December 9 and 15, 2015 incidents. Instead, the ALJ put too much weight on G.A.'s Individualized Education Plan (IEP), which is irrelevant to the HIB complaint. Petitioners contend that the conduct of G.A.'s special education teacher, Robin Levin (Levin) – *i.e.*, standing over G.A.'s shoulder, asking to see her test scores, and attempting to move her arm to see her paper – was motivated by the fact that G.A. was a special education student with a disability. Additionally, petitioners challenge the Interim Superintendent's certification submitted by the Board, arguing that she did not have knowledge of the facts and, accordingly, there was no competent evidence submitted to support the ALJ's findings of fact – in violation of the residuum rule, *N.J.A.C.* 1:1-15.5(b).

With regard to the ALJ's conclusion that the alleged conduct did not substantially disrupt or interfere with the orderly operations of the school or rights of other students, petitioners contend that the ALJ ignored evidence of a substantial disruption with the orderly operations of the school – specifically, the many emails and meetings with school officials; the fact that G.A. had to switch to another educational team; and the friction between the case manager and Levin. Further, petitioners maintain that the ALJ should not have deferred to the Board's argument that Levin was simply performing her job duties.

Petitioners also argue that the ALJ was not clear as to which material facts she relied on in determining to grant summary decision to the Board. Additionally, the ALJ failed to address petitioners' argument that the HIB investigation should have been conducted in another school so as to avoid the appearance of impropriety since the investigation was conducted in the school where Levin is employed. Finally, petitioners request that a full hearing be conducted in this matter so that they may testify, along with G.A. and Levin, and have their credibility as witnesses evaluated.

In reply, the Board contends that the ALJ properly found that G.A. was not the victim of HIB. Petitioner has not demonstrated that Levin acted improperly or that any purported mistreatment had any connection to G.A.'s status as a special education student. Instead, the Board maintains that the ALJ appropriately found that Levin's actions in checking G.A.'s work and seeing her test scores was a function of her job duties as the special education teacher assigned to G.A. With respect to petitioner's argument that the Interim Superintendent's certification lacked personal knowledge of the substantive issues, the Board explains that her job duties involve supervising all HIB matters, so she had personal knowledge of the instant HIB investigation.

The Board further argues that G.A.'s dislike for the way that Levin performed her job duties does not rise to the level of a substantial disruption or interference with the orderly operations of the school or the rights of other students. The ALJ correctly relied on *R.C.F. and A.L.F., on behalf of S.N.F. v. Board of Education of the Borough of South Plainfield, Middlesex County,* OAL Dkt. No. EDU-8049-12, decided August 2, 2013, *adopted* Commissioner Decision No. 325-13, September 18, 2013, for the proposition that students do not have the right to be free from instruction or discipline. Although G.A. may not have wanted

Levin to check her work, it was her job to do so. Finally, the Board contends that it was appropriate and in accordance with *N.J.S.A.* 18A:37-14 for it to review the HIB complaint internally, even if a member of the staff was involved. As such, the Board urges the Commissioner to adopt the Initial Decision and find that the Board's HIB determination was not arbitrary, capricious, or unreasonable.

Upon a comprehensive review of the record, the Commissioner agrees with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination because the alleged conduct fails to meet the statutory definition of HIB set forth at *N.J.S.A.* 18A:37-14. Specifically, the Commissioner concurs with the ALJ's determination that Levin's conduct was not motivated by G.A.'s status as a special education student. Levin was required as part of her job as a special education teacher to oversee G.A.'s academic progress, which would involve checking her test scores. There is nothing in the record that demonstrates that Levin's actions in doing so were in any way motivated by G.A.'s status as a special education student beyond their teacher-student relationship. As such, the Commissioner agrees with the ALJ that G.A. was not targeted because of her disability. As petitioner fails to meet the first element of HIB, it is unnecessary for the Commissioner to address the remaining elements.

The Commissioner finds petitioners' exceptions to be unpersuasive. The ALJ considered the evidence presented and appropriately found that the matter was ripe for summary decision. The ALJ did not rely on facts that are in dispute, and instead found that the parties agree as to the sequence of the material facts. To the extent that the parties may have different characterizations of certain facts – specifically regarding the December 16, 2015 incident in which petitioners allege that Levin grabbed G.A.'s paper from under her arms – those differences in the facts are not material because even assuming petitioners' characterization to be true, the alleged conduct fails to meet the statutory definition of HIB. Further, despite petitioners' contention, G.A.'s IEP was relevant to the extent that it helped demonstrate that Levin was required to provide G.A. with in-class support as her special education teacher and further explains the student-teacher relationship.

With respect to petitioners' remaining exceptions, the Interim Superintendent's certification was based on her knowledge of the case through her employment, which included supervising

HIB matters. Nevertheless, there is additional competent evidence in the record, such as the HIB complaint and investigation forms, that support the factual findings. Additionally, *N.J.S.A.* 18A:37-15 sets forth the procedure by which school districts are required to investigate HIB complaints, and there is no requirement that another school handle investigations involving staff members.

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.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/23/18

Date of Mailing: 4/23/18

* 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 09703-16

AGENCY DKT. NO. 161-6/16

S.A. AND C.A. ON BEHALF
OF MINOR CHILD, G.A.,

Petitioners,

v.

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

Respondent.

S.A. and **C.A.**, on behalf of **G.A.**, petitioners, pro se

Nikita K. Desai, Esq., and **John Comegno**, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: December 14, 2017 Decided: January 24, 2018

BEFORE **PATRICIA M. KERINS,** ALJ:

STATEMENT OF THE CASE

Petitioners, S.A. and C.A. on behalf of their daughter G.A., challenge the action of the Moorestown Township Board of Education's (Moorestown) decision that an HIB

(harassment, intimidation or bullying) violation pursuant to N.J.S.A. 18A:37-13 et seq. did not occur where a special education teacher, on several occasions, asked to see G.A.'s work in class. Petitioners allege that G.A., a special education student, had expressed discomfort with showing her work to others.

PROCEDURAL HISTORY

On June 13, 2016, petitioners filed a petition with the Commissioner of Education, challenging Moorestown's finding of "no HIB" in this matter. Respondent filed an answer on June 30, 2016. On that same day, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. Subsequently, respondent filed a motion for summary decision and petitioners filed an opposition to the motion and a cross-motion for summary decision. Respondent then filed a reply, followed by a sur-reply from petitioners. Oral argument was held and petitioners were provided an opportunity to, and did supply further information regarding G.A.'s status as a special education student.

FACTS

During the 2015-2016 school year, G.A., was a sixth-grade student at the Moorestown Upper Elementary School. As a student eligible for special education services based on her Attention Deficit Hyperactivity Disorder (ADHD), G.A. had an Individualized Education Plan (IEP) in place. G.A. was placed with "Team B," on which Robin Levin (Levin) worked as a special education teacher. Alleging that from September 2015 until December 2015, G.A. was "repeatedly harassed, intimidated and bullied by Robin Levin", petitioners filed an HIB complaint with respondent. According to their complaint, Levin repeatedly pulled G.A.'s papers from her hands in front of the entire class and constantly sought G.A. out at the end of class to give her special study guides, "knowing how [G.A.] felt embarrassed and uncomfortable about Ms. Levin's actions."

In response to petitioners' allegations respondent submits that on December 9, 2015, during classroom instruction, Levin asked to view G.A.'s work and that Levin conducted a check of all students' work at this time and did not single out G.A. According to a certification from Moorestown's Director of Curriculum and Instruction, Carole Butler,

in response to Levin's instruction, G.A. indicated that she would not show her work. Levin then responded to G.A. that her request was not a question, but rather a direction. G.A. then complied and after class Levin met with G.A. and explained that when a teacher asks to see school work, a student needs to comply, or else the behavior would be written up. G.A. told Levin that she would need to call her mother. On December 11, 2015, Levin called petitioners and spoke directly with her mother, S.A. According to S.A.'s certification, Levin had been told many times before that G.A. does not like to show her test scores to anyone. S.A. attests that, during the conversation on December 11, 2015, she repeated to Levin that G.A. is "afraid and embarrassed" during these interactions.

Respondent acknowledges that on December 16, 2015, Levin again asked to see G.A.'s work during classroom instruction but that G.A., in turn, covered her paper with her arm. Levin asked G.A. to move her arm and G.A. refused and asked Levin whether she had spoken with her mother. According to petitioners, Levin "tried to move G.A.'s arm from the top of the paper and grab the paper from underneath her hands. She pulled it away, threw it on the teacher's desk and stormed out of the classroom."

On the same date of this incident, S.A. filed an HIB form with the school. On the form, S.A. indicated that the alleged conduct was causing a "[s]ubstantial disruption or interference with orderly operation of the school" and causing G.A. "emotional harm." She alleged that Levin was "harassing and embarrassing [G.A.] in the classroom" and "disrupting [G.A.]'s learning experience." S.A. further alleged that Levin "created a hostile learning environment for [G.A.]," causing her frustration and anxiety.

On December 18, 2015, Principal Susan Powell and G.A.'s caseworker, Breanne Swedler, met with S.A. to discuss her concerns and possible adjustments to G.A.'s schedule. On December 22, 2015, the HIB investigation commenced, with investigators interviewing G.A. The investigation concluded on December 23, 2015 with a finding that the incident did not constitute HIB. Petitioners were verbally notified of the same. Respondent then made modifications to G.A.'s schedule so she would no longer be receiving instruction or special education support from Levin following the school's winter break.

On January 19, 2016, the HIB investigation was presented to the Board during its executive session. By letter dated January 21, 2016, petitioners were informed of its conclusion that no HIB had occurred. The letter also informed petitioners of their right to a hearing before the Board. Petitioners then requested an appeal hearing to challenge the decision that no HIB had occurred. On February 16, 2016, the scheduled hearing was held and continued to March 15, 2016 so that respondent would have the opportunity to hear from HIB Coordinator Michael D'Ascenzo and Principal Powell. On March 15, 2016, D'Ascenzo and Powell presented information regarding the HIB issue.

By letter dated March 21, 2016, Butler informed petitioners of respondent's decision to affirm the recommendation that no HIB had occurred. The letter also informed petitioners of their right to appeal respondent's decision to the Commissioner of Education.

After a review of the certifications filed in support of the parties' motion and cross-motion for summary decision in this matter I **FIND** that G.A. was a special education student classified on the basis of her ADHD. Her IEP does not classify her as emotionally disturbed (ED), nor does it specify the manner in which her teachers were required to deal with any discomfort she might encounter with having her work checked. Her IEP does require that she be provided with in class support in her academic classes including checks of her work. As a special education teacher assigned to provide support for G.A., Levin conducted in class checks of G.A.'s work and test scores. Levin's performance of her duties caused G.A. discomfort and upset which was communicated to Levin and other Moorestown staff.

LEGAL ANALYSIS

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, which govern the conduct of contested cases before the OAL, a party may file a motion for summary decision on substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion "shall be served with briefs and with or without supporting affidavits." N.J.A.C. 1:1-12.5(b).

Under this regulation, which is akin to the judiciary's motion for summary judgment, see R. 4:46-1, "the determination [of] whether there exists a genuine issue with respect to a material fact challenged requires . . . a consideration of whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995). In making this determination, the analysis is "'whether the evidence presents a sufficient disagreement to require submission to a [fact finder] or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533-34. Summary decision is also proper when the opposing party "points only to disputed issues of fact that are 'of an insubstantial nature.'" Id. at 529.

The Commissioner of Education will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008) (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966)), adopted, Comm'r (April 7, 2008), <http://njlaw.rutgers.edu/collections/oal/>. Further, the Commissioner will not substitute his or her judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). New Jersey courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, in order to prevail, the petitioner must demonstrate that the school board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M., supra, EDU 2780-07, Initial Decision (February 6, 2008), <http://njlaw.rutgers.edu/collections/oal/>.

Although petitioners characterize the interactions between G.A. and Levin differently than respondent, there are no genuine issues of material fact in dispute and this matter is appropriate for summary decision. Here, the parties agree as to the

sequence of the material facts, although the characterization of these events differ in some ways[1].

The analysis here must then shift to whether the material facts show a violation of New Jersey's Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13 et seq. That act is designed "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises." N.J.S.A. 18A:37-13.1(f). Under the Act, "harassment, intimidation or bullying" (HIB) is defined as:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
> b. has the effect of insulting or demeaning any student or group of students; or
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
> [N.J.S.A. 18A:37-14.]

Put in a more rudimentary way, a finding of HIB requires that: 1) the conduct is reasonably perceived as being motivated by an actual or perceived characteristic; 2) the

---

[1]. Notably, respondent argues that on December 16, 2015, "Ms. Levin asked G.A. to move her arm" in order to see her paper. Petitioners describe the same event as follows: "Ms. Levin tried to move G.A.'s arm from the top of the paper and grab the paper from underneath her hands. Ms. Levin then pulled the paper away, threw it on the teacher's desk, and stormed out of the classroom." Even accepting petitioners' characterization of this incident as true, respondent arguably is entitled to summary decision as a matter of law because, as described in greater detail within, the alleged conduct fails to meet the statutory definition of HIB.

conduct takes place on school property (or off school property if certain requirements are met); 3) the conduct substantially disrupts or interferes with the orderly operation of the school or the rights of other students; and 4) the conduct is such that a) a reasonable person should know it will physically or emotionally harm a student or damage her property, or place a student in reasonable fear that such harm or damage will occur, OR b) has the effect of insulting or demeaning the student; OR c) creates a hostile educational environment. For the fourth element to be met, only one of the three described circumstances (a, b, or c) must be satisfied.

In applying the statutory requirements to this matter, it first must be shown that the conduct must be "reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic." N.J.S.A. 18A:37-14. Respondent argues that the Petition fails to allege that Levin's conduct was motivated by an "actual or perceived characteristic" or "any other distinguishing characteristic" possessed by G.A. Respondent contends that "[s]imply alleging that G.A. is a student with a disability, without establishing that Levin treated G.A. a particular way because of her disability, does not cure petitioners' pleading deficiencies."

In their opposition papers, petitioners clarify their argument that "G.A. was harassed, intimidated and bullied by Levin due to G.A.'s disability." However, petitioners have not asserted any specific facts to support this theory. Petitioners mention that Levin only asked the special education students in the class to show their test scores to her. However, Levin was the designated special education teacher in the classroom, supporting another instructor and she had an obligation to specifically oversee the progress of the special education students. Thus, even if Levin only checked the scores of the special education students, this is not enough to support the theory that G.A. was targeted because of her disability.

Petitioners were provided the opportunity during the course of this matter to supplement their motion papers with information showing what about G.A.'s status as a special education student was the nexus to Levin's conduct in this matter. A review of

G.A.'s IEP does not show any reference to her needing special treatment when her work is checked, nor does it list any emotional disorder for which an accommodation is required. The IEP does show that her work was to be checked frequently.

The second requirement in the statutory definition of HIB states that the conduct must take place "on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3)." N.J.S.A. 18A:37-14. Here, there is no dispute that the alleged conduct took place in the classroom and, thus, on school property. Therefore, the second element of the HIB definition is met.

The statutory third requirement is that the conduct must substantially disrupt or interfere with the orderly operation of the school or the rights of other students. In R.C.F. and A.L.F. o/b/o S.N.F., EDU 08049-12, Initial Decision (August 2, 2013), adopted, Comm'r (September 18, 2013), <https://njlaw.rutgers.edu/collections/oal/html/initial/edu8049-12_1.html>, the parents of a student challenged the respondent board's finding of "no HIB" with respect to two incidents involving their daughter and a special education teacher. The incidents involved the teacher 1) sending the student to the principal's office because the student's skirt violated the school's dress code policy and 2) giving the student a "zero" because she was talking during a test. The ALJ determined that the teacher was merely disciplining the student for violations of school rules. Consequently, the ALJ rejected petitioners' position that the Board acted in an arbitrary manner by finding that no HIB had occurred.

Here petitioners allege that Levin is "disrupting [G.A.]'s learning experience." However, respondent argues that Levin was simply performing her job duties and requirements as an educator. While students have the right to "to be secure and to be let alone," they do not have the right to be free from instruction or free from discipline when those instructions are not followed. There is no evidence that Levin's conduct substantially disrupted or interfered with the orderly operation of the school or the rights of G.A. Thus, the third element of the HIB definition is not met.

Fourth, to qualify as HIB, the conduct must be such that:

> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
> b. has the effect of insulting or demeaning any student or group of students; or
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14 (emphasis added).]

Petitioners allege that "Ms. Levin knew [G.A.] felt embarrassed and afraid when she pulled her paper out from under her hands." "She has created a hostile learning environment for [G.A.] which [G.A.] finds it [sic] to be extremely frustrating causing her anxiety." Petitioner S.A. also noted that other students' inquiries about the interactions between Levin and G.A. added to "her anxiety and discomfort in the increasingly hostile learning environment."

Respondent argues that there is no support for petitioners' allegation that G.A. was afraid of Ms. Levin. Respondent notes that G.A. proactively approached Levin to ask questions about schoolwork, even after the HIB form was filed with the school, thus contradicting the assertion that G.A. feared Ms. Levin. During the investigation, G.A. stated that no classmates were teasing her about her interactions with Ms. Levin. S.A. Cert., Exh. B. G.A. further stated that she felt harassed, but then expressed that she did not know what the word means.

Accepting petitioners' characterization of the facts as true, condition (a) can be met. A reasonable person may not expect that asking to see a student's work would cause that student emotional distress. However, in this case, petitioners allege that Levin had received multiple notices that such actions caused G.A. extreme anxiety. Therefore, a reasonable person should have known, under the circumstances, that continuing to ask G.A. to show her paper could upset her. Thus, viewing the facts in a light most favorable to petitioners, this element of the HIB definition may be satisfied.

CONCLUSION

In this matter, a key issue is whether as petitioners contend, Levin's actions as alleged by petitioners were motivated by G.A.'s disability or other characteristic. The facts here support Moorestown's argument that petitioners have failed to raise a genuine issue of material fact whether Levin's actions could reasonably be perceived as being motivated by G.A.'s disability. G.A. is not classified for special education services on the basis of an emotional disability nor is there evidence in the record showing a connection between her ADHD and her negative response to having her work checked. Yet even if G.A. had been classified with emotional issues, the facts, even when viewed in petitioner's favor, do not lead to the conclusion that her teacher was motivated by her disability other than their relationship as special education teacher and student. Further, the IEP supports Moorestown's argument that Levin was acting within the general scope of her duties when she asked to see G.A.'s test scores. While it can be argued that Levin could have handled G.A.'s recalcitrance in a more sensitive manner, her actions could not be reasonably perceived as being motivated by the student's disability within the statutory meaning of an HIB violation.

In this matter therefore, respondent did not act in an arbitrary, capricious, or unreasonable manner by finding "no HIB." Some elements of the HIB definition are met because the alleged conduct took place on school property and a reasonable person should have known, under the circumstances, that the conduct could have upset G.A. However, the alleged conduct fails to meet every element required for a finding of HIB. Importantly, the conduct cannot reasonably be perceived as being motivated by G.A.'s disability or any other characteristic. Additionally, the alleged conduct did not substantially disrupt or interfere with the orderly operation of the school or the rights of G.A.

For these reasons, and because there are no material facts in dispute, summary decision should be granted in favor of respondent.

ORDER

Respondent's motion for summary decision is **GRANTED** and petitioners' 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 24, 2018
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: January 24, 2018 (emailed)

Date Mailed to Parties: January 24, 2018 (emailed)

/mel

124-18LM

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, Ed.D.
Acting Commissioner

April 20, 2018

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Wallington, New Jersey 07057

Alisa Di Chiara, Esq.
Law Offices of William R. Nunno
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Hackensack, New Jersey 07601

Re: *K.A., on behalf of minor children, D.B., D.A., and K.A. v. Board of Education of the Borough of Lodi, Bergen County, OAL Dkt. No. EDU 11902-17; Agency Dkt. No. 157-7/17*

Dear Counsel:

I have reviewed the materials filed in connection with petitioner K.A.'s motion for an extension of time to file exceptions to the March 19, 2018 Initial Decision of the Office of Administrative Law. Upon review of the submissions, I find that due to unforeseeable circumstances, possibly caused by inclement weather or the recent State holiday, petitioner did not receive the Initial Decision in a timely manner. As such, good cause has been demonstrated to extend the deadline for petitioner to file exceptions, in accordance with *N.J.A.C. 1:1-18.8.*

Accordingly, petitioner's motion for an extension of time to file exceptions to the Initial Decision is hereby granted. Petitioner is directed to file exceptions within 13 days of the date of this decision, and the Board may file a reply within 5 days of receipt of petitioner's exceptions.

Sincerely,

Lamont O. Repollet, Ed.D
Acting Commissioner

c: County Superintendent
State Law Library

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STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Arbitration	:	
- Between -	:	AGENCY DOCKET 83-4/17
BOARD OF EDUCATION, CITY SCHOOL DISTRICT OF JERSEY CITY	:	
"Board" or "Employer"	:	
- and -	:	
NABIL YOUSSEF	:	
"Youssef" or "Respondent"	:	

APPEARANCES

For the Board
SCARINCI HOLLENBECK, LLC
John G. Geppert, Jr., Esq., of Counsel
Shana Don, Esq., of Counsel
Craig Long, Esq., on the brief

For Nabil Youssef
FEINTUCH, PORWICH & FEINTUCH
Philip Feintuch, Esq.
Nabil Youssef, Respondent

BEFORE: HOWARD C. EDELMAN, ESQ., ARBITRATOR

BACKGROUND

The Board of Education served tenure charges on Nabil Youssef on or about April 25, 2017. It contends the charges have been proven and it seeks Youssef's discharge, as a result. Respondent insists they are without merit and asks that I dismiss them.

Nabil Youssef was hired by the Jersey City School District in 1999. Since 2001 he has taught Mathematics at Lincoln High School ("Lincoln"). According to the Board, though a satisfactory teacher from 2001 to about 2012, Youssef's performance, both in the classroom and out, declined substantially from the 2012-13 school year on. Respondent denies these allegations, insisting instead that they were in retaliation for a lawsuit he filed and in violation of accommodations granted him.

The Board brought tenure charges upon Youssef on or about April 25, 2017, pursuant to NJSA 18A: 6-115 et seq. In accordance with the rules of the Commissioner of Education, I was selected to decide the dispute. Hearings were held before me on September 5, 2017; October 5, 6, 12, 2017; November 2, 20, 2017; December 14, 2017 and (telephonically) on

February 2, 2018. Prior to the commencement of the hearings, two pre-trial conferences were held.

The parties submitted briefs on April 2, 2018. When I received them I closed the record. This Opinion and Award follows.

CHARGES

The charges read, in relevant part, as follows:

CHARGE ONE: INEFFICIENCY

1. During the period from September 2013 to the present, Respondent has demonstrated an inability to completely and responsibly execute his duties as a teacher in the following manner:

    a. The Respondent has failed to implement curricular goals and objective(s).
    b. The Respondent has failed to design coherent instruction.
    c. The Respondent has failed to assess student learning.
    d. The Respondent has failed to create an environment of respect and rapport.
    e. The Respondent has failed to establish a culture of learning.
    f. The Respondent has failed to communicate clearly and accurately.
    g. The Respondent has failed to use questioning and discussion techniques with flexibility and responsiveness.
    h. The Respondent has failed to engage students in learning.
    i. The Respondent has failed to provide feedback to students.

j. The Respondent has failed to attain student achievement that meets or exceeds performance benchmarks.
k. The Respondent has failed to reflect on teaching.
l. The Respondent has failed to contribute to the School and District.
m. The Respondent has failed to grow and develop professionally.
n. The Respondent has failed to attend professional development meetings.
o. The Respondent has failed to attend required staff meetings.
p. The Respondent has failed to attend pre-observation conferences.
q. The Respondent has failed to attend post-observation conferences.
r. The Respondent has failed to attend annual summative evaluation conferences.
s. The Respondent has failed to attend Corrective Action Plan conferences.
t. The Respondent has failed to demonstrate promptness and attendance.
u. The Respondent has received an Ineffective Rating for the 2013-2014 School Year in the Annual Summative Evaluation.
v. The Respondent has received a Partially Effective Rating for the 2014-2015 School Year in the Annual Summ2.ative Evaluation.
w. The Respondent has received a Partially Effective Rating for the 2015-2016 School Year in the Annual Summative Evaluation.

CHARGE TWO: CONDUCT UNBECOMING

2. The Board restates the allegations in Charge One and re-alleges and incorporates them by reference as if fully set forth at length herein.

3. During the period from September 2013 to the present, Respondent has additionally demonstrated unbecoming conduct in the following manner:

a. The Respondent has failed to create an environment of respect and rapport.
b. The Respondent has failed to engage students in learning.
c. The Respondent has failed to contribute to the School and District.
d. The Respondent has been insubordinate.
e. The Respondent has failed to comply with administrative direction.
f. The Respondent has failed to adhere to school policies and procedures.
g. The Respondent has failed to follow Board policies and procedures including but not limited to Board Policy No. 4116 "Evaluation"; Board Policy No. 4131/4131.1 "Staff Development."
h. The Respondent has failed and refused to attend professional development training sessions.
i. The Respondent failed and refused to cooperate in the Board's evaluation process.
j. The Respondent has failed and refused to complete required Student Growth Objectives.
k. The Respondent has failed and refused to adhere to Board and school policies and procedures regarding attendance.
l. The Respondent has failed to comply with Board Policy No. 4119/22/4219.22 "Conduct and Dress."
m. The Respondent has engaged in a pattern of behavior contrary to the position of a tenured educator.

CHARGE THREE: CONDUCT UNBECOMING

4. The Board restates the allegations contained in Charge One and Charge Two and re-alleges and incorporates them by reference as if fully set forth at length herein.
5. During the period from September 2013 to the present, Respondent has additionally demonstrated unbecoming conduct by insubordination in the following manner:

    a. The Respondent has failed and refused to attend professional development sessions;
    b. The Respondent has failed and refused to comply with administrative directives to attend professional development training;
    c. The Respondent has failed and refused to attend scheduled staff meetings;
    d. The Respondent has failed and refused to comply with administrative directives to attend staff meetings;
    e. The Respondent has failed and refused to submit Student Growth Objectives;
    f. The Respondent has failed an refused to comply with administrative directives to complete Student Growth Objectives;
    g. The Respondent has failed and refused to attend pre-observation conferences;
    h. The Respondent has failed and refused to attend post-observation conferences;
    i. The Respondent has failed and refused to review and participate in the evaluation process;
    j. The Respondent has failed and refused to complete Corrective Action Plans; and

k. The Respondent has failed and refused to adhere to the District's Evaluation Policy.

CHARGE FOUR: CONDUCT UNBECOMING

6. The Board restates the allegations contained in Charge One, Charge Two, and Charge Three and re-alleges and incorporates them by reference as if fully set forth at length herein.
7. During the period from September 2013 to the present, Respondent has additionally demonstrated unbecoming conduct by insubordination in the following manner:

l. The Respondent has engaged in a pattern of violation of the School and District's Attendance Policies;
m. The Respondent has consistently left the School prior to the contracted end of the school day, without notice to appropriate school personnel and in violation of the School's attendance and sign-out policy, of which he has been repeatedly advised.

CHARGE FIVE: OTHER JUST CAUSE

8. The Board restates the allegations contained in Charges One through Charge Four and re-alleges and incorporates them by reference as if fully set forth at length herein.
9. The Respondent has failed to properly adhere to the Board and school policies and procedures for overseeing students and improving her teaching skills.
10. The Respondent has consistently failed to follow instructions and violated the District's policies and procedures.
11. The cumulative effect of Respondent's misconduct and inefficiency as set forth above constitutes other sufficient cause sufficient to warrant dismissal.

WHEREFORE, Respondent has shown that he is unfit to discharge the duties and functions of the position in which he holds tenure in the School District, and he should be dismissed.

POSITIONS OF THE PARTIES[1]

The Board contends that it has proven the charges by a preponderance of the evidence. As to pedagogical matters, it argues that over three years Youssef exhibited poor, incompetent performance on numerous occasions. Specifically, it alleges:

- During a September 19, 2013 walk-through Principal Cheryl Richardson-Evans noted several students sleeping (3T-211)[2];

- on December 17, 2013, Assistant Principal Monica Patel observed Youssef's Math class and saw no instructional interaction among students, chairs in rows so that no group work existed and only personal conversations or total inattentiveness (Exhibit R-19). This class was rated ineffective;

- on April 28, 2014, Assistant Principal Chris Gadsen noted no collaboration or interaction in Youssef's class (3T-321);

---

[1] To expedite these findings, I have summarized the parties' positions.

[2] Numbers in parentheses ( ) refer to the sequence of transcripts and pages therein.

- on November 10, 2014, Patel noted a lack of communication between students and teacher (2T 49-50), only simple question and answer recall (2T 52-53);

- on January 10, 2015, Vice-Principal Natasha Walker concluded that Respondent failed to demonstrate familiarity with students' individual needs, as well as a lack of higher order instruction (4T-428);

- similarly, Walker's observation of a class held on February 15, 2016 was devoid of differentiated instruction based on students' needs (District Exhibit 157);

- on April 18, 2016, as in the other observations, Patel noted students inattentive (heads down) and/or personal conversations unrelated to the lesson (2T 69-70);

- on May 12, 2016, Evans indicated that Youssef was only "going through the motions (District Exhibit 121).

These observations were conducted fairly and without regard to any complaints, lawsuits, etc., Youssef filed, the Board insists. In its view, they demonstrate a pattern of incompetent, ineffective teaching performance.

Moreover, the Employer argues, Youssef made no attempt to participate in efforts to improve his teaching. When given his evaluations he refused to discuss them, it insists, blithely discounting their validity (e.g., District Exhibit 109).

Furthermore, Respondent failed to create Student Growth Objectives ("SGOs") for 2014-15, 2015-16 and 2016-17, the Board submits, in spite of repeated admonitions to do so (2T-56, 58, 60). These and other forms of indifference to his duty to improve resulted in ongoing, uncorrected and unacceptable performance, it alleges.

Similarly, the Board asserts, Youssef paid no attention to his obligation to attend most, if not all staff meetings. Citing numerous exhibits, the Employer insists that, "Respondent failed to attend a single meeting over a three year period." Brief, p. 1, emphasis in the original. It sought the assistance of his Union in getting him to attend, it suggests (3T 203-04). In virtually all instances his response was, "Talk to my lawyer (3T 204)," according to various witnesses. Based on this record, the Board concludes that from 2013 on Youssef stopped teaching and stopped trying to improve.

Furthermore, Youssef was progressively disciplined, as the Board sees it. During the last three years of his service at Lincoln he received many warnings and reprimands regarding his failure to meet with school officials regarding the creation of SGOs,

year-end evaluations and other matters directly related to teaching, it argues (e.g., Exhibits B77-79). These and related misfeasance resulted in the withholding of two increments, the Board points out.

Beyond the factors noted above, the Board insists that Youssef failed to attend every department or faculty meeting, beginning with the 2013-14 school year. Attendance was important to apprise teachers of new curricula, technology and other procedures so as to improve his classroom perform, the Board maintains. Respondent's refusal to show up constitutes willful neglect and, given the reminders and reprimands received as a result, gross insubordination, the Employer suggests.

As to Youssef's defenses to the charges, the Board contends they are utterly without merit. It notes Respondent raised the following claims:

a) The charges were preferred in retaliation for a lawsuit he filed against the District which he refused to withdraw.
b) He could not make most meetings because they were held in a building different from the one in which he taught and he had received a medical accommodation requiring him not to climb steps or walk significant distances.
c) he could not upload a number of evaluations on "Teachscape."

In response to these defenses, the Board offers the following:

a) Youssef's decline in performance and failure to attend meetings arose at least a year before the lawsuit was filed.
b) Respondent's medical accommodation expired before many of the incidents at issue. In addition, video surveillance shows him climbing steps free of incidents, and he often signed in at one building and taught at the other.[3]
c) "Teachscape" contained his evaluations and other performance related documents which were readily accessible online to Youssef.

Additionally, the Board notes that Youssef received three "Partially Effective" or "Ineffective" ratings three years in a row. These evaluations alone warrant his dismissal, pursuant to TEACHNJ. No mitigating factor may alter this finding, it submits. NJSA 18A: 17.3. A wealth of case law supports this view, the Board urges. Accordingly, it asks me to sustain the charges preferred against Respondent and to uphold its decision to seek the termination of his services.

Respondent, via his counsel, seeks the dismissal of all the charges. As to each one individually, he raises the following defenses:

[3] The buildings in question are the Freshman Academy and the Main building.

1. a. There is no evidence he failed to implement curricular goals and objectives.

b. The District did not establish that Respondent did not design coherent instruction. It criticized only his failure to use technology in the class.

c. No testimony was offered regarding the assessment of student learning.

d. Substantial testimony revealed an atmosphere of student respect and rapport (District Exhibits 29, 52, 58, et al.)

e. Exhibits P-52, 57, 68, 108, 123, rate Youssef "Effective" with respect to establishing a culture of learning.

f. No scores demonstrate Respondent failed to communicate clearly and accurately.

g. Students answered many questions and some responses (District Exhibits 64, 68) resulted in an "Effective" rating for the flexible use of questioning and discussion techniques.

h. Contrary to the view of District officials, Youssef did engage students in learning. In some instances, he was rated "Effective" in this category (District Exhibits 64, 68).

i, j, k. - No testimony supports these charges.

l, m, n, o, p, q, r, s, t.
These allegations are not relevant to Charge 1.

u, v, w. - The evidence concerning these charges demonstrates that the observation reports did not adhere to the evaluation process.

Respondent acknowledges I am without authority to second-guess evaluations in their assessment of teachers' classroom performance. However, he urges, I am empowered to overturn those assessments if I determine they are arbitrary, capricious or in

violation of NJSA 18A: 6-17.2 by failing to provide a corrective action plan ("CAP"). That his evaluations fall into one of these categories may be gleaned from the following evidence, in Respondent's view:

- His summative evaluation for 2014-15 should have been 2.64, not 2.4 and it did not include an SGO score. Had it been correctly computed he would have received an "Effective" for that year.
- No SGO score was given for 2015-16.
- No CAP was ever provided.
- A review of Patel's testimony reveals substantial inconsistencies. She also did not know if he ever attended meetings at the Freshman Academy.
- Many of Patel's comments are merely quotes from the Danielson rubric.
- Gadsen's testimony covered a two day observation; yet his report referred only to one day.
- The 2015-16 summative evaluation score should have been 2.60, not 2.40.
- Evans inferentially agreed with Youssef when she indicated she gets teachers' SGOs after they are sent to Patel. She has no knowledge if corrected SGOs are returned to the teacher (58-716).
- Jesse Prokopczyk, a Math supervisor, reported an Effective rating for the lesson observed on March 27, 2016. Respondent's Exhibit 8. Prokopczyk had no reason to offer suspect or biased testimony.
- Youssef never received a long observation. All he got were results of visits lasting approximately fifteen minutes.
- The District never questioned or criticized Youssef's students' results. These positive outcomes reveal that his instruction was generally effective.

- Despite having the credentials, he was improperly denied the position of SIG supervisor (T6-545).
- It was futile for him to discuss his performance with his supervisors because they were named defendants in a lawsuit he filed.

Respondent asks me to credit his testimony. Moreover, he insists, other evidence, similarly detailed, reveals his evaluations were arbitrary and/or capricious. Also, he urges, he never received a CAP, as required by statute. Thus, he concludes, he is not culpable of poor or ineffective teaching performance.

With respect to allegations relating to the attendance at meetings, Youssef cites the accommodation he received as a result of an injury. Contrary to the Board's insistence, he maintains it did not have an end date. As such, he should not have been required to walk up steps and/or between buildings in order to attend before or after school meetings.[4] He also insists that the requirement to attend frequent meetings violated the Collective Bargaining Agreement between the Board and the JCEA. As noted above, he urges that it would have been

[4] Moving between the Freshman Academy and the main building requires both activities.

futile to attend post-observation conferences with administrators who were named in his lawsuit.

Finally, like the Board, Respondent cites a number of decisions in which teachers were not discharged, even where, in his view, the charges were more serious than the ones leveled against him. Consequently, he concludes, these allegations should be dismissed or, at worst, he should receive a minor penalty.

DISCUSSION AND FINDINGS

The charges preferred against Respondent fall, generally, into three categories. The first relates to classroom performance. The second involves the failure to attend post-observation conferences, faculty meetings and department meetings. The third concerns administrative procedures; either failing to sign out or leaving early without notifying proper personnel.

Normally, my Opinion and Award would deal with the most important issues before lesser ones. Here, however, it is necessary to address charges which, even if proven, would result in a minor penalty.

After all, the real, underlying issue here is whether Respondent should be discharged or not.

The third category is the least significant. The allegations that are included therein generally involve leaving the school toward the end of the day. They do not include claims that Youssef left his class unattended. As such, I find, if proven they would yield a relatively minor penalty. In light of these factors and my determination reached on the more serious charges, I make no finding, neither express nor implied, on these lesser ones.

The remaining allegations center on classroom performance and the obligation to attend meetings. They will be analyzed separately.

As to the former, I am convinced that, with some reservations noted below, Youssef is culpable of poor teaching, as delineated in these charges. Most telling, in this regard, is Evans' testimony. She observed Respondent's class on April 28, 2015; November 13, 2015; and May 12, 2016. While the first one noted that Youssef demonstrated proficiency in Mathematics, he failed to deploy technology to enhance instruction (District Exhibit 68).

This is a legitimate criticism, I find. Contrary to Respondent's suggestion, District officials may require teachers to incorporate its use into their lessons.

A similar view, though unrelated to technology, appeared in Evans' evaluation of the November 13, 2015 class. He did not incorporate new techniques, such as detailing real life problems, into the classroom (District Exhibit 108).

It was also legitimate to conclude, as Evans did, that Respondent was "going through the motions" while she observed him on May 12, 2016. Criticism that he did not provide challenging work for students and did not circulate among them while the lesson was taught are valid, I find (District Exhibit 126).

Assistant Principal Monica Patel went into Youssef's class on a number of occasions: December 17, 2013; November 10, 2014; April 18, 2015. Not all of Patel's comments were helpful. For example, mere recitation of the Danielson rubric is certainly problematic. However, her conclusion that students were not engaged in the lessons - i.e., involved in personal conversations (2T-27, 30); had their head down (2T-30, 69), constitutes fair criticism, which, I

am convinced, was made objectively and without malice. Clearly, such disengagement contributes substantially to an overall poor lesson. Also, Natasha Walker found a lack of instruction based on students' individual needs (Observation of January 10, 2015) though, to Youssef's credit, she found the class "materially challenging" (4T 429).

In my view, what this all means is that Respondent was a marginal teacher. Though his classes were not chaotic, many students were not engaged nor challenged. Thus, I conclude, the Board has amply demonstrated his culpability of poor teaching performance, as alleged.[5]

The issue of SGOs and CAPs is relevant. I disagree with Youssef that he completed all SGOs as required. District Exhibit 18 and Evans' testimony convinces me Youssef did not complete and submit these documents. Patel credibly affirmed this failure. While he made some attempt to make appropriate SGO data more recently, he did not supply added information as directed.

[5] I reach this conclusion without re-calculating summative scores. The more significant factors are the events which occurred in the classroom on the dates cited.

As to the CAP, the record reveals that these are accessible online (5T-713, 735). While Youssef claimed no knowledge of the ability to view them in this manner, his failure to attend a meeting with Patel to discuss his 2015-16 CAP is likely the reason for his ignorance. He cannot be excused for his lack of knowledge by deliberately shirking his obligation in this regard.

My determination that Youssef failed to teach his classes competently [6] should not be misinterpreted. Until the 2013-14 school year his performance was deemed satisfactory. Even Prokopczyk's evaluation found him effective, and it is entitled to some consideration.

Nevertheless, it is likely that the introduction of the Danielson rubric and related protocol affected his performance, especially since, as noted herein, he made virtually no effort to modify his pedagogy in accord with its dictates. Stated differently, Youssef had the potential to perform adequately but stuck to his own pre-Danielson methodology which prevented him from doing so.

[6] See specific ruling on each charge, below.

There remains the issue of Respondent's failure to attend meetings to consider. The abject disregard for simple clear directives to attend them is, to a large extent, more worthy of condemnation than his problematic teaching.

The record contains overwhelming evidence that Youssef knew of scheduled and required staff and professional development meetings. It contains similar evidence that he simply refused to attend all or virtually all of them. I credit Evans' recall that she "begged" him to attend the professional development ones and that his response each time was, "Talk to my lawyer." It matters little whether Youssef failed to show up at 64 of these meetings during the period 2013-16, as Patel claimed, or whether the number was somewhat less (2T 43-44). There remains a single incontrovertible fact. On a consistent and repeated basis Respondent routinely failed to appear at numerous meetings of various types, despite being on clear notice of his obligation to do so. Indeed, the Union sought to get him to attend, but to no avail.

No teacher sets his/her own rules. So long as the obligations do not endanger his safety, compliance

is required. Failure to comply constitutes insubordination. Youssef's was manifest during the period in question.

Respondent raised five defenses to these charges. He insisted he did attend a number of them; that he could not attend many because he had to move from one building to another; that it was futile to meet with officials who were named defendants in the lawsuit; that the charges were in retaliation for having filed it; and that the Union contract limited the number of meetings he had to attend.

None of these assertions withstands scrutiny. Teachers signed attendance sheets for virtually all meetings. Youssef's name did not appear on any of them.[7] Even if he came in late at various times, as he insisted, it would have been an easy matter to sign at the bottom of the list. That teachers complained about his failure to appear is further evidence, though hearsay, that he routinely absented himself. Nor does the JCEA labor contract offer a valid excuse for his non-attendance. The workplace adage, "Obey, then grieve" required his presence. He could not engage in self-help in violation of directives.

[7] There may be one or two exceptions. No matter.

Youssef also asserted he had a medical accommodation which absolved him from walking up steps or long distances (District Exhibit P-204). The wording of the document states the accommodations "will be valid for the next six months."[8] However, more important is that other evidence conclusively demonstrates his physical condition did not prevent him from attending the meetings he missed.

A contemporaneous video shows Youssef walking up and down a flight of seven or eight steps a number of times in a period of a half hour or so. Also, for a substantial period after the accommodation was granted, he was assigned to the Freshman Academy. Youssef signed in at the main building and walked to the Academy. I see no reason why, under these circumstances, he could not walk back to attend a meeting at the end of the day in the building where he signed in.

Nor does his filing of the lawsuit absolve Youssef of the obligation to attend the meetings in question, I am convinced. It is rank speculation that it was "futile" to conference with administrators who were named defendants. It is equally speculative to

[8] The letter was transcribed in February 2015.

conclude that the poor evaluations he received resulted from retaliation by these individuals. He simply may not use the lawsuit as a shield to insulate himself from meeting his professional obligations. Thus, I conclude, there existed no valid reason for Respondent's failure to appear at numerous meetings which other faculty were required to attend.

What is the appropriate penalty for Respondent's misfeasance? In my view, the Board's decision to terminate his services must be upheld. As I suggested above, were his misfeasance grounded only in poor performance, a penalty less than dismissal, accompanied by appropriate remediation, might be warranted. This is so notwithstanding the statutory language that three ratings below "Effective" requires discharge.

Here, however, the record is far more incriminating. Youssef, though properly credentialed and schooled in his subject, demonstrated total indifference to and rejection of his professional obligations. He was progressively disciplined, having received numerous warnings and, most telling, a withholding of an increment. He had to know that further dereliction of duty would result in his

dismissal. Yet he continued to be insubordinate and scornful of the basic requirements of his job.

I reach this determination notwithstanding the Arbitration Awards cited by Respondent. Though in some cases teachers were returned to service despite individual acts which could be categorized as more egregious than Youssef's, none reveals a three year continuing course of conduct which so blatantly evinces a complete disregard for a teacher's professional obligations.[9]

Accordingly, and for the foregoing reasons, I conclude that Nabil Youssef is to be dismissed from service upon the Board's receipt of this Opinion and Award.

[9] The Award page sets forth my findings as to each specification.

AWARD

CHARGE ONE

1. Respondent Nabil Youssef is culpable of Specifications 1(a), (b), (d), (e), (f), (g), (h), (i), (k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), (w) as set forth in the charges preferred against him on or about April 25, 2017.

CHARGE TWO

2. Respondent Nabil Youssef is culpable of Specifications 2 (a-w), with the exception of 2(c) and 2(j), as set forth above.

3. Respondent Nabil Youssef is culpable of CHARGE TWO, Specifications 3(a) through 3(k), with the exception of 2(c) and 2(j) and 3(l) and 3(m).

4. Respondent Nabil Youssef is culpable of CHARGE THREE to the extent indicated with respect to CHARGES ONE and TWO.

5. Respondent Nabil Youssef is culpable of CHARGE THREE; Specifications 5(a) through 5(k).

6. Respondent Nabil Youssef is culpable of CHARGE FOUR to the extent indicated in (1), (2) and (3) above.

7. I make no determination as to Respondent Nabil Youssef's culpability of CHARGE FOUR - Items 7(l) and 7(m).

8. CHARGE FIVE merely restates other charges.

9. Respondent Nabil Youssef is not culpable of CHARGE ONE 1(c) and (j) and CHARGE TWO 3(l) and (m).

The appropriate penalty for Respondent Nabil Youssef's culpability of the charges set forth above is dismissal from service.

DATE: April 23, 2018

Howard C. Edelman, Esq.

State of NY)
)ss:
County of New York)

On this, the 23rd day of April, 2018, before me the undersigned Howard C Edelman, personally appeared, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same for the purposes therein contained.

Mary Halberstadt
Notary Public

MARY HALBERSTADT
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01HA6101768
Qualified in Nassau County
Commission Expires November 17, 2019

130-18R

OAL DKT. NO. EDU 13092-16
(EDU 12499-15 ON REMAND)
AGENCY DKT. NO. 181-7/15

P.F., ON BEHALF OF MINOR CHILD, C.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record, proposed 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 – mindful of the Commissioner's August 25, 2016 determination that the prior settlement agreement could not be approved because *N.J.A.C.* 6A:32-7.8(c) prohibits the Board from removing the disciplinary finding from C.F.'s record upon her graduation from private school as she is no longer enrolled in the District. Since the settlement agreement now requires disposal of the disciplinary finding in accordance with the Destruction of Public Records Law, *N.J.S.A. 47:3-15 et seq.* – which complies with *N.J.A.C.* 6A:32-7.8(c) – the Commissioner can approve the within settlement agreement. It is noted, however, that to the extent that Paragraph 4(e) of the settlement agreement provides for strict confidentiality, the parties are reminded that the settlement agreement may be subject to disclosure pursuant to the Open Public Records Act, *N.J.S.A.* 47:1A-1, *et seq.*

Accordingly, subject to the foregoing, 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: 4/24/18
Date of Mailing: 4/24/18

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT

OAL DKT. NO. EDU 13092-16

AGENCY DKT. NO. 181-7/15

P.F. ON BEHLAF OF C.F.,

Petitioners,

v.

WASHINGTON TOWNSHIP BOARD OF EDUCATION,

Respondent.

John O. Poindexter, III., for petitioner

Lauren E. Tedesco, Esq., for respondent (Capehart Scatchard, PA, attorneys)

Record Closed: March 19, 2018 Decided: March 20, 2018

BEFORE **SARAH G. CROWLEY**, ALJ:

This matter being remanded to the Office of Administrative (OAL) pursuant to the Commissioner's decision dated August 25, 2016. This matter was transmitted to the OAL on August 31, 2016, 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. Respondent's certified resolution approving the settlement was submitted along with the Settlement Agreement.

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.

March 20, 2018
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: 3/22/18

Date Sent to Parties: 3/22/18

Attachment

CAPEHART SCATCHARD
ATTORNEYS AT LAW

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2018 MAR 19 P 5:08

FAX

To:

Name: Hon. Sarah Crowley, A.L.J.

Company: Office of Administrative Law

Fax: 609-689-4100

From:

Name: Anne Clementi

Phone: 856-234-6800 x2145

Fax: 856-235-2786

Notes:

Total Number of Pages (including cover): 2

Date/Time: 3/19/2018 12:44:42 PM

Message: Re: P.F. o/b/o C.F. v. Washington Township Board of Education

Docket No. EDU 13092-2016

Agency Ref. No. 181-7/15

Attached please find correspondence from Ms. Tedesco with regard to the above-referenced matter.

CONFIDENTIALITY NOTE:

The documents accompanying this telephone transmission contain information from the law firm of Capehart & Scatchard, P.A., which is confidential and/or legally privileged. The information is intended only for the use of the individual or entity named on this transmission sheet. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this telecopied information is strictly prohibited, and that the documents should be returned to this firm immediately. In this regard, if you have received this telecopy in error, please notify us by telephone immediately so that we can arrange for the return of the original documents to us at no cost to you.

CAPEHART SCATCHARD
ATTORNEYS AT LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Lauren E Tedesco
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Fax: 856.235.2786

March 19, 2018

Honorable Sarah Crowley, A.L.J.
Office of Administrative Law
P.O. Box 049
Trenton, NJ 08625-0049

Re: P.F. o/b/o C.F. v. Washington Township Board of Education
OAL Docket No. EDU 13092-2016
Agency Ref. No. 181-7/15
Our File No. 9240-41152

Dear Judge Crowley:

As you will recall, this office represents the Washington Township Board of Education in the above-referenced matter. By letter dated March 5, 2018, we forwarded a copy of the fully executed Settlement Agreement and General Release to Your Honor. Please be advised that the Settlement Agreement referenced the incorrect docket number. The correct number is **EDU-13092-2016**.

Should you need anything further, please do not hesitate to contact me at the office.

Respectfully,

CAPEHART & SCATCHARD, P.A.

Lauren E. Tedesco

LET/amc
cc: John O. Poindexter, III. Esq.

CAPEHART SCATCHARD
ATTORNEYS AT LAW

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2018 MAR -9 P 3:11
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

March 5, 2018

Honorable Sarah Crowley, A.L.J.
Office of Administrative Law
P.O. Box 049
Trenton, NJ 08625-0049

Re: P.F. o/b/o C.F. v. Washington Township Board of Education
OAL Docket No. ~~EDU 12499-2015 S~~
Agency Ref. No. 181-7/15
Our File No. 9240-41152

Dear Judge Crowley:

Enclosed please find a copy of the fully executed Settlement Agreement and General Release with regard to the above-referenced matter.

Should you need anything further, please do not hesitate to contact me.

Respectfully,

CAPEHART & SCATCHARD, P.A.

Lauren E. Tedesco

LET/amc
Enc.
cc: John O. Poindexter, III, Esq. (w/enc.)

Capehart & Scatchard, P.A. 8000 Midlantic Drive, Ste. 300S P.O. Box 5016 Mount Laurel, New Jersey 08054-5016
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Attorneys for Respondent, Washington Township Board of Education

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2018 MAR -9 P 3:11
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

P. F., o/b/o minor child, C.F., Petitioner, vs. WASHINGTON TOWNSHIP BOARD OF EDUCATION, Respondent.	:	NEW JERSEY DEPARTMENT OF EDUCATION OFFICE OF ADMINISTRATIVE LAW DOCKET NO.: EDU 12499-2015S AGENCY REFERENCE NO.: 181-7/15 **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release ("Agreement") is entered into by and between P.F., individually and on behalf of her daughter, C.F. (collectively referred to as "Petitioners") and the Washington Township Board of Education ("Board") to resolve and settle all outstanding issues involved in this matter between the Petitioners and the Board.

WHEREAS, the Board is a local public board of education organized under Title 18A of the New Jersey Statutes with its principal offices located at 206 E. Holly Avenue, Sewell, Gloucester County, New Jersey 08080; and

WHEREAS, C.F., ("the Student") attended Orchard Valley Middle School as an eighth grader for the 2014-2015 school year; and

WHEREAS, the Student's mother is P.F.; and

WHEREAS, as a result of a June 25, 2015 disciplinary hearing before the Board arising from the Student's alleged violation of the Board's Student Code of Conduct, the Board placed the Student in an alternative educational setting, specifically the Gloucester County Alternative School ("GCAS"), for the 2015-2016 school year; and

WHEREAS, on or about July 15, 2015 Petitioners filed a Petition of Appeal, Docket No. OAL-EDU 12499-2015S, Agency Ref. No. 181-7/15, challenging the underlying disciplinary action and the Board's placement of the Student at GCAS; and

WHEREAS, the Student was never enrolled in GCAS for the 2015-2016 school year and instead was enrolled in a private school outside of the Washington Township School District; and

WHEREAS, after extensive negotiations, and in order to resolve any and all disputes between the Parties without resorting to time-consuming and costly litigation, the Petitioners and the Board have agreed to a full and final settlement of all claims and matters asserted in the Petition of Appeal and any claims that could have been asserted in a state or federal court proceeding that relate directly or indirectly to C.F.'s attendance in the Washington Township School District and/or the Petition of Appeal; and

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

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

1. So long as the Student continues her private school placement her disciplinary record containing the disciplinary finding of June 25, 2015, will be disposed of in accordance with the Destruction of Public Records Law, N.J.S.A. 47:3-15 et seq.

2. **Release and Waiver**: The Petitioners agree to the following **RELEASES AND WAIVERS:**

a. For good and valuable consideration, the Petitioners **RELEASE, WAIVE AND FOREVER DISCHARGE** the Board (its former, present and future board members, officers, employees, agents, and servants) 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 C.F.'s education, placement, proposed placements, discipline, counseling, safety, and/or attendance within the Washington Township School District and any out-of-district placement. This Release and Waiver shall run from the beginning of time through the date of full execution of this Agreement. This Release and Waiver includes, but is not limited to: (a) any and all claims asserted or which could have been asserted in the Petitioners' Petition of Appeal; (b) any and all claims asserted or which could have been asserted under the New Jersey Anti-Bullying Bill of Rights Act; (c) compensatory education; (d) reimbursement of any medical, behavioral, or education evaluations; (e) transportation; (f) expert witness fees; and/or (g) attorney's fees.

b. By way of further illustration, this Release and Waiver also includes, but is not limited to, any claim relating to the education of the Student in the Washington Township Public Schools and/or alleging a denial of FAPE, a denial of her safety,

discrimination, state or federal constitutional rights violations, state or federal civil rights violations, monetary damages, pain and suffering, personal injury, property damage, reimbursement, attorney's 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, including 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 Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq., the New Jersey Constitution, the United States Constitution, and the Civil Rights Act, 42 U.S.C. §1983, §1985, and §1988, the New Jersey Civil Rights Act, and the New Jersey Tort Claims Act N.J.S.A. 59:1-1 et seq.

c. This Release and Waiver does not limit any rights or obligations herein or bar an action to enforce the terms of this Agreement.

3. Within five (5) days of full execution of this Agreement, Petitioners agree to submit said Agreement to the New Jersey Office of Administrative Law and/or the Bureau of Controversies and Disputes for dismissal of the Petition of Appeal with prejudice.

4. **Miscellaneous:**

a. The Parties agree to refrain from taking any actions or making any statements, oral or written, critical or otherwise, in any medium whatsoever, relating to or concerning this dispute, which have the purpose of injuring each other's

reputations or causing any person or entity to refrain from or cease any employment or business relationship with each other.

b. 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.

c. P.F. represents that she has the 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 the Student not a party hereto.

d. P.F. acknowledges she has been represented by legal counsel and has had assistance of counsel throughout the instant matter.

e. 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.

f. The provisions of this Agreement are severable and, if any part is found to be unenforceable, the other portion shall remain fully valid and enforceable.

g. This Agreement shall be governed and construed under the laws of the State of New Jersey.

h. This Agreement constitutes the full and complete agreement of the Parties and may not be changed or modified absent mutual written agreement of the Parties.

i. This Agreement is binding upon the Parties and their respective heirs, assigns or successors in interest.

j. The Board has approved this Agreement and has authorized Superintendent Joseph N. Bollendorf to execute the Agreement on the Board's behalf.

Patricia Forman 1/19/2018

Patricia Forman, individually and on behalf of Cire Forman. Date

2/26/18

Joseph N. Bollendorf, Superintendent
Washington Township Board of Education Date

Target 4-23-18

Due 5-7-18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
P.O. Box 049
Trenton, NJ 08625-0049

OAL Docket. No.: EDU 11721-2015 S

Agency Ref. No.: 175-7/15

Transmitting Agency: Department of Education

Judge: John S Kennedy
Judge Phone No. (609) 441-3763
****
Jones, Najmah v. City of Atlantic City BOE, Atlantic County

Notice of Return
Failure to Appear

****

Najmah Jones failed to appear at a scheduled hearing on 01/29/2018. This case has been returned to the transmitting agency whose name is listed above.

If you failed to appear and still want to have a hearing, you must explain IN WRITING, why you did not appear. Send the explanation to the transmitting agency: Department of Education. The contact name and address for the agency appears on the second page of this notice. The agency must receive the explanation WITHIN 13 days of this notice. Copies of the explanation must be sent to all other parties.

The Office of Administrative Law no longer has jurisdiction over this matter. PLEASE DO NOT CONTACT the Office of Administrative Law. We can only direct you to the transmitting agency.

March 22, 2018
Date

Deputy Clerk, OAL

OAL DKT. NO. EDU 11721-15
AGENCY DKT. NO. 175-7/15

NAJMAH JONES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and *N.J.A.C.* 1:1-3.3 – along with copies of the notification sent to the parties by the OAL on March 22, 2018, providing petitioner with an opportunity to submit an explanation for her nonappearance – have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed a contested case before the Commissioner, and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/24/18
Date of Mailing: 4/24/18

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

132-18L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, Ed.D.
Acting Commissioner

May 2, 2018

Marc H. Zitomer, Esq.
Schenck, Price, Smith & King, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932

Michael I. Inzelbuch, Esq.
1340 West County Line Road
Lakewood, New Jersey 08701

Re: *M.V. and M.V., on behalf of minor child, T.V. v. Board of Education of the Township of Marlboro, Monmouth County, OAL Dkt. No. EDU 19081-16, Agency Dkt. No. 302-11/16.*

Dear Counsel:

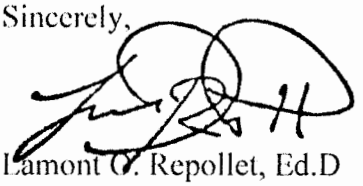
I have reviewed the papers filed in connection with respondent's request for interlocutory review of Administrative Law Judge (ALJ) Joseph Ascione's Prehearing Order, dated April 7, 2017, wherein ALJ Ascione set forth the following Order of Proofs: The respondent will have the burden to initially prove that its actions comport with the regulations under the HIB violation statute. Petitioner will then have the burden to establish that the Board's actions are arbitrary, or capricious.

Upon full consideration of the submitted materials, and pursuant to my discretion under *N.J.A.C.* 1:1-14.10, I have determined not to grant interlocutory review. Respondent's request for such review is significantly out of time. *N.J.A.C.* 1:1-14.10(b) provides that a request for interlocutory review must be made to the agency within five (5) working days from receipt of the order or ruling. Furthermore, the time limits may be relaxed by the agency head only where the need for a delay is caused by honest mistake, accident, or any cause compatible with due diligence. *See N.J.A.C.* 1:1-14.10(g). Respondent filed the present request well over a year after ALJ Ascione's Order was issued. Moreover, respondent has not set forth any reasons why the time limits should be relaxed by the agency head.

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Accordingly, respondent's request is denied.

Sincerely,



Lamont O. Repollet, Ed.D
Acting Commissioner of Education

LOR/SLP/ATA

cc: Joseph Ascione, Administrative Law Judge
Clerk, Office of Administrative Law

VIA FACSIMILE AND REGULAR MAIL

133-18SEC

AGENCY DKT. NO. 100-4/18

IN THE MATTER OF LARRY JAMES,	:	
CAMDEN CITY SCHOOL DISTRICT,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission (Commission), forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. The Commission determined that the respondent violated the School Ethics Act for failure to file disclosure statements that are required in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1, despite having received multiple reminders and opportunities to file these mandatory disclosure statements. The Commission recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent files his disclosure statement before the Commissioner issues his final decision, the Commission recommends that the respondent be suspended for 30 days. Respondent did not file exceptions, nor has he submitted proof that he filed his disclosure statement. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon school officials by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels. Accordingly, the respondent is removed from his position as a school official, as of the date of this decision, for violating the School Ethics Act.

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/03/18
Date of Mailing: 5/03/18

* 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 LARRY JAMES	:	BEFORE THE SCHOOL ETHICS COMMISSION
CAMDEN CITY PUBLIC SCHOOL DISTRICT, CAMDEN COUNTY	:	DECISION FOR FAILURE TO FILE PERSONAL/RELATIVE AND FINANCIAL DISCLOSURE STATEMENTS
	:	DOCKET NO.: D05-17

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on February 27, 2018, and mailed on February 28, 2018, through regular and electronic mail (e-mail), directing Respondent, a "school official" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find him in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1.

The OTSC issued by the Commission provided notification to Respondent that he had twenty (20) days to respond to the OTSC, and that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. Annually, on or before April 30th of each year, all school officials, as defined in N.J.S.A. 18A:12-23, must file Disclosure Statements with their local board secretaries or charter school designees. N.J.A.C. 6A:28-3.1(a). In addition, after the April 30th filing date, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. N.J.A.C. 6A:28-3.1(c), (d), (e) and (f).

Respondent is a school official who was elected or appointed after April 30, 2017 and, therefore, required to file Disclosure Statements within thirty (30) days of election or appointment. Respondent failed to file his Disclosure Statements within the statutorily required timeframe.

By correspondence dated February 5, 2018, from the Camden County Office of Education, Respondent was reminded that his Disclosure Statements had not yet been filed with

the Commission. This correspondence further advised Respondent that if he failed to file his Disclosure Statements within the next week, the Commission had the authority to issue an OTSC, find him in violation of the Act, and recommend a penalty up to and including removal for his non-compliance.

When the correspondence from the Camden County Office of Education failed to cause Respondent to file his Disclosure Statements, the Commission sent him another letter dated February 14, 2018, and informed Respondent that failure to file his Disclosure Statements by February 21, 2018, would result in the Commission voting to issue an OTSC. The Commission further advised that, if an OTSC issued, Respondent would be assessed a penalty, up to and including removal.

When Respondent failed to file his Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by February 21, 2018, and despite receiving multiple reminders and opportunities to file his Disclosure Statements, an OTSC was issued by the Commission at its meeting on February 27, 2018. After having been served with the OTSC, Respondent still failed to file his completed Disclosure Statements, or to otherwise respond to the OTSC.

DECISION/PENALTY RECOMMENDATION

Based on the record as set forth above, at its meeting on March 27, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1. Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files his Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

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

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked

"Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4-1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: March 28, 2018

133-18SEC+

AGENCY DKT. NO. 100-4/18

AMENDED DECISION

IN THE MATTER OF LARRY JAMES,	:	
CAMDEN CITY SCHOOL DISTRICT,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY.	:	DECISION
	:	

On May 3, 2018, the Commissioner issued a decision removing the respondent from his position for violating the School Ethics Act by failing to file disclosure statements that are required in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The School Ethics Commission (Commission) had recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent filed his disclosure statement before the Commissioner issued his final decision, the Commission recommended that the respondent be suspended for 30 days. The respondent did not file exceptions to the recommended penalty nor did he institute an appeal of the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Subsequent to the issuance of the Commissioner's May 3, 2018 decision, the Commission advised the Commissioner that respondent had, in fact, filed the requisite disclosure statements.[1] In determining the appropriate penalty in this case, it is important to recognize that the respondent is a principal in the Camden City School District where his presence in the school is vital to the students and other staff members.[2] Therefore, there must be flexibility in the implementation of a penalty that is least disruptive to the school community. Based on the unique circumstances in this case, the Commissioner finds that the appropriate penalty is a reprimand. Additionally, the respondent is severely admonished for his delay in filing the requisite disclosure

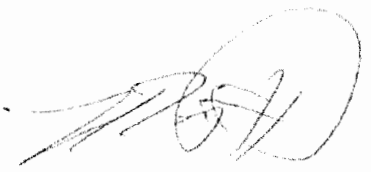
[1] The respondent never informed the Commissioner that he filed the disclosure statements despite having the opportunity to do so prior to the May 3, 2018 decision.

[2] The majority of cases that are forwarded to the Commissioner for review of the Commission's recommended penalty for violating the School Ethics Act involve members of local boards of education. The suspension of a board member does not interfere with the daily operations of a school.

statements, thereby causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

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

IT IS SO ORDERED.[3]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/16/18

Date of Mailing: 5/21/18

[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).

AGENCY DKT. NO. 95-4/18

IN THE MATTER OF THOMAS MACPHERSON,	:	
BOARD OF EDUCATION OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF PINE HILL, CAMDEN COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission (Commission) forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. The Commission determined that the respondent violated the School Ethics Act for failure to file disclosure statements that are required in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The Commission recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent files his disclosure statement before the Commissioner issues his final decision, the Commission recommends that the respondent be suspended for 30 days. Respondent did not file exceptions nor has he submitted proof that he filed his disclosure statement. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon school officials by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels. Accordingly, the respondent is removed from his position as a school official, as of the date of this decision, for violating the School Ethics Act.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/03/18

Date of Mailing: 5/04/18

* 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 THOMAS MACPHERSON, JR.	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***PINE HILL SCHOOL DISTRICT*, CAMDEN COUNTY**	:	**DECISION FOR FAILURE TO FILE PERSONAL/RELATIVE AND FINANCIAL DISCLOSURE STATEMENTS**
	:	**DOCKET NO.: D06-17**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on February 27, 2018, and mailed on February 28, 2018, through regular and electronic mail (e-mail), directing Respondent, a "school official" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find him in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1.

The OTSC issued by the Commission provided notification to Respondent that he had twenty (20) days to respond to the OTSC, and that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. Annually, on or before April 30th of each year, all school officials, as defined in N.J.S.A. 18A:12-23, must file Disclosure Statements with their local board secretaries or charter school designees. N.J.A.C. 6A:28-3.1(a). In addition, after the April 30th filing date, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. N.J.A.C. 6A:28-3.1(c), (d), (e) and (f).

Respondent is a school official who was elected or appointed after April 30, 2017 and, therefore, required to file Disclosure Statements within thirty (30) days of election or appointment. Respondent failed to file his Disclosure Statements within the statutorily required timeframe.

By correspondence dated February 5, 2018, from the Camden County Office of Education, Respondent was reminded that his Disclosure Statements had not yet been filed with

the Commission. This correspondence further advised Respondent that if he failed to file his Disclosure Statements within the next week, the Commission had the authority to issue an OTSC, find him in violation of the Act, and recommend a penalty up to and including removal for his non-compliance.

When the correspondence from the Camden County Office of Education failed to cause Respondent to file his Disclosure Statements, the Commission sent him another letter dated February 14, 2018, and informed Respondent that failure to file his Disclosure Statements by February 21, 2018, would result in the Commission voting to issue an OTSC. The Commission further advised that, if an OTSC issued, Respondent would be assessed a penalty, up to and including removal.

When Respondent failed to file his Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by February 21, 2018, and despite receiving multiple reminders and opportunities to file his Disclosure Statements, an OTSC was issued by the Commission at its meeting on February 27, 2018. After having been served with the OTSC, Respondent still failed to file his completed Disclosure Statements, or to otherwise respond to the OTSC.

DECISION/PENALTY RECOMMENDATION

Based on the record as set forth above, at its meeting on March 27, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1. Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files his Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

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

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked

"Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4-1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: March 28, 2018

OAL DKT. NO. EDU 15251-16
AGENCY DKT. NO. 247-9/16

M.M., ON BEHALF OF MINOR CHILD, J.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the Assistant Superintendent of the Bayonne School District signed the Agreement on behalf of the Board. The file does not contain a copy of the Board's resolution approving the settlement and designating the Assistant Superintendent to sign the Agreement on its behalf; nor is the resolution attached to the Agreement itself. In the alternative, the Agreement is not signed by the Board Attorney, who is the Board's duly authorized representative in litigation. In the absence of either the Board Attorney's signature or the appropriate Board resolution approving the Agreement and designating the Assistant Superintendent to sign the Agreement on its behalf – as required under *N.J.A.C.* 6A:3-1.13 – the Commissioner cannot approve the settlement terms that are within his jurisdiction.

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: 5/03/18
Date of Mailing: 5/04/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 15251-16

AGENCY DOCKET NO. 247-9/16

M.M. ON BEHALF OF J.M.,

Petitioners,

v.

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

Respondents.

Julie Warshaw, Esq. appearing on behalf of petitioners (Warshaw Law Firm, LLC)

Mitchell L. Pascual, Esq., for respondent (Chasan Lyener & Lamparello, P.C.)

Record Closed: March 27, 2018 Decided: March 29, 2018

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 6, 2016, 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. Several hearings and conference calls were conducted. The last hearing date was scheduled on December 22, 2017. Prior to that date, the parties advised that the matter was settled and that the hearing was not necessary. On January 23, 2018, the parties submitted the settlement agreement. The undersigned requested the original settlement agreement. Under my direction, my secretary inquired

about the original settlement agreement on January 24, February 16, and March 27, 2018, to no avail. A copy of the Settlement Agreement and Release is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement and General Release, I **FIND**:

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

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

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

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

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

3-29-18
DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

Date Mailed to Parties:
APR 3 2018
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE ("Agreement") is made and entered into this _____ day of _____ 2017, in the case of M.M. o/b/o J.M. a minor child, v. Bayonne Public School District Board of Education, in an appeal dated September 23, 2016 before the Commissioner of Education of a Harassment, Intimidation, and Bullying ("HIB") finding against J.M. This settlement agreement ("Agreement") is made by and between M.M. on behalf of J.M., minor child ("Petitioner") and the Bayonne Township Public School District Board of Education ("District"), hereinafter sometimes referred to collectively as "the Parties."

WHEREAS, M.M., as natural guardian and parent of the minor petitioner, J.M., filed an appeal with the Commissioner of Education on or about September 23, 2016, which sought the following: (1) that the finding of HIB against J.M. from an alleged incident on the field during a game on field day on May 24, 2016 be reversed, (2) that the HIB finding and investigation be removed from his student record, (3) that J.M.'s transfer from the Henry E. Harris School to the Mary J. Donohue School was a form of retaliation and that he must be switched back, (4) that the District would contact the State and to remove the "tag" and identifying marker from J.M.'s student ID number regarding the HIB finding, (5) that J.M.'s IEP shall be modified to include counseling to address the effects of this alleged incident and the transfer to a different school, to address his needs and learning issues, and to hold an IEP meeting to discuss the results of the independent evaluation conducted by Dr. Daniel DaSilva and incorporate those findings in J.M.'s IEP, and (6) attorney's fees.

WHEREAS, J.M. at all relevant times was a classified student;

WHEREAS, the parties both desire to resolve this matter on an amicable basis without the time, costs, and uncertainty of litigation;

NOW, THEREFORE, the parties, in full consideration of the exchange of promises and covenants set forth herein, the sufficiency of which is hereby acknowledged and agree as follows:

A. Terms of Agreement:

1. The District has agreed to remove all references to the HIB Complaint(s), investigation, and findings from J.M.'s student records,

2. the District has agreed to contact the State of New Jersey and request in writing to remove all "tags" associated with HIB and an HIB finding from J.M.'s student ID number;

3. The District has agreed to hold an IEP meeting within a reasonable time after receipt, by the District, of Dr. Daniel DaSilva's independent evaluation report in order to discuss the results of the independent evaluation and incorporate those findings in J.M.'s IEP as deemed appropriate and necessary by the District; and

4. The District has agreed to pay attorney's fees in the amount of $3,000.00 within 30 days from the date that the Board of Education approves said settlement agreement.

In exchange for the above terms, Petitioner has agreed to resolve this action and dismiss her appeal with prejudice.

B. No Admission: This Agreement is for the purpose of settling the dispute between the Parties only. This Agreement does not constitute an admission by either party on any of the issues that may have been in dispute between them.

C. Settlement and Release: This Agreement is a full settlement and release of all claims which exist or may exist between the Parties relating to said alleged HIB incident through the date this Agreement is fully executed. The Parties release and forever discharge each other (including with regard to the District its officers, agents, employees, predecessors, assigns, and

attorneys) from all existing demands, actions, claims of any kind, nature, and description both in law and in equity which the Parties have or might have, whether known or unknown, against each other through the date of execution of this Agreement, except as may be necessary to enforce the terms of this Agreement. Without limiting the foregoing generalities, the Petitioner specifically acknowledges that she is waiving any rights against the District which may have accrued, or might have accrued, to her and/or to J.M. which she may or may not know about at this time up to the date of execution of this Agreement.

D. Confidentiality: Except as necessary to enforce its terms or as required by law, subpoena, or administrative/judicial order, the Parties agree that the terms of this Agreement will be kept confidential and private between them; that is, neither party will disclose any aspect of it to anyone else. In the event either party is asked about the dispute, they shall tell all others that the dispute was settled in a manner satisfactory to both parties. The Parties may, without breach of this Paragraph or of this Agreement, disclose the terms of the Agreement to their educational, legal, and financial advisors and representatives to the extent necessary for such individuals to perform their professional duties and so long as each individual/entity commits to keeping such terms confidential. In addition, Petitioner may disclose the terms of the Agreement to family members who agree to be bound by the terms of this paragraph. The Parties may, without breach of this Agreement, as they deem necessary or desirable, seek to to introduce copies of this Agreement as an exhibit in administrative or judicial proceedings in furtherance of their rights and obligations under this Agreement and the laws as they relate to Petitioner or to J.M.

E. Access to Counsel and Understanding of Agreement: The Parties to this Agreement hereby acknowledge that they had the opportunity to consult with an attorney or other representative of their choice throughout these proceedings, that they have read this entire

Agreement, and that they have signed this Agreement, voluntarily with full understanding of its terms and without any other inducements or promises except for those set forth herein. This Agreement shall be executed in duplicate by the Parties. Each executed Agreement shall be considered an original. Petitioner hereby certifies that she is satisfied with the legal services of Julie Warshaw, Esq. of the Warshaw Law Firm, LLC. Petitioner also certifies that she has the legal authority on behalf of herself and her son, J.M., minor child, to enter into this Agreement.

F. Entire Agreement: The Agreement constitutes and contains the entire agreement between the Parties and shall be binding and inure to the benefit of the executors, administrators, personal representatives, heirs, successors and assigns of each. There are no other understandings or agreements, verbal or otherwise, in relation thereto, between the parties except as expressly set forth herein.

G. Governing Law: This Agreement is entered into in the State of New Jersey and shall be construed and interpreted in accordance with the laws of the State of New Jersey.

H. Construction: The language of all parts of the 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 to the action. In the event that one or more sections of this Agreement are found by a judicial body to be ineffective, the remainder of the Agreement shall remain in full force and effect. This Agreement can be executed in parts and still be considered an original copy. Captions set forth herein shall be for reference purposes only.

IN WITNESS WHEREOF having carefully reviewed this entire Agreement, each party intends to be legally bound to the terms set forth herein, and have executed the foregoing Agreement on the date first above written.

M.M. as parent and natural and legal guardian
of J.M., Minor Child

Assistant Superintendent
Representative of the Bayonne Township Public School Board of Education

136-18

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATES	:	COMMISSIONER OF EDUCATION
OF DYLAN JERYC, NORTH HUDSON	:	DECISION
ACADEMY, HUDSON COUNTY.	:	

SYNOPSIS

In December 2017, 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 for resigning his position without giving the notice required by his contract with the petitioner, a private school for students with disabilities. The respondent submitted a response, and the matter was transmitted to the OAL. Respondent subsequently failed to appear at a peremptory hearing on the issue of suspension of his certificate, and failed to provide an explanation for his failure to appear.

The ALJ found that: respondent failed to appear for a peremptory hearing on March 27, 2018; the attorney for the North Hudson Academy, appeared and was ready to proceed with the hearing; the respondent failed to provide any explanation for his failure to appear at the peremptory hearing. The ALJ concluded that, given respondent's failure to appear, the matter was no longer a contested case before the OAL. The ALJ therefore ordered the matter dismissed for failure to appear.

Upon review of the record, the Commissioner rejected the Initial Decision of the OAL, and granted summary decision to the petitioner. In so doing, the Commissioner found, *inter alia*, that: a dismissal was not appropriate in this situation, as petitioner brought the action and should have presented ex parte proofs on the merits at hearing, pursuant to *N.J.A.C.* 1:1-14.4(d); and the record makes clear that respondent ceased to perform his duties before the expiration of the term of his employment. Accordingly, the Commissioner ordered the suspension of the respondent's teaching certificate 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 3, 2018

136-18
OAL DKT. NO. EDU 01343-18
AGENCY DKT. NO. 10-1/18

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATES	:	COMMISSIONER OF EDUCATION
OF DYLAN JERYC, NORTH HUDSON	:	DECISION
ACADEMY, HUDSON COUNTY.	:	

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.

By way of procedural background, this matter was opened via an order to show cause served by petitioner North Hudson Academy (Academy), 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 the Academy. Respondent submitted a response and the matter was transmitted to the OAL. Thereafter, respondent failed to appear at a prehearing conference on February 27, 2018 and called the following day to say he was unable to attend. Respondent then failed to appear at a peremptory plenary hearing on the issue of the suspension of his teaching certificate on March 27, 2018, and failed to provide an explanation for his failure to appear. The Administrative Law Judge (ALJ) issued an Initial Decision indicating that this matter is no longer a contested case and dismissed the matter for failure to appear.

Upon review, the Commissioner finds that a dismissal of this matter is not appropriate in this situation, as the order to show cause was filed by the Academy, not respondent. Under this circumstance, the Academy should have presented ex parte proofs on the merits, pursuant to *N.J.A.C.* 1:1-14.4(d). Review of the affidavit submitted by the Academy, as well as the employment agreement entered into by the Academy and respondent in June 2017, indicates that: respondent entered into a contract for 2017-2018 school year; the employment agreement states that if respondent fails to complete

the term of the agreement for the school year, that he shall be assumed guilty of unprofessional conduct; on September 5, 2017, respondent sent written notice that he was resigning from the Academy and that his last day would be November 6, 2017; and respondent did not report to work on November 7, 2017. In his answer, respondent does not dispute the terms of his employment contract or the dates of his employment with the Academy. Instead, respondent argues that he needed to leave his employment with the Academy to be closer to his home and family, as his total commute was nearly three hours each day. He adds that the work environment at the Academy was stressful and he disagreed with some of the Academy's policies and practices. The record makes clear that respondent ceased to perform his duties before the expiration of the term of his employment. As such, the Commissioner finds that respondent is guilty of unprofessional conduct and his teaching certificate may be suspended, pursuant to *N.J.A.C.* 18A:26-10.

Accordingly, the Initial Decision of the OAL is rejected for the reasons set forth herein. Summary decision is hereby granted to the Academy, 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: 5/03/18

Date of Mailing: 5/04/18

* 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 01343-18
AGENCY DKT. NO. 10-1/18

IN THE MATTER OF THE TEACHING CERTIFICATES OF DYLAN JERYC, NORTH HUDSON ACADEMY, HUDSON COUNTY.

Dylan Jeryc, appearing pro se

Robert S. Feder, Esq. on behalf of North Hudson Academy

Record Closed: March 27, 2018 Decided: March 28, 2018

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about November 22, 2017, the Commissioner of Education Office of Controversies and Disputes received a Motion for an Order to Show, Affidavit and Proof of Service filed by the North Hudson Academy a private school for students with disabilities, seeking the suspension of Dylan Jeryc's teaching certificates for resigning on inadequate notice, pursuant to N.J.S.A. 18A:26-10.

On December 8, 2017, the Commissioner of Education Kimberley Harrington signed an Order to Show Cause demanding Dylan Jeryc to show cause before the Commissioner of Education by written answer within 20 days of receipt of the Order why an Order should not be entered suspending Dylan Jeryc's teaching certificate for unprofessional conduct.

On January 16, 2018, Dylan Jeryc in a letter addressed to the Commissioner responded, the letter was not signed.

On January 24, 2018, the Commissioner sent the matter to the Office of Administrative Law (OAL), for a Fact-Finding hearing and the matter was assigned to the hearing stated Administrative Law Judge.

On February 6, 2018, the OAL sent a notice of a prehearing conference to be held on February 27, 2018, this date was agreed to by this tribunal and the parties. On February 27, 2018, North Hudson Academy and its counsel appeared, Dylan Jeryc did not. On February 28, 2018, the undersigned received a message that Dylan Jeryc called to say he was unable to attend the hearing on February 27, 2018.

On March 1, 2018, another notice was sent to the parties advising that the matter was going to be heard on March 27, 2018, and that it was to be a **peremptory** plenary hearing on the issue of the suspension of the teaching certificate.

On March 27, 2018, Robert Feder, Esq., and a representative of the North Hudson Academy appeared and ready to proceed with the hearing. Dylan Jeryc did not appear nor did he call and no papers or notices were received in response to the Order to Show Cause or the peremptory hearing.

Because Dylan Jeryc again failed to appear for the peremptory hearing date and has had an opportunity to present his case, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law.

It is **ORDERED** that this matter be **DISMISSED** for failure to appear.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 28, 2018
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: March 28, 2018

Date Mailed to Parties: MAR 29 2018

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

lr

137-18

T.S. and C.S., on behalf of minor child, S.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TOTOWA, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In November 2017, petitioners T.S. and C.S. – the paternal grandparents of minor child S.S. – appealed the determination of the respondent Board that S.S. was not eligible for a free public education in the Totowa school district. Petitioners submitted certification that S.S. has been permanently domiciled with them in Totowa since September 12, 2017, and requested that S.S. be permitted to continue her education in Totowa schools. The petitioners filed a motion for summary decision. The Board asserted that a residency investigation revealed that S.S. resides with her mother, N.J., in Paterson, and is not entitled to attend Totowa schools.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(b)(2), petitioner has the burden of proof in a determination of residency; in the instant case, there was contradictory testimony presented by petitioners and respondent's witnesses; the testimony of N.J., S.S.'s mother, was not credible; T.S., Jr. – the father of S.S. – indicated in the original school registration form that his daughter lived with her mother, N.J., seven days a week; T.S., Jr. provided as identification a driver's license with a Paterson address; and N.J. collected food stamps for herself and her children, including S.S., at her Paterson address. The ALJ concluded that S.S. is not domiciled in Totowa, and affirmed the respondent Board's determination to remove S.S. from the Totowa school district.

Upon consideration, the Commissioner rejected and remanded the Initial Decision of the ALJ. In so determining, the Commissioner found, *inter alia*, that the issue of domicile cannot be decided on the factual determinations and conclusions set forth in the Initial Decision; specifically, the contradictory nature of several facts that are material to the adjudication of this matter render it impossible for the Commissioner to ascertain S.S.'s domicile, and affirm the ALJ's conclusion. Accordingly, the matter was remanded to the OAL for further proceedings.

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 5/04/18

OAL DKT. NO. EDU 17468-17
AGENCY DKT. NO. 258-11/17

T.S. and C.S., on behalf of minor child, S.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TOTOWA, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and petitioners' exceptions – filed pursuant to *N.J.A.C.* 1:1-18.4 – have been reviewed.[1]

The Administrative Law Judge (ALJ) found that S.S. was not domiciled in Totowa because: her school registration form indicated that she would be living with her mother, N.J., seven days a week; S.S.'s father – T.S., Jr. – held a driver's license with a Paterson address; and N.J. collects food stamps for herself and her children, including S.S., at the Paterson address. Petitioners take exception to the ALJ's consideration of the facts and legal conclusions. Specifically, petitioners argue that the ALJ: failed to address the motion for summary decision filed by them; erred in making credibility determinations; and did not consider relevant facts such as T.S., Jr.'s residence in Totowa with T.S. and C.S. – the grandparents of S.S.

Upon review, the Commissioner rejects – for the reasons set forth herein – the ALJ's decision finding that S.S. is not domiciled in Totowa, and remands the matter for further proceedings.

[1] The Commissioner was not provided with a transcript of the hearings at the OAL.

As a preliminary matter, the Commissioner notes that ALJs are within their discretion to make credibility determinations of witnesses pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-15.8; consequently, the Commissioner considers the factual findings and determinations of the ALJ material – and relies on the ALJ's credibility determinations of witness testimony – in rendering a final agency decision. In residency matters, where the adjudication of the issues are fact-specific, it is vital that the factual findings and legal analysis in the Initial Decision provide thorough deliberation of the evidence in the record and application of the facts of the case to the relevant laws. In this matter, the Commissioner finds that the issue of domicile cannot be decided on the factual determinations and conclusions as set forth in the Initial Decision. Specifically, the contradictory nature of several facts that are material to the adjudication of this matter renders it impossible for the Commissioner to ascertain S.S.'s domicile and affirm the ALJ's conclusion.

With regard to factual discrepancies, testimony of the resource officer revealed that the District conducted surveillance of the Paterson and Totowa residences in February 2018, and observed S.S. at the Totowa residence. No further investigation was undertaken to confirm whether S.S. was in fact living in Totowa with her father and grandparents, or exactly when she moved there; nor did the ALJ attempt to ascertain same. The ALJ also disregarded, without making a credibility determination, relevant testimony from T.S. in which he stated that T.S., Jr. resides in Totowa with T.S. and C.S.; this assertion requires further exploration and analysis, as it implicates S.S.'s eligibility to attend school in the District. Relatedly, the ALJ did not examine pertinent statutes and regulations in this matter, including *N.J.A.C.* 6A:22-3.1(a)(1) and

N.J.S.A. 18A:38-1(b).[2] Lastly, the ALJ did not address the disposition of petitioners' outstanding motion for summary decision.

The record does not support the ALJ's conclusion that S.S. is not domiciled in Totowa. Nor is it possible to establish from the record that S.S. *is* domiciled in Totowa without further examination and clarification of the facts. Accordingly – for the reasons expressed herein – this matter is remanded to the OAL for further proceedings.

IT IS SO ORDERED.[3]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/04/18

Date of Mailing: 5/04/18

[2] The record does not indicate that petitioners sought to have S.S. enrolled as an affidavit student; nor have they taken any actions pertaining to same. Petitioners, however, appear to suggest that S.S. should be allowed enrollment pursuant to *N.J.S.A.* 18A:38-1(b), which is further evidenced by the fact that petitioners have filed this matter on behalf of S.S., as opposed to T.S., Jr. Petitioners also maintain that T.S., Jr. is domiciled in Totowa, thereby implicating *N.J.A.C.* 6A:22-3.1(a)(1). In the absence of clear facts relating to the aforementioned considerations, the Commissioner will not make a determination on the legal soundness of the filing of the petition and the arguments proffered by petitioners. The Commissioner does, however, deem it necessary for S.S.'s parents – particularly T.S., Jr. – to be joined as parties to the case for proper adjudication of this matter.

[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 17468-17
AGENCY DKT. NO. 258-11/17

T.S. AND C.S. ON BEHALF OF MINOR CHILD S.S.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF TOTOWA, PASSAIC COUNTY,
Respondent.

Leonard S. Miller, Esq. for petitioners

Raymond B. Reddin, Esq., for respondent

Record Closed: March 12, 2018 Decided: March 28, 2018

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE

Petitioners T.S. and C.S. challenges the Board of Education of the Borough of Totowa's (respondent or Board) residency determination of S.S.

PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL) on November 28, 2017, for hearing as a contested case. The hearing was scheduled and heard on February 12, 2018. The parties submitted closing brief on March 12, 2018, at which time I closed the record.

FACTUAL DISCUSSION

Testimony

Patricia Capitelli

Patricia Capitelli (Capitelli) is the Superintendent of Totowa School District. On August 31, 2017, the mother of S.S., N.J., filled an incomplete registration form for S.S. to enter the school district. N.J., who resides in Paterson, was advised that the registration form was incomplete. Subsequently T.S. Jr., the father of S.S., filled out the registration forms. The parents were given a checklist as to what was needed to establish residency. Ms. Siok handled the registration for the district at that time. Siok was told that S.S. would live at her grandfather's house in Totowa.

A residency inquiry was begun at this time. John Sole (Sole) conducted residency checks on September 5 and 6, 2017. After the investigation Sole saw N.J. bringing her daughter to school.

On September 14, 2017, Capitelli and Lauren Terranova (Terranova) met with the parents of S.S. She first met with N.J. who did not want S.S. going to school in Paterson because 140 teachers had been laid off. In addition, N.J. believed that S.S. would do better in the Totowa school system. Capitelli later met with T.S. Jr., who gave a Totowa address. However, his expired driver's license listed a Paterson address. The enrollment form filed out by T.S. Jr. states that S.S. will reside with N.J. seven days a week in Paterson. T.S. Jr. did not provide any valid Totowa identification.

He was told that he needed proof that he resided in Totowa. These documents were not supplied. T.S. Jr. invited Capitelli and Terranova to come to his home to see that S.S. lived there.

The determination was that S.S. lived with her mother in Paterson and should be removed from Totowa School District. A notice of the recommendation of removal was sent to N.J. T.S. Jr. was copied on the letter. T.S. and C.S., the grandparents of S.S. were not listed with the registrar. The Board did not know that the grandparents were involved until N.J. stated that at the board meeting.

John Sole

John Sole is the resource officer for the Totowa School Board. He was assigned by Capitelli to do a residency investigation of S.S. On September 7, 2017, between 8:21 a.m. and 9:00 a.m. he went to the Totowa address given by T.S. Jr. He saw two vehicles at the residence. He did not see S.S. leave the premises. School starts at 9:00 a.m. S.S. was at school that day. On September 11, 2017, he again did surveillance at the Totowa address between 8:10 and 9:00 a.m. He saw two vehicles in the driveway. He waited to see if either vehicle left to take S.S. to school that day. Neither vehicle took S.S. to school that day, but S.S. was in school that day. On September 12, 2017, Sole waited at Memorial School, the school S.S. was going to and saw N.J. walk S.S. into the school. On September 13, 2017, Sole conducted surveillance on the Paterson address of N.J. from 8:11 a.m. to 8:25 a.m. at 8:25 a.m. he saw S.S. leave the premises with N.J. At 8:45 a.m. N.J. dropped S.S. off at school.

At the invitation of T.S. Jr., Sole and Debbie Barone went to the Totowa address. Once inside they were brought to the room that they were told belonged to S.S. It did not look like a child's room. There was nothing associated with children in the room. The clothes that were in the drawers appeared to be enough for an overnight visit—pajamas, underclothes, no shoes. He was told that S.S. was in the process of moving in.

On February 1, 2018, he did a surveillance on the Paterson property. He did not recognize anyone leaving the property. No children left the property. On February 2,

2018, he did a surveillance of the Totowa premises. At 8:25 a.m., he saw S.S. get on the school bus.

Debbie Barone

Debbie Barone (Barone) is a school counselor for the Totowa Board of Education. On September 17, 2017, she went with Sole to the Totowa residence regarding the residency investigation of S.S. The bedroom that she was told belonged to S.S. contained a double bed and two dressers. It did not look like a child's room. In the drawers she saw two t-shirts, leggings, and underwear. The other dresser contained papers. The backyard had a pool, but there were no child's toys in the backyard.

As the counselor, Barone introduces herself to the new students. On September 13, 2017, she introduced herself to S.S. S.S. told her that she had a baby brother that she shares a room with. She also said that she has two homes. S.S. said that her mother takes her to school and her grandmother picks her up from school, then her mother picks her up at 5:00.p.m.

Lauren Terranova

Lauren Terranova is the director of Special Education for the Board. She was asked to sit in on the meeting between N.J. and Capitelli regarding residency on September 13, 2017. On that day N.J. drove S.S. to school. N.J. was told if S.S. lived in Paterson, she had to go to school in Paterson. N.J. said S.S.'s grandparents lived in Totowa and she would use that address because the school in Paterson were terrible. After N.J. left T.S. Jr. arrived and stated that S.S. would live with him at his parent's house. T.S. Jr. produced his driver's license, which had a Paterson address. T.S. Jr. completed a registration form for S.S. On the form he stated that S.S. would be residing with N.J. seven days a week.

N.J.

N.J. is the mother of S.S. She testified that she became pregnant in March of 2017. She realized that she could not afford three children. She spoke to T.S. Jr. and suggested that S.S. stay with the parents of T.S. Jr. She registered S.S. in the Totowa School District. She listed a Totowa address for S.S. T.S. Jr.'s mother was listed as the contact person. N.J. stated that she was transitioning S.S. to living with her grandparents. She became aware that there was a residency investigation when she dropped S.S. off at the school. During the week of September 13, 2017, S.S. moved to her grandparent's home. N.J. does not pay for any necessities for S.S. She does not provide S.S.'s grandparents with any money. T.S. Jr. was supposed to take care of S.S. along with his parents. N.J. did not have any room for S.S. at her apartment because she has a three-year-old and an infant. S.S. visits her. N.J. was not asked to provide proof that S.S. lived in Totowa. She was never required to provide further documentation that S.S. lived in Totowa. N.J. was made aware on September 13, 2017, that Totowa's position was that S.S. did not live in Totowa. She later received a letter from Totowa's attorney.

There is no Court Order deciding custody of S.S. N.J. stated that she does not see S.S. during the week but she stated that she sometimes picks her up from school and drops S.S. off in Totowa. On September 7, 2017, and September 12, 2017, N.J. took S.S. to school. N.J. does not pay T.S. Jr. child support.

N.J. further testified that S.S. is currently on her health insurance and that she is also receiving food stamps for her children including S.S. in Paterson, New Jersey.

T.S.

T.S. is that grandfather of S.S. He did not receive a notice of the board meeting regarding the residency of S.S. He was not asked to bring any documentation to the meeting.

He testified that S.S. began living with him in September 2017 because N.J. was having financial difficulties. N.J. does not pay for anything for S.S. S.S. lives with him but visits her mother. T.S. Jr. has multiple scleroses, so T.S. and his wife C.S. take care of S.S. His daughter or wife takes S.S. to school. He was not involved in registering S.S. for school. T.S. and C.S. do not intend to file for custody of S.S.

FINDINGS OF FACT

In light of the contradictory testimony presented by respondent's witnesses and appellant, the resolution of this matter requires that I make credibility determinations with regard to the critical facts. The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 60 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder "is free to weigh the evidence and to reject the testimony of a witness even though not contradicted when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-522 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to observe the demeanor of the witnesses, I find that N.J's testimony. was not credible. She stated that when she became pregnant in March 2017, she knew that she could not support three children. However, she stated S.S. did not move to Totowa until September 2017. In addition, she testified that S.S. does not live with her but she receives food stamps for herself and her children, including S.S.

Based on the credible testimonial and documentary evidence, I **FIND** the following as **FACTS** in this matter:

1. Petitioners T.S. and C.S. are the grandparents of minor child S.S.
2. T.S. and C.S. reside in Totowa, New Jersey.
3. N.J. is S.S.'s mother and resides in Paterson, New Jersey.
4. T.S. Jr. is the father of S.S.
5. S.S. was enrolled in Memorial Elementary School in Totowa, New Jersey at the start of the 2017-2018 school year by N.J.
6. Totowa began an investigation to determine if S.S. was permanently residing at the Totowa address listed on her registration.
7. Sole conducted residency checks at the Totowa and Paterson addresses in September 2017.
8. On September 6, 2017, between the hours of 8:00 a.m. and 9:00 a.m. Sole did not see S.S. leave the Totowa residence; however, she did attend school.
9. On September 7, 2017, between the hours of 8:00 a.m. and 9:00 a.m. Sole did not see S.S. leave the Totowa residence. S.S. was in school on September 7, 2017.
10. On September 11, 2017, between the hours of 8:00 a.m. and 9:00 a.m. Sole did not see S.S. leave the Totowa residence but she was again present at school.
11. On September 12, 2017, Sole saw S.S. walking into the school with N.J.
12. On September 13, 2017, Sole conducted a residency check at the Paterson address and did witness S.S. leaving the residence at approximately 8:30 a.m. with her mother N.J. S.S. was present in school.
13. A meeting was scheduled with N.J. on September 13, 2017, upon her arrival, N.J. admitted, in front of witnesses, that she did not want her daughter to attend Paterson Schools. She was told that since S.S. lived in Paterson, she had to go to school in Paterson.
14. One hour after the meeting on September 13, 2017, T.S., Jr. arrived at the school and explained that S.S. would be living with him at his parent's house in Totowa.

15. On the same date, a home inspection was conducted at the Totowa address by Investigator Sole and Ms. Barone. Both of whom stated that the home lacked evidence that S.S. lived in the home.
16. Ms. Barone returned to school and introduced herself to S.S. S.S. voluntarily stated that she shares a room with her brother, she has two homes, her mother takes her to school, her grandmother picks her up from school, and her mother picks her up from her grandmother's home.
17. The Board attorney was notified on September 14, 2017, of the residency issue and it was recommended that S.S. formally be removed from the school district at the September 27, 2017, Board meeting. A notice of the recommendation of removal was sent to N.J. on September 14, 2017, T.S. Jr. was copied on the letter.
18. During the meeting the Board passed an official vote to affirm the decision to remove S.S. from its district.
19. T.S. Sr. and C.S. were not noticed of the Board meeting because he was not listed as the parent or guardian of S.S. on either registration of S.S.
20. N.J. receives food stamps in Paterson for herself and her children, including S.S.

LEGAL ANALYSIS

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

Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J 238, 250 (1955). The domicile of

an unemancipated child is that of his or her parent, custodian or guardian. P.B.K. ex rel. E.Y. v. Bd. of Educ. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001).

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

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

In this matter, T.S. Jr. in the registration form stated that S.S. would live with N.J. seven days a week. He provided as identification a driver's license that had a Paterson address. N.J. collects food stamps for herself and her children including S.S. at the Paterson address.

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that S.S. is not domiciled in Totowa.

ORDER

Accordingly, it is hereby **ORDERED** that respondent's determination to remove S.S. from its school district be **AFFIRMED**.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, 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.

3-28-18

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

Date Mailed to Parties: MAR 29 2018

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

LIST OF WITNESSES

For Petitioners:

N.J.

For Respondent:

Trish Capitelli

John Sole

Debbie Barone

Lauren Terranova

LIST OF EXHIBITS

For Petitioners:

P-1 Letter to N.J. from board attorney Raymond B. Reddin

P-2 Enrollment Information

P-3 Letter to Petitioners' attorney from board's attorney, re: Removal of S.S.

For Respondent:

R-1 Enrollment Form

R-2 Check List for Proof of Residency

STATE BOARD OF EXAMINERS DKT. NO. 1415-223
AGENCY DKT NO. 1-2/18A

IN THE MATTER OF THE	:	
REVOCATION OF THE CERTIFICATES	:	COMMISSIONER OF EDUCATION
OF JENNIFER FILO,	:	DECISION
STATE BOARD OF EXAMINERS.	:	

Order of Revocation by the State Board of Examiners, December 8, 2017

For the Respondent-Appellant, Steven J. Kaflowitz, Esq.

For the Petitioner-Respondent State Board of Examiners, Jennifer Hoff, Deputy Attorney General (Gurbir S. Grewal, Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with Appellant Jennifer Filo's appeal of the State Board of Examiners' (Board) Order of December 8, 2017, revoking her Teacher of the Handicapped Certificate and her Teacher of Elementary School Certificate of Eligibility with Advanced Standing. This matter stems from tenure charges that were filed in 2014 against the appellant by the Morris-Union Jointure Commission in accordance with the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 to 18.1. On March 22, 2015, an Arbitrator found that the appellant engaged in a pattern of corporal punishment against her special education students during the 2013-2014 school year.[1] The Arbitrator also determined that the appellant's unbecoming conduct warranted her dismissal from the Morris-Union Jointure Commission.

Thereafter, the Board issued an Order to Show Cause, dated June 26, 2015, directing the appellant to show why her certificates should not be revoked. The Order to Show Cause incorporated the Arbitrator's decision and found that there was "just cause for

[1] Pursuant to *N.J.S.A.* 18A:6-16, all tenure matters that are filed with the Department of Education are referred to an independent arbitrator for further proceedings.

consideration of the revocation of appellant's certificates as a result of the proven allegations in the tenure proceeding." After the appellant filed an answer to the Order to Show Cause, the case was transmitted to the Office of Administrative Law (OAL). The Administrative Law Judge (ALJ) determined that the Board was entitled to summary decision because the facts proven before the Arbitrator demonstrate that the appellant engaged in conduct unbecoming a teacher. In so doing, the ALJ denied the appellant's request for an evidentiary hearing because the doctrine of collateral estoppel[2] precluded the re-litigation of facts proven during the tenure arbitration proceedings. Based on the nature and extent of appellant's unbecoming conduct, the ALJ recommended the revocation of the appellant's certificates. On December 8, 2017, the Board issued an Order adopting the Initial Decision and revoking the appellant's certificates.

On appeal, the appellant reiterated the arguments advanced before the ALJ and the Board, contending that it was not appropriate to apply the doctrine of collateral estoppel to her case so as to give the Arbitrator's award preclusive effect. The appellant maintains that collateral estoppel should not have been invoked because arbitrators are not bound by the rules of evidence that ensure fairness in a court setting and the grounds for an appeal of an arbitrator's decision is very narrow. The appellant also stresses that in this case, the Arbitrator's decision was palpably incorrect because it was based almost exclusively on the testimony of the school district's witnesses, which contradicted the credible testimony of the appellant and her witnesses. The appellant further argues that even if the Commissioner determines that collateral estoppel should apply, the totality of her teaching career should have been considered in determining the appropriate penalty. As a result, the appellant maintains that the Commissioner should reject the Board's decision revoking her certificates and either remand this matter to the OAL for a full

[2] Collateral estoppel is an equitable principle that bars re-litigation "when an issue of fact or law is actually litigated and determined by a valid and final judgment." *Winters v. North Hudson Reg'l Fire and Rescue*, 212 *N.J.* 67, 85 (2012) (citations omitted).

hearing or, in the alternative, impose a sanction on the appellant that is less than the revocation of her 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 the parties' 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. Despite the appellant's contentions to the contrary, the Commissioner finds – for the reasons stated in the Initial Decision – that the ALJ appropriately invoked the doctrine of collateral estoppel denying the appellant's request for an evidentiary hearing at the OAL.[3] There is no doubt that the license revocation proceeding is grounded in the same facts that gave rise to the tenure charges filed against the appellant. Moreover, the facts underlying the revocation proceeding were fully litigated in the binding arbitration process, during which the appellant had an opportunity to present witnesses and testify before the Arbitrator. Further, the Commissioner finds that there is no public policy concern or fairness issue that would dictate an exception to the application of the doctrine of collateral estoppel in this case.

The Commissioner also finds that the Board's decision to revoke the appellant's certificates is fully supported by the evidence in the record. The appellant's unbecoming conduct was not based on an isolated incident; rather, she engaged in a pattern of corporal

[3] All of the arguments made by the appellant on appeal were previously considered and thoroughly addressed, both by the ALJ in the Initial Decision and by the Board in its Order of Revocation.

punishment against her special education students throughout the 2013-2014 school year. The egregious behavior included, among other things: twisting the wrists of several students; bending back students' fingers to punish or control behavior; smacking a student's knuckles with a wooden clipboard; and yelling at students and mimicking their autistic behaviors. There is nothing in the record to suggest that the Board's decision to revoke the appellant's certificates – which was based on the nature and extent of the unbecoming conduct proven during the tenure arbitration proceedings – was arbitrary, capricious or unreasonable. Therefore, the Commissioner finds no basis upon which to disturb the decision of the Board.

Accordingly the decision of the State Board of Examiners is affirmed for the reasons expressed therein. [4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/04/18

Date of Mailing: 5/04/18

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

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
TRENTON, NEW JERSEY

IN THE MATTER OF TENURE HEARING)
)
between)
)
TRENTON BOARD OF EDUCATION,)
)
Petitioner) **CONSENT**
and) **AWARD**
)
IAIN PARTRIDGE,)
Respondent)
)
DOCKET NO. 33-2/18)

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

APPEARANCES

FOR THE PETITIONER

Adam S. Herman, Esq, Adams, Gutierrez & Lattiboudere, LLC

FOR THE RESPONDENT

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

BACKGROUND

In accordance with N.J.S.A. 18A:6-10 and N.J.S.A. 18A:6-11, on January 3, 2018, the Trenton Board of Education, County of Mercer, State of New Jersey ("Petitioner" or "School District") instituted sworn tenure charges against Iain Partridge ("Respondent"), a tenured teacher. Pursuant to N.J.A.C. 6A:3-5-1(b)(6), Adam S. Herman, Counsel for the Petitioner, by letter dated January 30, 2018, submitted the following documents to the Commissioner of Education:

(1) a Statement of Tenure Charges, Statement of Evidence with exhibits;

(2) a signed sworn Statement of Tenure Charges, Certificate of Determination and Board Resolution certifying the charges to be served via overnight mail upon Edward Cridge, Esq., Mellk O'Neil, along with Proof of Service upon the Respondent.

The Respondent filed an answer opposing the charges. "The Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation." By letter dated February 20, 2018, the charges were referred to the undersigned pursuant to N.J.S.A. 18A:6-16 as amended by P.L. 2012, C-26 and P.L. 2015, C. 109 to "review those charges, which are not dismissed as the result of a Motion under the preponderance of the evidence standard," as well as "Respondent's defenses and any Motion which may be filed with the arbitrator" in order to render a decision on the merits.

The Respondent was charged with "Unbecoming Conduct, Corporal Punishment and Other Just Cause." By letter dated February 9, 2018, the

Respondent, aside from acknowledging his employment with the District, denied all the charges and specifications.

On April 25, 2018, the parties submitted a document to the Arbitrator entitled "Settlement Agreement," indicating that the School District and the Respondent ("collectively, the 'Parties') have voluntarily resolved all disputed matters and entered into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below..."

The undersigned Arbitrator, pursuant to his authority under N.J.S.A. 18A:6-9 "to hear and make a final determination on a controversy and dispute arising under sub article B of article 2 of chapter 6 of Title 18A of the New Jersey Statutes (C.18A:6-10 et seq.)," having reviewed the terms of the Settlement Agreement ("Settlement") between the Petitioner Trenton Board of Education and Respondent, Iain Partridge, as well as the District Resolution approving the Settlement, with respect to the Tenure Charges the Petitioner filed against the Respondent, finds that the terms and conditions of the Settlement set forth herein (attached) meets the standards established by the State Board of Education in the matter entitled *In re Cardonick,* State Board decision of April 6, 1983 (1990 *School Law Decisions* (S.L.D.) (842, 846).

CONSENT AWARD

Accordingly, I approve the terms of the Settlement and memorialize its terms and conditions in a Consent Award.

May 1, 2018

Robert T. Simmelkjaer

STATE OF NEW JERSEY}
COUNTY OF BERGEN}

On the 1st day of May 2018, before me came Robert T. Simmelkjaer to me known as the person who executed the foregoing instrument, which is his award.

Notary Public

Jin An
Notary Public
New Jersey
My Commission Expires 5-4-2021
No. 50037586

Edward A. Cridge, Esq. (NJ Bar ID No. 02646-2006)
MELLK O'NEILL
51 E. Broad Street
Hopewell, NJ 08525
P:(609)-924-0700 / F: (609)-924-4622
Attorneys for Respondent Iain Partridge

IN THE MATTER OF THE TENURE CHARGES AGAINST IAIN PARTRIDGE,	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
TRENTON PUBLIC SCHOOLS BOARD OF EDUCATION, MERCER COUNTY	Agency Dkt. No. No. 33-1/18
	Administrative Action
	SETTLEMENT AGREEMENT

The Trenton Board of Education (the "District"), whose principal office is located at 108 North Clinton Avenue, Trenton, New Jersey 08609, and its successors, assigns, officers, employees, agents and representatives (collectively, "School District"), Iain Partridge, having an address at 388 Bishop Street, Browns Mills, New Jersey 08015 ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

WHEREAS Respondent is a tenured teacher employed by the District; and

WHEREAS Respondent is a member of the Trenton Education Association ("TEA"); and

WHEREAS the District certified tenure charges of Unbecoming Conduct, Corporal Punishment and Other Just Cause to the Commissioner of Education of the State of New Jersey, captioned *In the Matter of Tenure Charges Against Iain Partridge, Trenton Board of Education* ("Tenure Charges"), and such charges were assigned Docket No. 33-1/18 and Respondent filed an answer opposing the charges; and the Commissioner of Education, having reviewed the charges

and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator Robert Simmelkjaer ("Arbitrator") for a hearing; and

WHEREAS, Respondent has denied the allegations set forth in the tenure charges; and

WHEREAS, the Parties are aware of the uncertainty of the outcome of arbitration; and

WHEREAS, the District with stringent budget limitations and due to the expenditure of resources due to multiple days of hearings with numerous witnesses, including several students, and the concern that students will be removed from school to testify and that school administrators will be removed from their educational duties and responsibilities during that time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

WHEREAS the proposed Stipulation of Settlement is in the best interest of the Parties and the public because Respondent agrees to serve a six month suspension, thereafter to resume his teaching duties upon a determination that he is fit for duty, upon the formal approval of this stipulation of settlement by the Trenton Board of Education; and

NOW, THEREFORE, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Respondent shall serve a six (6) month suspension. Respondent shall be deemed to have served a paid suspension from January 1, 2018 through January 22, 2018 and shall also serve an unpaid suspension from January 23, 2018 through June 30, 2018. This suspension shall serve as the entire discipline for Respondent with respect to these tenure charges. Respondent agrees not to, and waives any right to, challenge or otherwise contest this suspension.

2. Respondent agrees to attend professional development, anger management, and/or other training (collectively herein, "Training") identified by the District in connection with his resumption of his teaching duties in September 2018. The cost of any such Training shall be borne by the District. Any such training shall take place within 30 miles of the District's central office in Trenton, New Jersey, or, in the alternative, may take place online. In the District's discretion, any such Training may take place prior to June 30, 2018. Otherwise, the Training shall take place between July 1, 2018 and October 31, 2018. The actual Training shall not exceed 20 hours. Respondent shall not be entitled to any additional compensation for his attendance/participation in the Training.
3. At the expiration of the suspension period referenced in Paragraph 1, Respondent agrees to voluntarily submit to a physical and psychiatric fitness for duty examination by a District doctor(s) to determine his ability to fulfill the duties of a teaching staff member.
    a. The initial fitness for duty examination shall be conducted by Robert Wood Johnson Occupational Health (the "RWJ Physician") whose costs and fees in connection with the examinations shall be paid by the Board. The Board shall communicate, in writing, to the RWJ Physician the purpose of the examination, which is to determine whether Respondent is fit for duty as a school attendance officer.
    b. Respondent understands that the RWJ Physician will conduct an initial fitness for duty examination and will: (i) make a determination as to whether Respondent should be referred to a specialist, including, but not limited to a neurologist, psychologist, or psychiatrist for further examination and testing; (ii) recommend that Respondent undergo drug or alcohol testing and/or attend an Employee

Assistance Program; (iii) conclude that Respondent is fit for duty; or (iv) conclude that Respondent is not fit for duty.

c. In the event that the RWJ Physician recommends that Respondent should be referred to a specialist, including, but not limited to a neurologist, psychologist, psychiatrist for further examination and testing, the costs and fees in connection with the subsequent examination shall be paid by the Board. Said specialist will issue a report, which shall set forth the testing administered, a diagnosis, reference to the *Diagnostic and Statistical Manual of Mental Disorders*, 5th Edition ("DSM-5") or the International Classification of Diseases ("ICD-10"), if applicable, and a professional opinion as to whether Respondent is fit for duty. The RWJ Physician, based on said report, will then render the final determination as to Respondent's fitness for duty.

d. In the event that it is determined that Respondent is not fit for duty, the report setting forth the determination will set forth with specificity the reasons thereof, a diagnosis and reference to the DSM-5 or ICD-10, if applicable.

e. For purposes of this Agreement, Respondent shall not be "fit for duty" if:

    1. Respondent suffers from a drug and/or alcohol addiction which substantially impairs his ability to discharge his duties and responsibilities as a teaching staff member;
    2. Respondent receives an Axis I through Axis IV diagnosis in accordance with the DSM-5 which is deemed to substantially impair his ability to discharge his duties and responsibilities as a teaching staff member; or

3. Respondent receives an Axis V Global Assessment of Functioning ("GAF") Score which is deemed to substantially impair his ability to discharge his duties and responsibilities as a teaching staff member; or

4. Respondent suffers from a disorder and/or condition recognized by the International Classification of Diseases ("ICD-10") which substantially impairs his ability to discharge his duties and responsibilities as a teaching staff member; or

5. Respondent suffers from a disease which could be communicable in the regular course of her performance of his duties as a teaching staff member; or

6. Respondent suffers from a medical condition not falling within the parameters of subsections (a)-(e) above which substantially impairs his mental /cognitive functioning, and which substantially impairs his ability to discharge his duties and responsibilities as a teaching staff member.

f. If Respondent is found to be fit for duty as a result of the examination process, Respondent shall be returned to a teaching staff position within the managerial prerogative of the Board.

g. If the Report indicates that Respondent is not fit for duty but can perform the duties of a teaching staff member with a reasonable accommodation, the Parties shall convene to determine whether there is a reasonable accommodation that can be offered by the Board.

h. As provided in N.J.S.A. 18A:16-4 and District Policy 3161, if the results of the examination indicate mental abnormality or communicable disease and Respondent is deemed not fit for duty, Respondent will be ineligible for further service and will be placed on sick leave and compensated in accordance with his sick leave entitlement, if any, until proof of recovery, satisfactory to the District, is furnished. In the event any such leave of absence exceeds a period of two years, Respondent shall not be returned to duty.

i. Respondent retains all rights under the New Jersey Law Against Discrimination and the Americans with Disabilities Act, including but not limited to the right to seek a reasonable accommodation in his employment.

4. Upon resumption of his teaching duties effective September 1, 2018, or any later date if Respondent is not deemed to be fit for duty in accordance with the preceding paragraph, Respondent agrees to accept an assignment as a teaching staff member at any school within the District that the District finds to be appropriate and in the best interest of the District. The Parties specifically agree that any assignment to a school location other than Trenton Central High—Chambers or the STEM and HRTB SLC shall not be deemed to be a disciplinary transfer.

5. Respondent agrees that his sick bank shall be adjusted downward by the District to reflect the inclusion of only five (5) sick days, rather than twelve (12) sick days, for the 2017-18 school year

6. The District agrees that this Agreement represents full and final discipline for any act or omission of Respondent, whether or not related to his employment, whether or not alleged in the tenure charges, occurring through the date upon which this Agreement is approved by the Trenton Board of Education. The District retains the right to use this settlement agreement and

suspension in any future disciplinary proceeding. The parties acknowledge and agree that entry into this Agreement does not constitute an acknowledgement or admission by either party as to the truth, accuracy, merit, or demonstrability of the allegations set forth in the above-captioned tenure charges. Respondent acknowledges and agrees that this Agreement may be relied upon by the District for purposes of demonstrating progressive discipline in any future proceedings. Respondent shall have the right to explain his decision to enter into this Agreement in any future proceedings.

7. The District agrees to dismiss the instant tenure charges with prejudice, subject to the approval required in Paragraphs 18 and 19.

8. In exchange for the consideration set forth above, the sufficiency of which is hereby acknowledged, Respondent hereby waives, releases and discharges as against District any and all claims or causes of action, known or unknown, suspected or unsuspected, arising through the date of his execution of this Agreement, including, without limitation, any claim for attorneys' fees, costs or other monetary relief; discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act

of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, personal day pay, wages, attorneys' fees, costs, and/or future wage loss.

Respondent also agrees to withdraw with prejudice any and all complaints, claims, petitions, suits that he or a representative may have previously filed on his behalf against the District that are still pending in any and all courts and/or before any and all agencies with the exception of workers compensation claims, which includes, but is not limited to the complaint presently pending before the New Jersey Department of Labor and Workforce Development filed on February 1, 2018, bearing File Number: D65-11-403.

This provision, however, shall exclude and not apply to the matter entitled *Trenton Board of Education-and-Trenton Education Association*, Docket No. TO-2018-001 (the "Contested Transfer Petition"), which is currently pending before the State of New Jersey, Public Employment Relations Commission. All claims and defenses set forth in the Contested Transfer Petition and related pleadings are expressly preserved. The District agrees that the execution of

this Agreement by Respondent is not a waiver or relinquishment of any claim, position, or argument set forth in the Contested Transfer Petition and related pleadings.

Notwithstanding the foregoing, Petitioner reserves the right to apply for unemployment compensation during his unpaid suspension period and the District reserves the right to oppose any such application.

Notwithstanding this release of claims /causes of action, Respondent retains all of the rights and protections of a tenured staff member of the District.

9. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that he: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives her right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has 7 days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that he may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the 7 day period.

10. This agreement shall not constitute a precedent in any matters involving other District employees.

11. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or

pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

12. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

13. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

14. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

15. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

16. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

17. Additionally, this Stipulation is subject to final approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel

for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

18. This Stipulation of Settlement is also subject to formal Board of Education approval.

19. Upon formal approval of this stipulation of settlement by the District and the Arbitrator, a copy of same will be placed in Respondent's personnel file.

Dated: 4/12/18

IAIN PARTRIDGE

TRENTON BOARD OF EDUCATION

Dated: 4/23/18

GENE BOUIE

CERTIFICATION

I, Iain Partridge, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this 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: 4/12/18

IAIN PARTRIDGE

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b)2

Dated: 4/13/18

APPROVED:

[illegible]

142-18L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Acting Commissioner

May 10, 2018

Benjamin B. Brenner, Esq.
The Carroll Law Firm, PC
1 North New York Road, Suite 39
Galloway, New Jersey 08205

Robert P. Merenich, Esq.
Gemmel, Todd & Merenich
767 Shore Road, P.O. Box 296
Linwood, New Jersey 08221

Re: *Derrick Carrington v. Board of Education of the City of Pleasantville, Atlantic County,*
OAL Dkt. No. EDU 13587-17, Agency Dkt. No. 167-7/17.

Dear Counsel:

I have reviewed the papers filed in connection with respondent's request for interlocutory review of Administrative Law Judge (ALJ) Judge John S. Kennedy's Order dated April 26, 2018, denying the Board's Motion for Summary Decision.

Upon full consideration of the submitted materials, and pursuant to my discretion under *N.J.A.C.* 1:1-14.10, I have determined not to grant interlocutory review. Respondent's request for such review, in effect, undermines the ongoing proceeding at the Office of Administrative Law (OAL). It is not the role of the Commissioner to forestall the discretion of ALJs in matters pending before the OAL, particularly in a case where the ALJ has determined that further fact finding is necessary for proper adjudication of the matter. Once ALJ Kennedy issues a recommended decision, the Commissioner will have an opportunity at that time to determine the legal issues with the benefit of a full record.

Accordingly, respondent's request is denied.

Sincerely,

Lamont O. Repollet, Ed.D
Acting Commissioner of Education

LOR/SLP/ATA

cc: John S. Kennedy, Administrative Law Judge
Clerk, Office of Administrative Law

VIA FACSIMILE AND REGULAR MAIL

143-18

AGENCY DKT. NO. 8-1/18

IN THE MATTER OF THE TENURE	:	
HEARING OF JUSTIN C. MUNIZ,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH OF	:	DECISION
CARTERET, MIDDLESEX COUNTY.	:	

For Petitioner: Arlene Quinones Perez, Esq.
For Respondent: Nicholas Poberezhsky, Esq.

The tenure charges at issue in this matter were filed against respondent on January 11, 2018. On January 30, 2018, counsel for respondent filed a motion to dismiss in lieu of an answer. Several extensions of time for filing a response to the motion were granted while the parties attempted to settle the matter.

On April 11, 2018, petitioner's attorney advised that the parties had entered into a settlement agreement and forwarded a copy of the signed agreement. On May 10, 2018, Petitioner's attorney further advised:

> As you are aware, this Firm serves as General Counsel to the Carteret Board of Education ("Board"). On or about March 28, 2018, Mr. Muniz tendered a letter of resignation and the Board unanimously voted to approve same. As such, please accept this correspondence as the Board's formal request to withdraw the tenure charges filed in connection with the above referenced matter.

The Commissioner has reviewed the terms of the settlement agreement and has determined that it is in compliance with the requirements of *N.J.A.C.* 6A:3-5.6; he therefore approves the withdrawal of the tenure charges.

In view of the foregoing, the Commissioner concludes that this matter is moot and no further proceedings are necessary in regard to the pending tenure charges. This matter is therefore dismissed with prejudice.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/15/18
Date of Mailing: 5/15/18

Arlene Quiñones Perez, Esq., ID #01134-2009
DeCotiis, FitzPatrick, Cole & Giblin, LLP
Glenpointe Centre West
500 Frank W. Burr Blvd., Suite 31
Teaneck, New Jersey 07666
(201) 347-2114
Attorneys for Petitioner
Carteret Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST JUSTIN C. MUNIZ BY THE CARTERET BOARD OF EDUCATION, MIDDLESEX COUNTY, NEW JERSEY	BEFORE THE COMMISSIONER OF EDUCATION Agency Dkt. No.: 8-1/18 **SETTLEMENT AGREEMENT AND RELEASE**

RECITALS

WHEREAS, Petitioner School District of the Borough of Carteret ("Petitioner" or "District") has employed Respondent Justin Muniz ("Respondent") in the District since August 2003; and

WHEREAS, Respondent is tenured in the District as a paraprofessional. On or about November 29, 2017, Petitioner certified tenure charges against Respondent to the Commissioner of Education charging Respondent with unbecoming conduct and insubordination; and

WHEREAS, Respondent filed a Motion to Dismiss the instant tenure charges on January 29, 2018; and

WHEREAS, the parties acknowledge that this matter will be considerably long and costly, especially in dealing with a tenure hearing with the potential of dozens of witnesses being called over a period of many days; and

WHEREAS, the settlement of the tenure charges complies with the requirements of N.J.A.C. 6A:3-5.6 and is in the public interest since settlement avoids what would otherwise be a considerably lengthy and costly proceeding with no guarantee of a favorable outcome for the District; and

WHEREAS, the charged party is entering into this agreement with a full understanding of his rights;

NOW, IN CONSIDERATION of the payment to Respondent, as provided for herein, and other good and valuable consideration, and the promises and covenants contained herein, the receipt and sufficiency of which is acknowledged, the parties do hereby agree as follows:

1. **Non-Admission**. This Agreement is not, and shall not in any way be considered or construed as, an admission of liability by either party of discrimination, retaliation, tortious conduct, or of any violation of any law, common law, or federal, state or local statute or regulation, or of any education policy, practice, contract or agreement, or of any alleged duty owed, or of any unlawful or wrongful acts whatsoever by either party. Both parties specifically deny any wrongdoing of any kind.

2. **Consideration**. the Parties agree to the following good and valuable consideration:
   (a) Petitioner shall immediately withdraw the tenure charges against Respondent with prejudice; and
   (b) Respondent agrees to immediately withdraw with prejudice the contractual grievance filed by the employee association concerning Respondent's removal from the payroll.
   (c) Petitioner will pay Respondent the amount of eleven thousand and one hundred and fifty-four dollars ($11,154.00) as full and final settlement of any and all claims he has or may have had against Petitioner. The $11,154.00 represents three (3) month's salary for Respondent (at $3,718.00 per month); and

(d) Said payment shall be issued in one (1) full payment of eleven thousand and one hundred and fifty-four dollars ($11,154.00) on or by March 30, 2018; and

(e) Respondent shall be solely responsible for payment of any and all taxes due on these settlement proceeds; and

(f) Petitioner shall not deduct any taxes or pension contributions from these settlement proceeds.

3. **Covenant Not to Sue**. In exchange for the consideration set forth in paragraph 2, Respondent agrees that neither he, nor any person, organization, agency, or other entity acting on his behalf, will file, charge, claim or sue, or cause to be filed, charged, claimed or sued, any other lawsuit, legal proceeding, action, grievance, or claim of any nature with any court, agency, or tribunal (including any action for damages, attorneys' fees, injunction, declaratory, monetary, equitable or other relief) against the Petitioner, based on any matter, fact or event occurring prior to the effective date of this Agreement, whether now known or unknown, or involving any continuing effects of any acts or practices which may have arisen or occurred prior to the effective date of this Agreement, whether now known or unknown.

4. **Written Resignation and Waiver of Tenure Rights**. In exchange for the consideration set forth in paragraph 2, Respondent agrees to submit an irrevocable letter of resignation for the purpose of resignation to be effective on June 30, 2018; Respondent further agrees to forfeit any and all tenure and/or seniority rights he has accrued while working under Petitioner's employ as to any position in the District. Respondent will not return to his position during this transition period nor will be eligible for medical benefits.

5. **Agreement Not to Apply for Reemployment.** As part of the consideration for entering into this Agreement, Respondent expressly agrees not to apply for reemployment with Petitioner in any capacity.

6. **Retrieval of Personal Property.** Petitioner hereby agrees to permit Respondent entry into his office at the Administration Building for up to two (2) full days during the month of _____, 2018, for the purpose of retrieving his personal belongings. Petitioner and Respondent shall schedule this for such dates and at such times as to minimize disruption to the orderly operations of the building.

7. **Access to District Facilities.** Upon the execution of this agreement, Respondent's rights and privileges with respect to accessing district property will be equal to that of the public for events and functions open to the public, such as sporting events and theater arts performances. Respondent will also have all customary privileges accorded to parents / guardians of students in the district as it applies to Respondent's own children while they are enrolled in the district. Respondent will also be able to access district property for any emergencies involving his spouse while she is employed there.

8. **Unemployment Benefits**. Should Respondent apply for unemployment benefits, Petitioner agrees that it will not appeal any determinations issued by the Department of Labor as to Respondent's eligibility for unemployment benefits. However, to the extent that the Department of Labor requests information from Petitioner concerning Respondent's employment, Petitioner reserves the right to provide such information to the Department of Labor in accordance with all applicable laws and regulations.

9. **Confidentiality.** Respondent agrees that the terms, conditions, fact of payment, amount of payment, and underlying facts of the settlement stated in this Agreement shall be held strictly confidential by him, his spouse, and any necessary disclosure to an attorney, accountant and financial adviser. Respondent further agrees that he shall not describe, characterize or disclose any such information in any manner whatsoever, directly or indirectly, orally or in writing to anyone not a party to this Agreement, except to the extent required by law or to say, "the matter has been resolved", if asked, and except that Respondent may disclose the terms of this Agreement to his spouse, accountant, or financial advisor and attorney, or when legally obligated by law to do so. Similarly,

Petitioner agrees to keep all terms and conditions of this Settlement Agreement strictly confidential and to not disclose same unless required to do so by law.

10. **Non-Disparagement.** The Parties, their agents, representatives, servants, and employees understand and agree that they will not engage in any activity or make any statement that may disparage or reflect negatively on each other, its employees, officials, officers, directors, employees, or related entities and related individuals.

11. **Neutral Job Reference.** In the event that Petitioner is contacted by any person or entity seeking a professional, personal, or character reference related to Respondent, all parties agree that Petitioner shall advise such person or entity that it is the policy of Petitioner to solely provide information verifying employment, dates, and title, and that Petitioner shall provide no further information.

12. **Certification of Service and Final Salary.** Petitioner agrees to promptly submit to the Public Employees' Retirement System a Certification of Service and Final Salary as required in order for Respondent to obtain retirement benefits.

13. **General Release and Waiver of all Claims.** In exchange for the consideration set forth in paragraph 2, Respondent fully releases and forever discharges Petitioner of and from any and all claims, actions, causes of action, back pay, front pay, contracts, agreements, promises, charges, judgments, grievances, obligations, rights, demands, debts, physical injury, pain, suffering, emotional distress, compensatory damages, punitive damages, attorneys' fees, expenses, costs, losses, liabilities, damages, or accountings of whatever nature, whether known or unknown, disclosed or undisclosed, asserted or unasserted, in law or equity, contract or tort or otherwise (herein collectively designated "Claims"), through the effective date of this Agreement, including, but not limited to, any and all Claims of harassment, discrimination, retaliation, and any and all tort Claims or contract Claims for general damages, and any and all Claims arising under, made, regarding, or involving: any federal, state, or local laws or under the common law; violations of any federal, state, or educational practices or civil rights laws or ordinances; Claims for

personal injury, failure to reinstate, wrongful conduct, or discrimination; New Jersey Department of Education regulations and related statutes; the Civil Rights Acts of 1866 and 1871, as amended, 42 U.S.C. §1981; the Civil Rights Act of 1964, as amended, including Title VII; the Age Discrimination in Employment Act, as amended; the New Jersey Law Against Discrimination; the Employee Retirement Income Security Act; the Fair Labor Standards Act; the National Labor Relations Act, as amended; the American's with Disabilities Act; Fair Housing Act; Section 504 of the Rehabilitation Act; any and all state wage payment and collection laws; the Respondent's policies, practices, collective bargaining agreements, contracts, benefits, or understandings; any Claims arising out of any relationship, including employer/employee relationship, between or among Respondent and Petitioner predating the effective date of this Agreement; and any and all grievances or demands for mediation or arbitration, or Claims or demands under Petitioner's policies and procedures; and any and all Claims asserted, or which could have been asserted, including any Claims against any current or former agents or employees of Petitioner.

Respondent hereby specifically waives, releases, and gives up all Claims and rights, as described in the preceding paragraph, whether now known or unknown, which he has or may have against Petitioner, based on any fact, act, event, or omission, whether now known or unknown, occurring before the Effective Date of this Agreement. Respondent understands that he is waiving, releasing, and giving up all Claims and rights that he knows about and all Claims and rights that he may not know about.

Similarly, Petitioner hereby specifically waives, releases, and gives up all Claims and rights, as described in the preceding paragraph, whether now known or unknown, which it has or may have against Respondent, based on any fact, act, event, or omission, whether now known or unknown, occurring before the Effective Date of this Agreement. Petitioner understands that it is waiving, releasing, and giving up all Claims and rights that it knows about and all Claims and rights that it may not know about.

14. **Liens and Indemnification by Respondent**. It is further understood that as a condition of this settlement, all claims, and/or liens, past, current, and/or future arising out of this settlement or asserted against the proceeds of this settlement are to be satisfied by Respondent and/or his Attorneys, including but not limited to any Medicare or Medicaid claims and/or liens, Child Support claims and/or liens; Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician or attorney claims and/or liens, or any of the statutory, equitable, common law or judgment claims and/or liens, including but not limited to claim based on subrogation or any other legal or equitable theory. Respondent therefore agrees, upon prompt presentation of any such claims and/or liens, to defend Petitioner and its insurer against any such claims and/or liens, and to indemnify and hold Petitioner and its insurer harmless against any judgment entered against Petitioner and its insurer based on such claims and/or liens, including the payment of any fines, charges, and attorneys' fees incurred as a result of any such lien.

15. **Costs and Attorneys' Fees.** Each party's costs and attorneys' fees, if any, will be borne by the respective party.

16. **Payment**. Payment to Respondent is subject to Petitioner's receipt of Respondent's signed and notarized Agreement, letter of resignation, as well as a child support search report.

Respondent represents and warrants that neither Petitioner nor its attorneys provided any advice regarding the taxability of the settlement amounts paid pursuant to this paragraph. Respondent acknowledges and agrees that he is solely responsible for payment of any and all federal, state, and local taxes which may be due from the settlement sum in the event that it is determined that any taxes are owed based on the taxation laws in effect on the date of execution of this Agreement or become due at any time in the future because of a change to the laws governing the taxation of such settlement proceeds. Respondent further acknowledges and agrees to indemnify and hold harmless Petitioner and its attorneys harmless in the event that any federal, state, or local taxing authority asserts

against any claim for unpaid taxes, failure to withhold taxes, or interest based upon the payment of the settlement sum to Respondent.

17. **Effective Date**. The effective date of this Agreement shall be the day following the date upon which the signed and notarized Agreement is received by Petitioner's attorneys and executed by Petitioner's Board of Education President. The Board will hold a special meeting on December 7, 2017, to review and vote on this Settlement Agreement.

18. **Applicable Law**. This Agreement shall be governed by and construed in accordance with the laws of New Jersey, except where federal law controls. Should any provision of this Agreement be declared or determined by any Court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not to be a part of this Agreement or may be modified as necessary.

19. **Entire Agreement**. This Agreement sets forth the entire agreement between the parties and fully supersedes any and all prior agreements or understandings between the parties.

20. **Signatures**. This Agreement may be signed in counterparts. However, this Agreement will not be binding among the parties until it has been executed by and among the Parties, and subject to Petitioner's receipt of Respondent's signed and notarized Agreement, and a completed child support search report.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties have executed this Settlement Agreement and General Release as of the dates set forth below.

RESPONDENT

By: _____ Dated: 3.28.18
JUSTIN C. MUNIZ

PETITIONER

By: _____ Dated: 3/28/18

Name: Martin C Murray

Title: BOG President

STATE OF NEW JERSEY,
COUNTY OF MIDDLESEX: SS.:

I CERTIFY that on the 28th day of March, 2018, Justin C. Muniz personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his act and deed.

_____
Notary Public

My Notary Expires on 2/25/2019

Justin C. Muniz
88 Daniel Street
Carteret, NJ 07008

March 28, 2018

Mrs. Rosa Diaz, Superintendent
Carteret School District
599 Roosevelt Avenue
Carteret, NJ 07008

Re: Letter of Resignation

Dear Mrs. Diaz:

Please accept this letter as notice of my resignation from the Carteret School District effective close of business March 28, 2018. My resignation is expressly contingent on the Board's ratification of the terms of the Settlement Agreement accompanying this letter.

Sincerely,

Justin C. Muniz

AGENCY DKT NO. 72-3/18

IN THE MATTER OF THE TENURE	:	
HEARING OF SHERALYN CONRAD,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ELIZABETH, UNION COUNTY.	:	

For the Petitioner, Lester E. Taylor, Esq.
No appearance by or on behalf of Respondent, Sheralyn Conrad

This matter was opened before the Commissioner of Education on March 22, 2018, through tenure charges of conduct unbecoming, excessive absenteeism, insubordination and other just cause certified by Harold E. Kennedy, Jr., Board Secretary/School Business Administrator of the Elizabeth School District, together with supporting evidence against respondent, Sheralyn Conrad, 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 Federal Express on February 23, 2018, and also on March 19, 2018 via regular mail.

On March 26, 2018, the Commissioner directed the respondent – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. No reply to the tenure charges was received from or on behalf of respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate that respondent has been employed as a tenured teacher in the District from February 1994 to September 2005, and again beginning in September 2009. During the course of her teaching career with the District, the respondent has been excessively absent on an annual basis. For example, during the 2014-2015 school year, the respondent was absent on approximately 33 days; 49.5 days during the 2015-2016 school year; and 129.5 days during the 2016-2017 school year, as of April 20, 2017. Repeated requests for medical documentation went unanswered by respondent until January 9, 2017, when respondent indicated that the necessary medical certificate would be sent as soon as her doctor filled it out. Respondent did not return the necessary documents to the petitioner and did not return to the classroom for the remainder of the 2016 - 2017 school year.

The charges also allege that respondent pled guilty to Driving While Intoxicated in violation of *N.J.S.A.* 39:4-50, and failed to report her arrest and conviction to the Superintendent in violation of regulation and Board Policy. Additionally, in April of 2014, respondent admitted that she made up Developmental Reading Assessment (DRA) scores for nearly all of her students because she had not completed the DRA assessments.

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 conduct unbecoming a teaching staff member, chronic and excessive absenteeism, abandonment of position, insubordination and other just cause have been proven and overwhelmingly warrant the 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.[1]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/15/18

Date of Mailing: 5/15/18

[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)

145-18

AGENCY DKT. NO. 104-3/16

IN THE MATTER OF THE TENURE	:	
HEARING OF CHONG-HWA CHANG,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF	:	DECISION
CORRECTIONS, NEW JERSEY STATE PRISON	:	

For Petitioner: Dianne M. Moratti, DAG
Chong-Hwa Chang, respondent, pro se

The tenure charges at issue in this matter were filed with the Commissioner on March 30, 2016. On April 25, 2016, respondent filed an answer wherein she requested that the matter be held in abeyance pending resolution of concurrent criminal proceedings arising from the same allegations. Accordingly, the matter was placed in abeyance pursuant to *Ott. v. Board of Education of Hamilton Township*, 160 *N.J. Super.* 333 (App. Div. 1978).

In response to a May 4, 2018 letter from the Department of Education requesting a status update, respondent advised in a May 11, 2018 letter:

> I am writing to update you on my status. I was ordered to appear for a Pre-Indictment Conference on August 25, 2016; whereupon, I was entered into the Pre-trial Intervention Program for a period of 36 months, beginning August 25, 2016. On the same date, I was ordered to forfeit my public employment with the Department of Corrections as a Teacher 1 at the New Jersey State Prison.
>
> On November 1, 2017, the State Board of Examiners voted to revoke my teaching Certificates and was told to return them to the Secretary of the State Board of Examiners, which I did in December of 2017.

In view of the foregoing, the Commissioner concludes that this matter is moot and no further proceedings are necessary in regard to the pending tenure charges. This matter is therefore dismissed with prejudice.

A copy of this decision will be forwarded to the State Board of Examiners for whatever action it deems appropriate.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/16/18

Date of Mailing: 5/16/18

OAL DKT. NO. EDU 1412-03
AGENCY DKT. NO. 344-10/02

MARIAN OSBOURNE, PETITIONER, V. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

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 March 28, 2018 OAL hearing – has been reviewed. Petitioner did not file an explanation for her failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/16/18
Date of Mailing: 5/16/18

* 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).

147-18

AGENCY DKT. NO. 246-10/17

BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	ORDER
C.F., ON BEHALF OF MINOR CHILDREN, I.F. AND S.F.,	:	
RESPONDENT.	:	

On February 9, 2018, a final agency decision was rendered in this matter, wherein the Commissioner found C.F. liable for tuition in the amount of Twenty Six Thousand Nine Hundred Sixteen Dollars ($26,916.00), representing tuition for a period of ineligible attendance by her children, I.F. and S.F., in the Board's school district during the 2016-2017 school year. The Board subsequently notified the Commissioner that C.F. had failed to comply with the decision, and requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. C.F. 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, Cynthia Falcone is now subject to entry of a judgment by the court in the amount of $26,916.00, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/16/18

Date of Mailing: 5/16/18

OAL DKT. NO. EDU 1684-17
AGENCY DKT. NO. 13-1/17

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
SHAKOOR REID, MARION P. THOMAS	:	DECISION
CHARTER SCHOOL, ESSEX COUNTY.	:	

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

Upon review, the Commissioner approves the 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. A copy of this decision is being forwarded to the State Board of Examiners.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/16/18
Date of Mailing: 5/16/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01684-17
AGENCY DKT. NO. 13-1/17

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATES OF SHAKOOR REID, MARION P. THOMAS CHARTER SCHOOL, ESSEX COUNTY

Joseph Maddaloni, Jr., Esq., for Shakoor Reid (Schenck, Price, Smith & King, attorneys)

Bernice M. Jalloh, Esq., for Marion P. Thomas Charter School (Jalloh & Jalloh, attorneys)

Record Closed: March 28, 2018 Decided: April 3, 2018

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

The Department of Education transmitted this matter to the Office of Administrative Law (OAL) on February 1, 2017, where it was filed on February 3, 2017 for determination as a contested case.

The parties reached an amicable resolution of the matter and submitted the attached Consent Order indicating the terms thereof.

Having reviewed the record and the Consent Order, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives and statements made therein.
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 3, 2018
DATE

KELLY J. KIRK, ALJ

Date Received at Agency:

Date Mailed to Parties: APR 5 2018
mm

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SCHENCK, PRICE, SMITH & KING LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Joseph Maddaloni, Jr.
(Attorney I.D. No.: 001561990
Attorneys for Respondent, Shakoor Reid

RECEIVED

2018 MAR 28 A 9:34

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

IN THE MATTER OF THE SUSPENSION OF

THE TEACHING CERTIFICATE OF SHAKOOR REID,

MARION P. THOMAS CHARTER SCHOOL, NEWARK, ESSEX COUNTY, NEW JERSEY.

BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION

OAL Docket No.: EDU 01684-17
Agency Docket No.: 13-1/17

CONSENT ORDER

THIS MATTER, having been opened to the Court through petition filed by Bernice Martina Jalloh, Esq., Jalloh & Jalloh, L.L.C., 21 W. Blancke St., Suite 2, Linden, NJ 07036, Counsel for Marion P. Thomas Charter School ("MPTCS") seeking to suspend the teaching certification of Shakoor Reid ("Reid") (collectively the "Parties"), and the Parties having resolved their differences, it is hereby agreed by and between the Parties as follows:

1. Suspension of Clegg's Teaching Certificate. Reid's teaching certificate shall be suspended for a period of one hundred eight (108) days commencing on May 15, 2018 and continuing through and including August 31, 2018. Reid shall forfeit his teaching certificate to the New Jersey Board of Education and/or to the New Jersey Board of Examiners and Certification as may be required to effectuate the suspension. Reid shall comply with any and all conditions and/or limitations that may be imposed upon him by law, rule or regulation during the term of the suspension.

2. Dismissal with Prejudice. The above-captioned matter is hereby dismissed with prejudice and without costs to either Party.

3. No admission of Liability. Reid expressly denies having violated any contract, law, rule or regulation in this matter, and has accepted the suspension so as to resolve this matter and avoid further litigation costs, expenses and time.

4. Consultation with Counsel. The Parties acknowledge that each of them has consulted with, or had the opportunity to consult with, legal counsel of their own selection about this Consent Order. The Parties each understand how this Consent Order will affect their legal rights and voluntarily enter into this Consent Order with such knowledge and understanding.

5. Non-Disparagement. Reid agrees not to disparage MPTCS, including MPTCS's present and former officers, directors, employees, agents, or attorneys. MPTCS agrees that it will not disparage Reid, including his agents or attorneys.

THE UNDERSIGNED HEREBY CONSENT TO THE FORM AND ENTRY OF THIS CONSENT ORDER:

SCHENCK, PRICE, SMITH & KING LLP
Counsel for Shakoor Reid

By:_____
Joseph Maddaloni, Jr., Esq.

JALLOH & JALLOH, L.L.C.
Counsel for Marion P. Thomas Charter School

By:_____
Bernice Martina Jalloh, Esq

AGENCY DKT. NO. 37-2/15

E.S., ON BEHALF OF MINOR CHILDREN, M.S. AND Z.S.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	ORDER
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	
RESPONDENT.	:	

On September 24, 2015, a final agency decision was rendered in this matter, wherein the Commissioner found E.S. liable for tuition in the amount of Seventeen Thousand Three Hundred Forty Dollars and Ninety Six Cents ($17,340.96), representing tuition for a period of ineligible attendance by his children, M.S. and Z.S., in the Board's school district between February 9, 2015 and June 23, 2015.* The Board subsequently notified the Commissioner that E.S. had failed to comply with the decision, and requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. E.S. offered no reasons why the judgment against him should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Erland Sanon is now subject to entry of a judgment by the court in the amount of $17,340.96, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/16/18

Date of Mailing: 5/17/18

* E.S. appealed the Commissioner's September 24, 2015 decision to the Appellate Division of the Superior Court. By decision dated February 9, 2017, the Appellate Division affirmed the Commissioner's decision and assessment of tuition.

150-18
OAL DKT. NO. EDU 13261-17
AGENCY DKT. NO. 188-8/17

HOWARD WALKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX 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.

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 Agreement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/16/18

Date of Mailing: 5/16/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 13261-17
AGENCY DKT. NO. 188-8/17

HOWARD WALKER,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner (Schwartz Law Group, LLC, attorneys)

Lori E. Kolin, Esq., for respondent (Keenan & Doris, LLC, attorneys)

Record Closed: March 12, 2018 Decided: April 10, 2018

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

On September 11, 2017, 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 settlement conference on February 2, 2018 and during that time, the parties engaged in settlement discussions and agreed to settle the matter. A signed copy of the Settlement Agreement and Release

indicating the terms of settlement was forwarded to the undersigned on April 10, 2018 and is attached hereto.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 10, 2018

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: _____

Date Mailed to Parties: APR 12 2018 _____

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

ROBERT M. SCHWARTZ, ESQ.
SCHWARTZ LAW GROUP, LLC
MONROE OFFICE CENTER AT FORSGATE
12 CENTRE DRIVE
MONROE TOWNSHIP, NEW JERSEY 08831
(609) 860-9100
ATTORNEY FOR PETITIONER, HOWARD WALKER
ATTORNEY ID: 005771978

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2018 APR 10 A 10:32

HOWARD WALKER	) BEFORE THE COMMISSIONER
	) OF EDUCATION, THE STATE OF
Petitioner,	) NEW JERSEY
	)
v.	) OAL Docket No.: EDU 13261-17
	) Agency Docket No.: 188-8/17
EAST ORANGE BOARD OF EDUCATION	)
	) PETITION OF APPEAL
Respondent	)
	)

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("this Agreement") is entered into as of the ____th day of February, 2018 (the "Effective Date") by and between the East Orange Board of Education, on behalf of the East Orange Board of Education's commissioners, officials, officers, directors, employees, consultants, agents, affiliates, administrators, representatives, executives, attorneys, insurance carriers, insurance administrators, beneficiaries, (past, present or future), departments, divisions, predecessors, successors and assigns, (collectively "East Orange Board of Education Group" or "the Board") and Dr. Howard Walker, on his behalf and the behalf of his spouse, children, parents, consultants, agents, heirs, trustees, estates, administrators, representatives, executives, attorneys, beneficiaries, (past, present or future), principals, predecessors, successors and assigns, (collectively the "Howard Walker Group" or "Dr. Walker"). Together, the Board and Dr. Walker shall be referred to as "the Parties."

WHEREAS, Dr. Walker filed a Petition of Appeal on or about August 11, 2017 in accordance with Title 18A of the New Jersey statutes contesting the salary and increment withholding ("increment") that had been voted upon by the Board for the 2017-2018 school term, now pending before the New Jersey Office of Administrative Law under the caption Howard Walker v. City of East Orange Board of Education, Agency Docket. No. 188-8/17 ("the Petition"); and;

WHEREAS, on February 2, 2018, the day that this matter was to proceed to hearing before the Honorable Elissa Mizzone Testa, ALJ, the Parties reached an amicable resolution of the Petition, the terms of which were set forth on the record;

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which the Parties acknowledge, and intending to be legally bound hereby, the Parties agree to settlement on the following terms, inclusive of the terms set forth on the record:

1. Good Faith. All parties to act in good faith in furtherance of this agreement and Petitioner's employment with the EOBOE.

   a. All parties shall comply with all statutory and/regulatory requirements governing Petitioner's employment with the EOBOE, and specifically, with respect to Petitioner's evaluations by supervising administrators.

   b. All parties shall comply with all EOBOE requirements pertaining to evaluations and/or rebuttals to evaluations, including but not limited to, complying with all necessary artifacts compilation and/or presentation to supervising administrators.

   c. It is expressly understood that no decision has heretofore been made with respect to Petitioner's 2018-2019 increment being awarded or withheld as his summative evaluation has not been completed, and it is not yet known whether Petitioner will achieve a performance rating of "highly effective", "effective", "partially effective", or "ineffective".

2. Settlement Payment: The Parties agree that the settlement payment pursuant to this agreement is the inclusion of Dr. Walker's 2017-2018 increment, which has a value of $398.00, upon the meeting of certain conditions precedent, as follows:

   a. Following two consecutive terms for which Petitioner receives a summative evaluation of "partially effective" or greater, inclusive of the 2017-2018 school term, and for which his increment is not withheld for any reason and is therefore awarded, the value of the 2017-2018 increment withheld by the Board at the conclusion of the 2016-2017 term, specifically, $398.00, shall be included in Petitioner's then-salary, on a prospective basis only;

3. Dismissal of the Petition. In consideration therefore, the Petition shall be dismissed with prejudice, and without attorneys' fees or costs to either Party.

4. General Release. Petitioner covenants and agrees that for himself, his spouse, children, parents, consultants, agents, heirs, trustees, estates, administrators, representatives, executives, attorneys, beneficiaries, (past, present or future), principals, predecessors, successors and assigns, (collectively the "Howard Walker Group"), knowingly, irrevocably and unconditionally release, renounce, remise, acquit and forever discharge the East Orange Board of Education, the East Orange Board of Education's commissioners, officials, officers, directors, employees, consultants, agents, affiliates, administrators, representatives, executives, attorneys, insurance carriers, insurance administrators, beneficiaries, (past, present or future), departments, divisions, predecessors, successors and assigns, (collectively "East Orange Board of Education Group"), from any and all claims, demands, actions, rights, interests, costs, liabilities and expenses, including attorney's fees, and causes of action of every kind and nature whatsoever, in law or in

equity, in any jurisdiction, whether now known or unknown, that Howard Walker, or any person acting under him, may now have or claim at any future time to have, based in whole or in part upon any acts or omissions occurring prior to the Effective Date of this Agreement without regard to present actual knowledge of such acts or omissions, including specifically, but not by way of limitation, any claims, causes of action or demands of Howard Walker which have been made or could have been made, or which are the subject matter of, arise from, or are connected with, directly or indirectly, or related in any way to any lawsuit, grievance, or petition previously brought, maintained or filed in any jurisdiction by Howard Walker and Howard Walker's Group against the East Orange Board of Education Group, including but not limited to: (1) claims under the New Jersey Law Against Discrimination ("NJ LAD"); (2) claims under N.J.S.A. 11A:2:13; (3) claims under the New Jersey Civil Rights Act; (4) claims under the New Jersey Constitution; (5) all wrongful discharge claims (including claims based on breach of contract or implied contract, breach of the covenant of good faith and fair dealing, constructive discharge or violation of public policy); (6) claims under the Civil Rights Act of 1964, 42 U.S.C. § 2000, as amended; (7) claims under the Civil Rights Act of 1866; (8) claims under the Americans With Disabilities Act; (9) claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq.; (10) claims under the Employee Retirement Income Security Act of 1974; (11) claims under the Older Workers Benefit Protection Act of 1990; (12) claims under the New Jersey Conscientious Employee Protection Act; (13) claims under the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq.; (14) claims under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq.; (15) claims under the New Jersey State Constitution or the United States Constitution; (16) claims under workers' compensation law or unemployment law(s); (17) any events that Petitioner alleged in the Action or in discovery in the Action; (18) any loss, damage, or claim associated with the injuries and/or damages sustained by Petitioner as set forth in the Action; (19) any public policy, contract, tort or common law claim; (20) any demand for punitive or exemplary damages, past, current or future health care costs, or for civil or criminal fines or forfeitures; (21) any demand for costs or litigation expenses including, but not limited to, attorneys' fees; and (22) claims under any other federal or state statute, common law, or decisional law, as well as claims for harassment, discrimination, disparate treatment, retaliation, negligent and/or intentional infliction of emotional distress, assault, battery, negligence, recklessness, for alleged interference in any contract, economic opportunity or prospective economic advantage, or for alleged violation of any federal, state or local law, regulation, ordinance or common-law duty relating to, arising out of, or having any bearing whatsoever on Petitioner's employment by the East Orange Board of Education, including any separation therefrom. This list is not intended to be exclusive and Dr. Walker's intent is to discharge the Board from any other statutory or common law cause of action of every kind and description. The Parties intend that this Agreement shall discharge the Board to the maximum extent permitted by law as discussed herein.

5. Covenant Not to Sue. Dr. Walker warrants that he has not commenced any legal proceedings of any type (including but not limited to charges filed with any governmental agency) against the Board, other than the within Petition. Further, Dr. Walker agrees that he will not commence any legal proceedings against the Board arising from or relating to his employment with the Board up to the Effective Date of this Agreement. In the event of a violation of this paragraph, Dr. Walker agrees that the Board shall be entitled to immediate dismissal of the legal proceedings with costs.

6. No Admission of Liability. The Parties acknowledge and agree that nothing in this Agreement may be construed as an admission of liability by the Board or an admission that the Board engaged in any unlawful activity.

7. Severability. If a tribunal declares any portion of this Agreement unenforceable, the remainder shall be enforceable.

8. Reliance on Own Counsel. In entering into this Agreement, the Parties acknowledge that they have relied upon the legal advice of their respective attorneys, who are the attorneys of their own choosing.

9. Entire Agreement. This Agreement constitutes the entire agreement and understanding of the Parties and supersedes all prior negotiations and/or agreements, proposed or otherwise, written or oral, concerning the subject matter hereof. The terms of this Agreement are fully understood and voluntarily accepted by the Parties, and other than the consideration set forth herein, no promises or representations of any kind have been made by either Party. Furthermore, no modification of this Agreement shall be binding unless in writing and signed by each of the Parties.

10. Applicable Law, Construction, and Choice of Forum. This Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey; however, since each Party to this Agreement and their counsel have negotiated and reviewed this Agreement, the general rule of construction that any ambiguity or uncertainty in a writing shall be interpreted against the party drafting the writing shall not apply in any proceedings to enforce or interpret of this Agreement. Any proceedings to enforce or interpret this Agreement shall only be brought in a court of competent jurisdiction within the State of New Jersey, and the Parties consent to personal jurisdiction in such courts.

11. Counterparts. This Agreement may be executed by the Parties in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

12. Notices. Any notice given or demand made pursuant to this Agreement shall be made by certified mail, return receipt requested, to the following persons at the following addresses:

If to the Board:

Lori E. Kolin, Esquire
Keenan & Doris, LLC
71 Union Avenue
Rutherford, New Jersey 07070

If to Dr. Walker:

Robert M. Schwartz, Esquire
Law Office of Robert M. Schwartz
12 Centre Drive
Monroe, New Jersey 08831

13. Facsimile or Electronic Signature Fully Binding. The Parties agree that a facsimile or electronic signature herein shall be deemed to have the same force and effect of an original.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties hereby execute this Agreement.

For Dr. Howard Walker

By: Howard Walker
Howard Walker
3-6-18
Date: February , 2018

By:
Robert M. Schwartz, Esq.
Attorney for Dr. Walker
3-6-18
February , 2018

For The East Orange Board of Education

By:
Terry Swanson-Tucker, President
4/9/18
Date: February , 2018

By:
Lori E. Kolin, Esq.
Attorney for EOBOE
4/9/18
February , 2018

SCHWARTZ LAW GROUP, LLC

MONROE CENTRE AT FORSGATE
12 CENTRE DRIVE
MONROE TOWNSHIP, NEW JERSEY 08831

*ROBERT M. SCHWARTZ**
Email:RMSchwartz@schwartzlawgroupllc.com

*ANDREW L. SCHWARTZ***
Email:ALSchwartz@schwartzlawgroupllc.com

Telephone: (609) 860-9100
Facsimile: (609) 860-2777

* *Admitted in NJ*
** *Admitted in NY & NJ*

March 27, 2018

Lori E. Kolin, Esq.
Keenan & Doris, LLC
71 Union Avenue
Rutherford, NJ 07070

Re: Howard Walker/East Orange BOE
OAL Docket No. EDU 13261-17
Agency Docket No. 188-8-17

Dear Ms. Kolin:

This is to confirm that the settlement agreement that Dr. Walker executed mistakenly indicated that he would need to receive at least two partially effective or better evaluations for two consecutive terms to obtain the prospective reinstatement of the increment that was withheld for the 17-18 school term. By way of this letter I wish to confirm that our agreement is that Dr. Walker would have to receive two effective or better summative evaluations for two consecutive terms in order to receive prospective reinstatement of this year's increment withholding.

Thank you.

Very truly yours,

Robert M. Schwartz

RMS:va
cc: Howard Walker (via email)

151-18

OAL DKT. NO. EDU 5438-05
AGENCY DKT. NO. 82-3/05

DARENE KACPROWICZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON 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: 5/16/18

Date of Mailing: 5/16/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05438-05
AGENCY DKT. NO. 82-3/05

DARENE KACPROWICZ,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT, OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Allan Porwich, Esq., for petitioner (Feintuch, Porwich & Feintuch, attorney)

Laura Miller, Esq., for respondent (Scarinci & Hollenbeck, attorneys)

Record Closed: April 6, 2018 Decided: April 9, 2018

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 18, 2005 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof. A copy of the Stipulation of Settlement is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

April 9, 2018
DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency:

APR - 9 2018

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/sej

Laura M. Miller, Esq. (Id No. 003032006)
SCARINCI & HOLLENBECK, LLC
ATTORNEYS AT LAW
1100 Valley Brook Avenue
Lyndhurst, New Jersey 07071
Tel.: (201) 896-4100
Attorneys for Respondent
Jersey City Public Schools
Our File No.: 8206.1231

DARENE KACPROWICZ, Petitioner, v. JERSEY CITY PUBLIC SCHOOLS, Respondent.	OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU 05438-2005-N AGENCY REF. NO.: 82-3/05 **STIPULATION OF SETTLEMENT**

THIS MATTER having been brought before the Office of Administrative Law by Alan S. Porwich, Esq., of the firm of Feintuch, Porwich & Feintuch, appearing for Petitioner, with Laura M. Miller, Esq., of the firm of Scarinci & Hollenbeck, LLC, appearing for Respondent, and the parties having adjusted the differences between them, and for good cause being shown,

IT IS HEREBY STIPULATED AND AGREED as follows:

1. Respondent shall restore 15 days to Petitioner's sick leave bank which were deducted subsequent to Petitioner's accident on April 21, 2004;

2. Respondent shall pay Petitioner the sum of $1,500.00, for the 15 days being restored to Petitioner's sick leave bank, which shall be considered as payment for unused accumulated sick leave at the time of Petitioner's retirement on July 1, 2007, pursuant to the Collective Bargaining Agreement between the Respondent and Jersey City Education

Association in effect at the time of Petitioner's retirement.

3. The aforesaid payment shall be subject to applicable federal and state taxes and any other legally required deductions. The satisfaction of any and all tax liabilities related to the aforesaid payment shall be the sole responsibility of Petitioner.

4. Petitioner hereby releases Respondent and its respective past and present officials and employees from any and all liabilities, claims, causes of action, charges, appeals, complaints, obligations, costs, losses, damages, injuries, attorney's fees, and other legal responsibilities of any form or kind whatsoever which Petitioner has or may have against Respondent arising out of, or related to, any claims to an entitlement to restoration of sick days; nor shall Petitioner re-file a complaint or petition based upon the same facts in this Court or in any other tribunal.

5. This Stipulation is not an admission by the Respondent and/or any of it respective present or former agents, employees or representatives of any wrongdoing or liability, and is being entered into solely for the purpose of economic expediency.

6. Petitioner agrees to indemnify and hold the Respondent and all of its insurance carriers harmless in connection with any claim made by reason of liens or tax obligations associated with payment of the sum described in Paragraph 2 of this Stipulation.

FEINTUCH, PORWICH & FEINTUCH Attorneys for Petitioner	SCARINCI & HOLLENBECK, LLC Attorneys for Respondent
BY: _____ Alan S. Porwich	BY: Laura M. Miller Laura M. Miller
Dated: April 2, 2018	Dated: 4/6/18

152-18LM

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Acting Commissioner

May 17, 2018

Sabino Valdez
P.O. Box 463
Paramus, New Jersey 07652

Board Secretary
Board of Education of the City of Union
3912 Bergen Turnpike
Union City, New Jersey 08087

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

Dear Parties:

I have reviewed Sabino Valdes' fifth motion to reopen this matter, wherein he specifically seeks to reopen "the final decision rendered [in this matter] by the State Board of Education, [and] to modify the final decision rendered by Commissioner William L. Librera in this matter to include the review and final agency action on an Interlocutory Order rendered by the Administrative Law Judge in this matter." Mr. Valdes requests that "upon review of said Order the Commissioner reject the same and grant [his] Motion to Dismiss the relevant Tenure Charges, with prejudice." Mr. Valdes further requests that "[Commissioner] Librera's decision [be] modified to instruct the district board to reinstate [his] tenured position and pay [his] full salary and emoluments[.]"

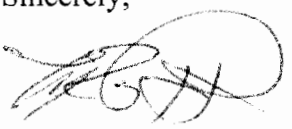
As the parties are aware, Mr. Valdes' request to reopen this matter has been adjudicated on four prior occasions at this tribunal.[1] Although in his present request to reopen, Mr. Valdes submits that the basis for his request is "newly discovered evidence and additional facts and arguments," he has not presented any new evidence or arguments that would warrant

[1] The procedural history of this matter has been fully set forth in the January 11, 2018 and March 30, 2018 decisions and is incorporated herein by reference. Additionally, Mr. Valdes has brought this matter to the Appellate Division on four separate occasions. In denying Mr. Valdes' appeal of the Commissioner's November 3, 2016 decision relating to his second motion to reopen, the Appellate Division stated that this was the "**fourth time**" that the tribunal had been asked to consider this matter and Mr. Valdes "has **not** shown good cause to reconsider or reopen the matter." (Emphasis added).

reopening this matter. Therefore, for the reasons thoroughly set forth in the Commissioner's January 11, 2018 and March 30, 2018 decisions, Mr. Valdes' fifth motion to reopen is denied on its face – without need for further adjudication – as he has failed to demonstrate good cause.

Accordingly, the fifth motion to reopen the above referenced matter is hereby DENIED.[2]

Sincerely,



Lamont O. Repollet, Ed.D.
Acting Commissioner of Education

c: County Superintendent
State Law Library

LOR/SLP/ATA

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).

IN THE MATTER OF TENURE BETWEEN

Laurie Olsen-DelGuercio

- And -

School District of the Township of Union, Union County New Jersey

Agency DKT. NO. 268-11/17

Arbitrator: Kinard Lang

Hearing Dates: January 22 and March 13, 2018

Hearing Locations: New Jersey Department of Labor, Fitch Plaza, Trenton, N.J. and Union County School District Office, respectively.

Issue: Does the School District of Union Township have sufficient cause to revoke the Tenure of secretary/ clerk Laurie Olsen-DelGuercio; if not, what shall the remedy be?

APPEARANCES:

Paul E. Griggs, Esq. - Petitioner

Nicholas Poberezhsky, Esq. - Respondent

Post Hearing Briefs Filed: April 16, 2018

BACKGROUND

What follows is my synopsis of facts stipulated to by the parties. The Respondent was employed by the District as a secretary/clerk at Union High School in September of 2008 and acquired tenure in September 2011; approximately one-year later the District began paying her an annual stipend of approximately $1,016.00 for taking on the *extra-curricular* duties of School Treasurer.

In her capacity as School Treasurer she handled collection and processing of school activity funds: from receipt-to-reconciliation-to-deposit. In the pre-dawn hours of Thursday June 29, 2017 several former Union H.S. students gained access to that premises through an unlocked library window and burglarized the building. Upon receiving report of that event from Ms. DelGuercio, the Union Police Department responded and learned that approximately $28,899.41 in cash (student activity funds) had been stolen from Respondent's locked file cabinet draw, and $57,139.84 was in the school safe when the burglary occurred.

On or about July 6, 2017 Respondent received notice, that in effect, her service as school treasurer was terminated. The parties' Joint Exhibit 7. says in pertinent part:

> *"...I informed Ms. Delguercio that there was* ***negligence*** *on her part and that consequences could follow. Ms. Bossard and I escorted Ms. Delguercio to the cbank to deposit the rest of the money which was $57,139.84 and I had her name* ***removed from the account. I explained to Ms. DelGuercio that she would no longer be in charge of the Student Activity accounts****..."* (Emphasis added)

On August 30, 2017 Respondent was placed on administrative leave with pay:

> *"...due to an on-going investigation regarding the theft of student activity funds at Union High School. While you are on this leave, you are not permitted on the school grounds of any Township of Union Public School without my prior approval. In addition, you should not have any contact with faculty, staff, or students of any Township of Union Public Schools."*

School Superintendent Gregory Tatum filed tenure charges against the Respondent on or about October 11, 2017.

Those Charges were based on the conclusion that June 29th theft of student activity funds resulted from Respondent's "*Unbecoming Conduct, Inefficiency, Incompetency and Other Just Cause.*"

This Arbitrator was assigned to decide this matter in accordance with the provisions of *P.L. 2012, c. 26, as amended by P.L. 2015, c 109.*

POSITIONS OF THE PARTIES

PETITIONER

We are told the Respondent's Tenure must be revoked because the events of June 29, 2017 demonstrated her guilt of the following:

CHARGE I

Conduct Unbecoming a School Employee for leaving student activities funds in the form of cash in a cabinet drawer overnight and failing to promptly deposit approximately $26,899.41 into the Union High Booster Association bank account.

CHARGE II

Conduct Unbecoming a School Employee for leaving student activities funds in the approximate amount of $57,139.84 in the school safe and failing to promptly deposit $57,139.84 into the Union High School Booster Association bank account.

CHARGE III

Inefficiency of a School Employee by failing to deposit student activity account receipts into the Union High School Booster Association bank account.

CHARGE IV

Incompetency Violation of Board Policy; by leaving $26,899.41 in cash in a cabinet draw overnight, Respondent violated Board Policy 3450 saying, "*In no case shall money be left overnight in schools except in the safe provided for safekeeping of valuables.*"

CHARGE V

Incompetency Violation of Board Policy; on or about June 28, 2017 Respondent left approximately $84,039.25 in cash in a cabinet drawer and in the school safe overnight, in violation of Board Policy 3453, requiring "*All receipts from student fund-raising projects, athletic events, and other events for which admission is charged will be deposited promptly...*"

CHARGE VI

Negligence, by leaving said moneys in the cabinet drawer and school safe Respondent was negligent in her management and oversight of activity funds.

RESPONDENT

Of course, the Respondent disavows all the cited Charges; she argues they are both substantively and legally flawed. In that all the allegations against her focus exclusively on her asserted failings as a *School Treasurer,* not in her tenured position as Secretary. The record shows she was removed from the Treasurer's job on July 6, 2017, hence her performance in the Treasurer's job was not then, or now, a valid legal basis for charges against her tenure as a Secretary.

The TEACHNJ Act requires **inefficiency** charges be predicated on two consecutive "ineffective" or "partially effective" summative evaluations; the record in this matter is devoid of evidence that the Respondent was **ever** formally evaluated.

Hence, consistent with the New Jersey Superior Court in Newton v. Newark Public Schools, Ms. DelGuercio's tenure may not be revoked based on asserted inefficient performance, that has never been evaluated.

With respect to the Respondent's claimed **conduct unbecoming** a school employee, allegations of that nature are generally reserved for the most egregious offenses. What we have here is her placing school funds in a locked file cabinet overnight, and keeping money in the school safe, rather than depositing it in the bank. Those are at worst errors of judgment, not the moral turpitude usually concerned in charges of this nature.

The preceding conduct may arguably be characterized as **negligence,** but the record shows there were at least two *"contributors"* to the burglary; the librarian's miscommunication with the janitor resulted in the burglars' access window being left open.

The Petitioner would have us find the Respondent **incompetent** because she is said to have violated School Board Policies 3450 and 3453, yet we have her unrebutted confession of actual and constructive ignorance of both those policies. In that regard, it is undisputed that the only Treasurer training she received was from her predecessor.

DISCUSSION AND ANALYSIS

The Respondent's *threshold* assertion, that the TEACHNJ Act does not contemplate Petitioner's loss of her secretarial tenure based on claimed failings in a separate, paid by stipend, non-tenured job, as school treasurer, is facially persuasive. That is so because pertinent provisions of the Act read:

> *N.J.S.A 18A:17-2 (Tenure of secretary, assistant secretary, school business administrator or Business manager of a board of education of any school district who has or shall have devoted his **full time** to the duties of his office..."*
> In that regard, Respondent argues:

"...the District lacks subject matter jurisdiction to bring tenure charges against her based on her sole role as School Treasurer, a non-tenured stipend (**part-time**) *position she has already been removed from. Since the tenure charges have nothing to do with Ms. Olsen-DelGuercio's tenured position as a* ***fulltime*** *secretary, there is nothing left to litigate."* (Emphasis supplied)

The District cites a plethora of Opinions, generally written before passage of the Act, with which it would support the legal and substantive rightness of the Respondent's tenure revocation. While they are instructive, I find none of them are on point with respect the threshold question here: Where if at all, does the Act say a tenured employee may lose that tenure for proven misbehavior in an *extra-curricular* job, held at School District discretion. I have found nothing in the Act, or the cases relied upon by the Petitioner, that directly answers that question, under the instant circumstances.

However *common sense* reading of the parties' evidence and arguments does not permit my summary dismissal of the Respondent from all culpability regarding the events of June 29, 2017; that is so because, as Petitioner argues, the money would not now *be in the wind,* had she not left it where she did. Yet, no one could reasonably conclude *the buck stops there.*

That is so because, while the evidence shows she is not blameless for what happened in the morning of June 29th, the blame must be equitably shared:

Board Policy 3453 says *"...The student activity funds for each school shall be kept in a separate account,* ***Supervised by the building principal.*** *Separate and complete records shall be maintained for each student organization. All receipts from student fund-raising Projects, athletic events, and other events for which admission is charged will be deposited* ***promptly.*** *Bank deposits shall agree with the receipts in the case receipt book."* (Emphasis supplied.)

I find, consistent with the above cited Board Policy, the Union High School Principal had final responsibility for failing to make prompt bank deposits of the $57,139.84 in the school safe during June 29, 2017 burglary. Additionally, we cannot ignore the finding of the Union Police; that the burglars gained access to the premises through a window left unlocked, because of the librarian and janitor's *failure to communicate.*

Conduct Unbecoming a School Employee

Petitioner cites the New Jersey Supreme Court when it argues Respondent's leaving $26,899.41 in the file cabinet overnight, and failing to promptly deposit $57,139.84 in the bank, are acts unbecoming; because, among other reasons, those acts:

"...adversely affect(ed) *the morale or efficiency of the* [*department*]*" or "ha*[d] *a tendency to destroy public respect for* [government] *employees and confidence in the operation of* [*public*]*services."*, (citations omitted).

The record shows the Union High School burglary became an issue in Union Township School Board elections that were broadly covered by local media; the burglary did nothing to encourage confidence in Union H.S. management among the local taxpayers whose money was stolen. Clearly, that loss of public money was an *act unbecoming.* In that regard, Respondent tells us she cannot be held responsible for the unforeseen criminal acts of others; no Criminal charges were ever filed against her, and she was never suspected of being involved in the crime.

I find Respondent's behavior was not, per se, inherently *"unbecoming".*

Inefficiency of a School Employee

Petitioner cites N.J.S.A. 18A:6-10 where it provides, in part that, "*No person shall be dismissed or reduced in compensation, except for inefficiency, incapacity, unbecoming conduct, or other just cause...* ". We are told Respondent's leaving $26,899.41 in a file cabinet overnight fits The Random House College Dictionary 680 (Revised Edition 1982), definition of inefficiency: *"...not efficient; unable to effect or achieve the desired result with reasonable economy."* Here, the *desired result* was safekeeping of the cited funds, and we have seen that on June 29th that did not occur.

But here's the rub; absent linkage of Respondent's asserted *inefficiency,* as a part-time Treasurer, to her performance in her full-time secretarial position, the former is no basis for loss of tenure in the latter, and Petitioner did not produce preponderant evidence of that linkage. The Inefficiency Charge is unproven.

Incompetency

The Petitioner would find Respondent incompetent because of her failure, as school treasurer, to follow Board Policy 3450. However, there is no evidence in the record establishing she was put on notice about that Policy, or the consequences for failing to follow it. Likewise, Petitioner has produced no evidence linking what it would have us find as the Respondent's incompetency on June 28th, as a treasurer, to her performance in the capacity of secretary. In a similar vein, it is stipulated that she has never been formally evaluated as to her competence as a secretary, the position from which her tenure would be revoked.

I find insufficient evidence that Respondent's tenure should be impaired on the basis of incompetence.

Negligence

Petitioner has the burden of proving all the Charges by the preponderance of evidence; that includes negligence when Respondent left money in a file cabinet and the school safe overnight, on June 28, 2017.

Citing Rappaport v. Nichols, 31 N.J. 188, 203 (1959), we are told: "
[A] tortfeasor is generally held answerable for the injuries which result in the ordinary course of events from his negligence and it is generally sufficient if his negligent conduct was a substantial factor in bringing about the injuries..."

We have previously observed that if the money was not left in the cabinet, the burglars would not have gotten it, and we know the Respondent left it there. Notwithstanding those plain facts, the Respondent would deny being answerable for the School District's financial injury, because negligence is not an appropriate basis for tenure charges.

Additionally, we are told there are mitigating circumstances: there is no history of burglaries at Union High School, and no evidence that the Respondent's behavior on June 28th made her file cabinet a "target". Contrarily, the Union Police report indicates the burglars initially went through classrooms and other offices before making their way into the main office and *stumbling* upon the cash in the cabinet.

I find no **specific** provision in the Act with respect to negligence, apparently the *"...or other just cause..."* language in the Act is relied upon when Petitioner argues tenure revocation based on negligence. And while the evidence shows that June 28, 2017 may have been the only time the Respondent left cash in the cabinet overnight, she did so without advising the Principal or seeking his permission in advance. That behavior was negligent.

Conclusions

I find the Union Township, County of Union has produced a preponderance of evidence that the Respondent was negligent in performance of her duties as **School treasurer** on June 28, 2017; that negligence is implicitly linked to her service as Secretary; that all Petitioner's the other Charges have not been proven, and or linked to her tenured **Secretarial** position by a preponderance of evidence. Hence, the following Award.

AWARD

Laurie Olsen-DelGuercio shall retain her tenure with no loss of seniority, benefits and pension rights, if any accrued to her service before July 7, 2017. With the exception of earnings lost during Ms. DelGuercio's one-hundred and twenty (120) day suspension, she shall be made whole for all lost wages and emoluments of employment.

With respect to Petitioner's request for Restitution, it is Denied.

Kinard Lang, Arbitrator, May 10 2018

Kinard Lang 5/10/2018

Marisol I. Suarez 5/10/2018

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
MARISOL I. SUAREZ, Notary Public
City of Philadelphia, Phila. County
My Commission Expires March 31, 2019

156-18

OAL DKT. NO. EDU 4708-17
AGENCY DKT. NO. 56-3/17

HIGH POINT EDUCATION ASSOCIATION	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
HIGH POINT REGIONAL HIGH SCHOOL BOARD OF EDUCATION, SUSSEX COUNTY,	:	
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. According to Paragraph 9 of the Agreement, the effective date of the Agreement shall be the day following the date upon which the signed Agreement is ratified by the Board 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 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: 5/21/18
Date of Mailing: 5/22/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 04708-17
AGENCY DKT. NO. 56-3/17

HIGH POINT EDUCATION ASSOCIATION,
Petitioner,
v.
HIGH POINT REGIONAL HIGH SCHOOL BOARD OF EDUCATION, SUSSEX COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Brent R. Pohlman, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: April 23, 2018 Decided: April 23, 2018

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

This matter was transmitted to the Office of Administrative Law on April 5, 2017 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof. A copy of the settlement agreement and Board Resolution is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

April 23, 2018
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: APR 26 2018

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/sej

EXTRACT FROM THE MINUTES OF
A MEETING OF THE BOARD OF EDUCATION
OF HIGH POINT REGIONAL HIGH SCHOOL
COUNTY OF SUSSEX, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of High Point Regional High School in the County of Sussex, NJ, convened in public session on January 16, 2018, in the High School Cafeteria:

Members Present: Mrs. Anderson, Mr. Dunn, Mr. Miller, Mr. Vealey, Mr. Voitcu, Mr. Kehoe, Ms. Kymer
Members Absent: Mr. Notaro. Mr. Antcliff,

Board member, Mrs. Anderson made a motion seconded by Mr. Voitcu and carried by roll call vote, to approve the following:

I. LEGAL

1. It is recommended that the Board of Education approve the settlement agreement in the matter known as High Point Education Association o/b/o Kimberly Crowell v. High Point Regional High School Board of Education, OAL Docket No.: EDU 04708-2017, and authorize the Board President to execute the agreement on behalf of the Board.

ROLL CALL VOTE:

AYES: 7

NOES: 0

ABSTENTIONS: 0

ABSENT: 2

STATE OF NEW JERSEY)
) ss.:
COUNTY OF SUSSEX)

James Minkewicz, being first duly sworn on oath, deposes and says:
That deponent is the Board Secretary of the Board of Education of High Point Regional High School in the County and State aforesaid and that the annexed extract from the minutes of a meeting of the Board of Education of the School District held on January 16, 2018 at the time and place therein stated has been compared by deponent with the original minutes of the meeting recorded in full in the official Minute Book of the Board and is a true copy thereof and of the whole of the original so far as it relates to the subject matters referred to in this extract.

SEAL

James Minkewicz
Business Administrator/Board Secretary

Sworn by me on this 16th day of January, 2018.

Eric L. Harrison - ID #033381993
METHFESSEL & WERBEL, ESQS.
2025 Lincoln Highway, Suite 200
PO Box 3012
Edison, New Jersey 08818
(732) 248-4200

2018 APR 23 A 9:49

HIGH POINT EDUCATION ASSOCIATION O/B/O KIMBERLY CROWELL Petitioner, V. HIGH POINT REGIONAL HIGH SCHOOL BOARD OF EDUCATION Respondent.	NEW JERSEY OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO.: 56-3/17 OAL DOC. NO.: EDU 04708-2017N **SETTLEMENT AGREEMENT**

RECITALS

WHEREAS, the High Point Regional High School District ("District"), which is operated by the High Point Regional High School Board of Education ("Board" or "Respondent"), serves students from 9th through 12th grade; and

WHEREAS, Petitioner High Point Education Association on behalf of Kimberly Crowell ("Association") is the labor organization that represents employees within the District' and

WHEREAS, Kimberly Crowell ("Crowell") was employed in various roles in the District until her resignation in June 2017; and

WHEREAS, the Association and Crowell shall be jointly referred to as "Petitioners".

WHEREAS, the Association and Crowell disputed the facts and circumstances leading up to Crowell's resignation from the District; and

WHEREAS, following her resignation from the District the Association and Crowell filed a Petition of Appeal with the Commissioner of Education, an Unfair Practice Charge ("UPC") with the Public Employment Relations Commission (P.E.R.C.) and a request for non-binding arbitration with the Public Employment Relations Commission; and

WHEREAS, the Petition of Appeal was thereafter transmitted to the New Jersey Office of Administrative Law ("OAL") for a hearing.

WHEREAS, the parties, desiring to settle this dispute amicably without the need for lengthy and costly litigation, and in a manner through which no party admits any liability whatsoever; and

WHEREAS, it is understood and agreed by the Association and Crowell that Respondent, and its heirs, executors, administrators, officers, employees, successors, and assigns, by reason of the payment, consideration, and any other terms made on behalf of Respondent, do not admit any liability nor have they made any agreement to make any payment or to take any action not reflected in this Agreement.

WHEREAS, it is understood and agreed that in releasing any and all claims Petitioners have asserted or could have asserted against Respondent, intend to release any and all claims they have asserted or could have asserted against all former and current employees, agents, and elected/appointed representatives of Respondent that exist through the date this Agreement is signed; thus, the term "Respondent" shall be understood to include all former and current employees, agents, and elected/appointed representatives of Respondent.

NOW, IN CONSIDERATION of the payment to Crowell, as provided for herein, and other good and valuable consideration, and the promises and covenants contained herein, the receipt and sufficiency of which is acknowledged, the parties do hereby agree as follows:

1. **Non-Admission**. This Agreement is not, and shall not in any way be considered or construed as an admission of liability by Respondent of discrimination, retaliation, tortious conduct, or of any violation of any law, common law, or federal, state or local statute or regulation, or of any education policy, practice, contract or agreement, or of any alleged duty owed by Respondent, or of any unlawful or wrongful acts whatsoever by Respondent. Respondent specifically denies any wrongdoing of any kind.

2. **Consideration**. the Parties agree to the following good and valuable consideration:
    (a) Respondent Board will pay Crowell a lump sum amount of Seven thousand Five hundred dollars ($7,500) which will come from Respondent's insurance carrier; and
    (b) Said lump sum payment shall be subject to and less all mandatory and usual deductions; and

3. **Dismissal of Lawsuit, and Covenant Not to Sue**. In exchange for the consideration set forth in paragraph 2, Petitioners agree to dismiss the petition of appeal with prejudice, and agree not to appeal from the dismissal of, re-file, revive or reopen the petition of appeal in any way. The Petitioners further agree to dismiss the UPC before PERC, as well as the request for non-binding arbitration.

Crowell further agrees that neither she, nor any person, organization, agency, or other entity acting on her behalf, will file, charge, claim or sue, or cause to be filed, charged, claimed or sued, any other lawsuit, legal proceeding, action, grievance, or claim of any nature with any court, agency, or tribunal (including any action for damages, attorneys' fees, injunction, declaratory, monetary, equitable or other relief) against the Respondent, based on any matter, fact or event occurring prior to the effective date of this Agreement, whether now known or unknown, or involving any continuing effects of any acts or practices which may have arisen or occurred prior to the effective date of this Agreement, whether now known or unknown.

4. **Waiver of Tenure Rights**. In exchange for the consideration set forth in paragraph 2, Petitioner agrees to forfeit any and all tenure and/or seniority rights she has accrued while working under Respondent's employ as to any position in the District.

5. **General Release and Waiver of all of Petitioner's Claims**. In exchange for the consideration set forth in paragraph 2, Petitioners fully releases and forever discharges Respondent of and from any and all claims, actions, causes of action, back pay, front pay, contracts, agreements, promises, charges, judgments, grievances, obligations, rights, demands, debts, physical injury, pain, suffering, emotional distress, compensatory damages, punitive damages, attorneys' fees, expenses, costs, losses, liabilities, damages, or accountings of whatever nature, whether known or unknown, disclosed or undisclosed, asserted or unasserted, in law or equity, contract or tort or otherwise (herein collectively designated "Claims"), through the effective date of this Agreement, including, but not limited to, any and all Claims of harassment, discrimination,

retaliation, and any and all tort Claims or contract Claims for general damages, and any and all Claims arising under, made, regarding, or involving: any federal, state, or local laws or under the common law; violations of any federal, state, or educational practices or civil rights laws or ordinances; Claims for personal injury, failure to reinstate, wrongful conduct, or discrimination; New Jersey Department of Education regulations and related statutes; the Civil Rights Acts of 1866 and 1871, as amended, 42 U.S.C. §1981; the Civil Rights Act of 1964, as amended, including Title VII; the Age Discrimination in Employment Act, as amended; the New Jersey Law Against Discrimination; the Employee Retirement Income Security Act; the Fair Labor Standards Act; the National Labor Relations Act, as amended; the American's with Disabilities Act; Fair Housing Act; Section 504 of the Rehabilitation Act; any and all state wage payment and collection laws; the Respondent's policies, practices, collective bargaining agreements, contracts, benefits, or understandings; any Claims arising out of any relationship, including employer/employee relationship, between or among Crowell and Respondent predating the effective date of this Agreement; and any and all grievances or demands for mediation or arbitration, or Claims or demands under Respondent's policies and procedures; and any and all Claims asserted, or which could have been asserted, in the petition of appeal referenced above, including any Claims against any current or former agents or employees of Respondent.

Crowell hereby specifically waives, releases, and gives up all Claims and rights, as described in the preceding paragraph, whether now known or unknown, which she has or may have against Respondent, based on any fact, act, event, or omission, whether now known or unknown, occurring before the Effective Date of this

Agreement. Petitioner understands that she is waiving, releasing, and giving up all Claims and rights that she knows about and all Claims and rights that she may not know about.

6. **Liens and Indemnification by Petitioner**. It is further understood that as a condition of this settlement, all claims, and/or liens, past, current, and/or future arising out of this settlement or asserted against the proceeds of this settlement are to be satisfied by Crowell and/or her Attorneys, including but not limited to any Medicare or Medicaid claims and/or liens, Child Support claims and/or liens; Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician or attorney claims and/or liens, or any of the statutory, equitable, common law or judgment claims and/or liens, including but not limited to claim based on subrogation or any other legal or equitable theory. Crowell therefore agrees, upon prompt presentation of any such claims and/or liens, to defend Respondent and its insurer against any such claims and/or liens, and to indemnify and hold Respondent and its insurer harmless against any judgment entered against Respondent and its insurer based on such claims and/or liens, including the payment of any fines, charges, and attorneys' fees incurred as a result of any such lien.

7. **Prevailing Party Status**. Petitioners understand and agree that they will not be considered a prevailing party under any statute, common law, or otherwise as a result of this Agreement.

8. **Payment**. Payment to Crowell is subject to Respondent's receipt of Crowell's and the Association's signed and notarized Agreement, as well as a child support search report.

Petitioners represents and warrants that neither Respondent nor its attorneys provided any advice regarding the taxability of the settlement amounts paid pursuant to this paragraph. Petitioners acknowledges and agrees that Crowell is solely responsible for payment of any and all federal, state, and local taxes which may be due from the settlement sum in the event that it is determined that any taxes are owed based on the taxation laws in effect on the date of execution of this Agreement or become due at any time in the future because of a change to the laws governing the taxation of such settlement proceeds. Petitioners further acknowledge and agree to indemnify and hold harmless Respondent and its attorneys harmless in the event that any federal, state, or local taxing authority asserts against any claim for unpaid taxes, failure to withhold taxes, or interest based upon the payment of the settlement sum to Crowell.

9. **Effective Date**. The effective date of this Agreement shall be the day following the date upon which the signed Agreement is received by Respondent's attorneys, Methfessel & Werbel, P.C, and ratified by Respondent's Board of Education.

10. **Applicable Law**. This Agreement shall be governed by and construed in accordance with the laws of New Jersey, except where federal law controls. Should any provision of this Agreement be declared or determined by any Court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not to be a part of this Agreement or may be modified as necessary.

11. **Entire Agreement**. This Agreement sets forth the entire agreement between the parties and fully supersedes any and all prior agreements or understandings between the parties.

12. **Signatures**. This Agreement may be signed in counterparts. However, this Agreement will not be binding among the parties until it has been executed by and among the Parties, ratified by Respondent's Board of Education, and subject to Respondent's receipt of Petitioners' signed and notarized Agreement, and a completed child support search report.

KIMBERLY CROWELL FURTHER CERTIFIES, ACKNOWLEDGES, AND REPRESENTS THAT SHE IS ABLE TO READ AND UNDERSTAND ENGLISH, THAT SHE UNDERSTANDS ALL OF THE PROVISIONS HEREIN, WITH THE ADVICE AND ASSISTANCE OF HER ATTORNEY, AND THAT SHE MAKES THIS RELEASE KNOWLINGLY AND VOLUNTARILY.

KIMBERLY CROWELL ACKNOWLEDGES THAT SHE HAS NO PHYSICAL OR MENTAL PROBLEM, CONDITION, OR IMPAIRMENT OF ANY KIND WHICH HAS INTERFERED WITH HER ABILITY TO READ AND UNDERSTAND THE MEANING OF THIS RELEASE OR ITS TERMS.

KIMBERLY CROWELL FURTHER REPRESENTS THAT IN SIGNING THIS RELEASE, SHE DOES NOT RELY ON ANY PROMISES OR REPRESENTATIONS MADE BY ANYONE OTHER THAN THOSE STATED SPECIFICALLY HEREIN.

KIMBERLY CROWELL FURTHER WARRANTS, REPRESENTS, AND AGREES THAT IN SIGNING THE RELEASE, SHE DOES SO WITH FULL KNOWLEDGE OF ANY AND ALL RIGHTS WHICH SHE MAY HAVE WITH RESPECT TO RESPONDENT AND THE LAWSUIT.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties have executed this Settlement Agreement and General Release as of the dates set forth below.

By: Kimberly Crowell Dated: Jan 17, 2018
KIMBERLY CROWELL

By: _____ Dated: 1-18-18
HIGH POINT EDUCATION ASSOCIATION ~~PRESIDENT~~
Signature Related for the HPEA

By: _____
Dated: 2/20/18 **KYLE VEALEY**
BOARD PRESIDENT

OAL DKT. NO. EDU 17780-15
AGENCY DKT. NO. 315-10/15

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

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

Upon review, the Commissioner observes that the Superintendent and Business Administrator of the Jersey City Board of Education signed the agreement on behalf of the Board. The file does not contain a copy of the Board's resolution approving the settlement and designating the Superintendent or Business Administrator to sign the agreement on its behalf – as required by *N.J.A.C.* 6A:3-1.13 under these circumstances – nor is the resolution attached to the stipulation of settlement itself. In the alternative, the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation. Without either the Board attorney's signature or the appropriate Board resolution designating the Superintendent or Business Administrator to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

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: 5/22/18

Date of Mailing: 5/22/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. EDU 17780-15
AGENCY DKT. NO. 315-10/15

SEAN DOHERTY,

Petitioner,

v.

JERSEY CITY PUBLIC SCHOOLS,

Respondent.

Philip Feintuch, Esq., on behalf of petitioner Sean Doherty (Feintuck, Porwich & Feintuck, attorneys)

Derlys Maria Gutierrez, Esq., for respondent Jersey City Public Schools (Adama Gutierrez & Lattiboudere, attorneys)

Record Closed: April 6, 2018 Decided: April 10, 2018

BEFORE **GAIL M. COOKSON**, ALJ:

On or about October 16, 2015, petitioner Sean Doherty (petitioner) appealed the denial of a salary increment for the 2015-2016 school year from the Jersey City Public Schools (respondent) under cover of December 4, 2015. The Board filed its Answer and Affirmative Defenses to the Verified Petition under cover of November 2, 2015. The matter was transmitted to the Office of Administrative Law (OAL), on November 5, 2015, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The matter was assigned to me on November 12, 2015. On November 30, 2015, I convened a telephonic case management conference. Among other issues discussed, a hearing date for March 9, 2015, was scheduled. That date was adjourned several times on request of both parties in order to complete discovery. On June 20, 2017, I set the matter down for a peremptory hearing date of October 20, 2017.

Prior to the scheduled peremptory hearing date, the parties communicated that they were in the process of negotiating a resolution of the matter and, accordingly, the hearing was adjourned. The parties were given the opportunity to reduce the settlement to writing. Under cover of April 6, 2018, the parties submitted to the undersigned a fully executed Settlement Agreement. On the basis of the written agreement submitted, I **FIND** that all parties in this matter are satisfied with the terms and conditions of that agreement. I have reviewed the record and terms of the Settlement Agreement, made a part hereof, and **FIND**:

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 10, 2018

DATE

GAIL M. COOKSON, ALJ

Date Received at Agency:

APR 12 2018

Date Mailed to Parties:

id

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ADAMS GUTIERREZ & LATTIBOUDERE, LLC

Cherie Lee Adams
Derlys Maria Gutierrez
Perry L. Lattiboudere
Sandro Polledri
Jerrold J. Wohlgemuth
John E. Croot, Jr.
Adam S. Herman
Audra A. Pondish
Melisa E. Gerecci Meyler
Leslie F. Prentice
Kimberly G. Williams

THE LEGAL CENTER
1037 Raymond Blvd.,
Suite 900
Newark, NJ 07102
973.735.2742

MARLTON OFFICE
10000 Lincoln Drive East
Suite 201
Marlton, NJ 08053
856.988.5488

RECEIVED
2018 APR 10 A 7:47
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

April 6, 2018

VIA FACSIMILE & REGULAR MAIL
Honorable Gail Cookson, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: Sean Doherty v. Jersey City Public Schools
Agency Reference No.: 315-10/15
OAL Docket No.: EDU 17780-2015

Dear Judge Cookson:

This firm represents Respondent, Jersey City Public Schools in the above-captioned matter. Enclosed please find the fully executed settlement agreement. In light of the approved settlement agreement, we respectfully request that Your Honor issue a decision approving the settlement.

Thank you for Your Honor's consideration in this matter

Respectfully yours,

DERLYS MARIA GUTIERREZ

DMG/jd
Enc.
cc: Hope R. Blackburn, Esq., General Counsel, Jersey City Public Schools (via email)
Philip Feintuch, Esq. (via facsimile only)

ADAMS GUTIERREZ & LATTIBOUDERE, LLC
The Legal Center
1037 Raymond Blvd, Suite 900
Newark, New Jersey 07102
(973) 735-2742
Attorneys for Respondent,
Jersey City Public Schools

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2018 APR 10 A 7:4
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SEAN DOHERTY, Petitioner, v. BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, Respondent.	OFFICE OF ADMINISTRATIVE LAW AGENCY REFERENCE NO.: 315-10/15 OAL DOCKET NO.: EDU 17780-2015N **STIPULATION OF SETTLEMENT**

The Jersey City Public Schools (the "District"), whose principal office is located at 346 Claremont Street, Jersey City, New Jersey 07305, and its successors, assignees, officers, employees, agents and representatives (collectively, "District"), and Sean Doherty ("Petitioner"), residing at 15 Church Towers, Apt. 7D, Hoboken, NJ 07030 have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

WHEREAS Petitioner is a tenured teaching staff member employed by the District as a teacher; and

WHEREAS the Parties intend to adopt, by way of compromise and accord, an amicable resolution of the Petition of Appeal; and

NOW THEREFORE, in consideration of the foregoing and of the mutual agreements contained herein, and intending to be legally bound, the Parties mutually agree as follows:

1. Upon final approval of the signed Stipulation of Settlement by the Judge, the Petitioner shall and hereby does withdraw the instant Petition of Appeal.
2. The District shall restore Petitioner's increment prospectively, thereby placing Petitioner on his proper step for the 2018-2019 school year as if his increment for the 2015-2016 school year had not been withheld.
3. Petitioner understands and agrees that he will not be reimbursed for the salary that he did not receive in the 2015-2016 school year as a result of the increment withholding.
4. This agreement shall not constitute a precedent in any matters involving other District employees.
5. The Parties each acknowledge that counsel has advised them regarding this Stipulation of Settlement and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.
6. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.
7. This Stipulation of Settlement shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education shall have exclusive jurisdiction

over any dispute arising from, in connection with, or related to this Stipulation of Settlement.

8. This Stipulation of Settlement may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.
9. This Stipulation of Settlement or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation of Settlement jointly prepared this Agreement.
10. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation of Settlement.
11. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.
12. The parties agree that the terms of the settlement agreement are subject to approval by the Superintendent of Schools of the Jersey City Public Schools pursuant to authority given to her by the Jersey City Board of Education.
13. Additionally, this Stipulation of Settlement is subject to final approval by the Judge pursuant to N.J.A.C. 1:1-19.1, and will become effective only upon approval by the

Judge. Counsel for the Parties shall jointly request the Judge's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Petition of Appeal.

Dated: 2/27/18

SEAN DOHERTY

Dated: 3/29/18

DR. MARCIA LYLES
SUPERINTENDENT OF SCHOOLS
JERSEY CITY PUBLIC SCHOOLS

Dated: 4/5/18

Regina Robinson, School Business Administrator/Board Secretary

158-18

OAL DKT. NO. EDU 00866-18
AGENCY DKT. NO. 281-12/17

J.C., ON BEHALF OF MINOR CHILD, R.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed stipulation of settlement and release (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 observes that the Board President of the Randolph Township Board of Education signed the Agreement on behalf of the Board. The file does not contain a copy of the Board's resolution approving the settlement terms and designating the Board President to sign the Agreement on its behalf; nor is the resolution attached to the Agreement itself. Alternatively, the Agreement is not signed by the Board Attorney, who is the Board's duly authorized representative in litigation. Without either the Board Attorney's signature or the appropriate Board resolution approving the Agreement and designating the Board President to sign the Agreement on its behalf – as required under *N.J.A.C.* 6A:3-1.13 – the Commissioner cannot approve the within Agreement.

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: 5/22/18

Date of Mailing: 5/22/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00866-18N
AGENCY DOCKET NO. 281-12/17

J.C. ON BEHALF OF R.M.,
Petitioners,
v.
TOWNSHIP OF RANDOLPH BOARD OF EDUCATION, MORRIS COUNTY,
Respondent.

Judith Connelly, petitioner, pro se

Matthew J. Donohue, Esq., for respondent (Schenck, Price, Smith & King, LLP)

Record Closed: April 11, 2018 Decided: April 13, 2018

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

This matter was transmitted to the Office of Administrative Law (OAL) on January 17, 2018, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The hearing was scheduled for April 11, 2018. On March 9, 2018 respondent's counsel submitted a Motion for Summary Judgment requesting the matter be dismissed. The undersigned denied said motion by Order dated March 29, 2018. Prior to the hearing date respondent's counsel advised that the parties

reached a tentative settlement agreement and requested the matter hearing be cancelled. The hearing was rescheduled to June 5, 2018. Prior to that date respondent's counsel submitted the fully executed Stipulation of Settlement and Release, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement and General Release, I **FIND**:

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

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

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

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

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

April 13, 2018
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

Date Mailed to Parties: APR 16 2018

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for the Randolph Township
Board of Education

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2018 APR 11 A 11:11
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

J.C. o/b/o R.M., Petitioner, v. RANDOLPH TOWNSHIP BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OAL Dkt. No. EDU 00866-2018 N Agency Ref. No. 281-12/17 **STIPULATION OF SETTLEMENT AND RELEASE**

This Agreement is made by and between Petitioner, Judy Connelly ("J.C."), minor child R.M.'s biological mother, Tracy McConkey ("T.M."), and the Respondent, Randolph Township Board of Education Board of Education ("Board").

RECITALS

WHEREAS, on or about November 7, 2017, Petitioner J.C. requested that her granddaughter R.M. be enrolled in the Randolph Public School District ("District") as an affidavit pupil pursuant to N.J.S.A. 18A:38-1(b)(1); and

WHEREAS, J.C. indicated within the affidavit that minor child R.M.'s biological mother, T.M., would be moving to Randolph, New Jersey after the conclusion of litigation in the State of Washington, but no proof of T.M. moving to Randolph was ever submitted; and

WHEREAS, on or about November 22, 2017, the Board denied Petitioner's request due to R.M. not meeting the criteria established in N.J.S.A. 18A:38-1(b)(1); and

WHEREAS, Petitioner thereafter filed a Petition of Appeal to challenge the Board's determination with regard to R.M.; and

WHEREAS, this administrative action is captioned J.C. o/b/o minor child R.M. v. Township of Randolph Board of Education, and is currently pending before the Commissio... of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 00866-2018 N, Agency Dkt. No. 281-12/17 ("the Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, on or about March 29, 2018, T.M. has moved to Randolph, New Jersey; and

WHEREAS, in order to avoid the expense, inconvenience, distractions and inherent uncertainties associated with continuation of this dispute, and the fees and expenses that inevitably would result therefrom, the Parties, by this Agreement, herein agree to adopt a full and final settlement for the duration of the 2017-2018 school year of any and all claims, lawsuits, complaints, and/or disputes between Petitioner and Respondent in connection with any and all damages and losses arising from the Litigation; and

WHEREAS, by this Agreement, the Board shall not contest R.M.'s eligibility to attend the District for the remainder of the 2017-2018 school year; and

WHEREAS, by this Agreement, Petitioner will voluntarily withdraw the Petition of Appeal without prejudice, and without costs to any party as against the other;

NOW, THEREFORE, in consideration of good and valuable consideration, the sufficiency and adequacy of which is acknowledged, the parties to this Agreement agree as follows:

1. The Parties mutually agree that for the remainder of the 2017-2018 school year, R.M. shall be enrolled in the District on a tuition-free basis, subject to T.M. signing an affidavit declaring her intent to remain domiciled within Randolph Township for the foreseeable future.
2. Petitioner understands and agrees that this Settlement shall apply only for the 2017-2018 school year and this Settlement shall in no way entitle R.M. to enroll in the District in any subsequent school years if T.M. is no longer domiciled in Randolph Township, New Jersey.
3. Petitioner, in consideration of this Stipulation of Settlement and Release, and in full, final, and complete settlement of the matter, hereby agree to a withdrawal and dismissal, without prejudice, of the Petition of Appeal in this matter.
4. The terms of this Agreement shall in no way constitute acceptance or assent by the Board that R.M. is automatically entitled to a free public education in the District at any point in the future, and the Parties understand and agree that Respondent reserves the right to investigate R.M.'s and/or Petitioner's residency status in the District at any time in order to determine whether or not Petitioner and/or T.M. and R.M. are domiciled in the District.
5. This Agreement is subject to approval by the Board. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.
6. Petitioner and T.M. voluntarily agree that they shall not file any claims against the Board, collectively or individually, its members, employees and agents, arising from R.M.'s education in the District, unless there is a complete failure by the same, either directly or indirectly, to the educate the child as per New Jersey State standards.

7. 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.

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

9. Petitioner and T.M. hereby represent that they are freely entering into this Agreement, that they were advised of their right to obtain counsel of their choosing and have chosen not to be represented, and that they have read and fully understand the contents and effects of this Agreement.

10. This Settlement is subject to the approval of the Administrative Law Judge assigned to this matter and the Commissioner of Education. The terms of this Agreement shall not be binding until said approvals are received.

11. This Agreement shall be binding upon all Parties hereto, and shall inure to the benefit of each of them, as well as their respective estates, heirs, legal representatives, successors, predecessors, parent companies, subsidiaries, affiliates, owners, directors, officers, shareholders, members, employees, agents and assigns.

12. This Agreement constitutes the entire understanding and agreement by the parties with respect to the subject matter of this Agreement, and there are no agreements, undertakings, restrictions, representations or warranties as between the parties other than those set forth herein. This Agreement supersedes all previous arrangements or understandings, whether written or oral, and contains the entire agreement of the parties with respect to its subject matter. This Agreement may be modified or amended only by written agreement jointly executed by the Petitioner and Respondent.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, consisting of six (6) pages, on the dates set forth below.

PETITIONER

Date: 4/9/18

Judy Connelly, Petitioner

Date: 4/9/2018

Tracy McConkey

FOR RESPONDENT,
RANDOLPH BOARD OF EDUCATION

Date: 4/10/18

Ronald Conti, Board President

STATE OF NEW JERSEY)
ss:
COUNTY OF MORRIS)

I CERTIFY that on April 9, 2018, Judy Connelly and Tracy McConkey, Individually and o/b/o R.M., personally came before me and acknowledged under oath, to my satisfaction, that they:

(a) are named in and personally signed this document; and

(b) signed, sealed and delivered this document as their act and deed.

Susan E. Chillemi
~~Attorney or~~ Notary Public

SUSAN E. CHILLEMI
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES FEB 13, 2022

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for the Randolph Township
Board of Education

J.C. o/b/o R.M., Petitioner, v. RANDOLPH TOWNSHIP BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OAL Dkt. No. EDU 00866-2018 N Agency Ref. No. 281-12/17 **AFFIDAVIT**

STATE OF NEW JERSEY :
ss:
COUNTY OF MORRIS :

Tracy McConkey, of full age, being duly sworn according to law, deposes and says that:

1. I am a currently domiciled in Randolph Township, and reside in 121 South Road, Mendham, New Jersey with my minor child R.M. as of this date.

2. I fully intend to remain domiciled within Randolph Township at 121 South Road, Mendham, New Jersey with my minor child R.M. for the foreseeable future. I consider this address my permanent residence, i.e. my true, fixed permanent home.

3. I fully understand that I must provide proof of residency that I am domiciled at 121 South Road, Mendham, New Jersey to the Randolph Board of Education Business Administrator no later than April 30, 2018.

4. I fully understand that failure to provide the aforementioned proof of residency by April 27, 2018 will render minor child R.M. as a non-resident student, and I will be assessed tuition if I fail to provide the proof of residency.

TRACY MCCONKEY

Dated: 4/9/2018

BE IT REMEMBERED, that on Apr. 19, 2018, before me the subscriber, personally appeared TRACY MCCONKEY, who, I am satisfied, is the person named in and who executed the within Instrument, and thereupon did acknowledge that she signed, sealed and delivered the same as her act and deed, for the uses and purposes therein expressed.

Notary

SUSAN E. CHILLEMI
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES FEB 13, 2022

AGENCY DKT. NO. 22-1/18

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE	:	COMMISSIONER OF EDUCATION
OF PAOLA GROLLI-COLE, SCHOOL DISTRICT	:	DECISION
OF THE TOWNSHIP OF FRANKLIN,	:	
SOMERSET COUNTY.	:	

For Petitioner, Andrew W. Li, Esq.

No appearance by or on behalf of Respondent

This matter was opened before the Commissioner of Education on February 28, 2018, by way of an Order to Show Cause (OTSC) filed by petitioner, School District of the Township of Franklin, and duly served upon respondent, Paola Grolli-Cole, requiring respondent to show cause as to why an order should not be entered suspending her teaching certificate pursuant to *N.J.S.A.* 18A:26-10, *N.J.S.A.* 18A:28-8, and *N.J.A.C.* 6A:9B-4.8[1]. Petitioner alleges that respondent failed to provide the requisite sixty (60) day notice of intent to resign pursuant to *N.J.S.A.* 18A:28-8, and requests that the Commissioner suspend respondent's teaching certificate for up to one (1) year.

By notice dated February 28, 2018, the Bureau of Controversies and Disputes (Bureau) acknowledged receipt of proof that the OTSC had been served upon respondent, and directed respondent to answer within twenty (20) days. On March 26, 2018, upon not having received an answer to the OTSC, the Bureau sent respondent a second and final notice – via regular and certified mail – directing that she file an answer within ten (10) days. The notice further advised that petitioner's allegations would be deemed admitted if respondent failed to file an answer; whereupon, the matter would be summarily decided by the

[1] The Commissioner notes that the petition in support of the OTSC correctly quotes *N.J.A.C.* 6A:9B-4.8 but incorrectly cites *N.J.A.C.* 6A:9-17.9 (the former subchapter, prior to its recodification to subchapter 9B-4 *et seq.*, in 2014); however, the error is *de minimis*, as content and applicability of the provision remains the same.

Commissioner pursuant to *N.J.A.C.* 6A:3-1.5(e). The certified mail was returned as "unclaimed," but the regular mail was not returned. For sake of diligence, the Bureau sent another notice on April 24, 2018, advising respondent of her rights, and reminding her to file an answer within ten (10) days following receipt of the letter. Neither the regular mail nor the certified mail has been returned. To date, no answer to the OTSC has been filed.

The certification submitted by petitioner in support of the OTSC alleges that: respondent – a tenured teaching staff member in the District – was employed as a French Language teacher for the 2017-2018 school year, during which time she took a leave of absence scheduled from September 11, 2017 to December 22, 2017; respondent was expected to return to her teaching duties on January 2, 2018; while on leave, however, respondent sent a letter to the District on November 29, 2017, tendering her resignation from her teaching position in the District; this date fell short of the requisite sixty (60) day notice. Respondent has not denied these allegations, despite having had the opportunity to do so. 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, *N.J.S.A.* 18A:28-8, and *N.J.A.C.* 6A:9B-4.8.

Accordingly, summary decision is hereby granted to petitioner, and respondent's teaching certification is suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[2]

ASSISTANT COMMISSIONER OF EDUCATION[3]

Date of Decision: 5/23/18

Date of Mailing: 5/23/18

[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)

[3] This matter has been delegated to the undersigned Assistant Commissioner pursuant to *N.J.S.A.* 18A:4-34.

NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

IN THE MATTER OF:

THE TENURE HEARING OF NATHANIEL T. GERSON AND THE SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY

AGENCY DOCKET NO. 19-1/18

DECISION APPROVING SETTLEMENT AGREEMENT

Before
James W. Mastriani
Arbitrator

Appearances:

For the Petitioner:
Kyle J. Trent, Esq.
Apruzzese, McDermott, Mastro & Murphy, P.C.

For the Respondent:
Jerry Tanenbaum, Esq.
Mattleman, Weinroth & Miller, P.C.

On February 5, 2018, I was appointed by the New Jersey Department of Education, Bureau of Controversies and Disputes to serve as arbitrator pursuant to N.J.S.A. 18A:6-16 as amended by P.L. 2012, c. 26 and P.L. 2015, c. 109, to hear and make a final determination on tenure charges filed by the School District of the City of Paterson [the "Petitioner"] against tenured teacher Nathaniel Gerson [the "Respondent"]. Upon receipt of that appointment, I reviewed the certified tenure charges and the answer opposing the charges. Thereafter, I conducted conference calls with counsel for the parties, at which time the procedures for the expeditious processing of this case were discussed and mutually agreed upon. At the time, the parties requested, and I agreed, that the matter should proceed directly to formal hearings without foreclosing the possibility that they would engage in settlement discussions in the interim.

Arbitration hearings in this matter were scheduled to be held on May 4 and 7, 2018. After the hearings were scheduled, the Petitioner and Respondent voluntarily engaged in informal discussions to ascertain whether the issues raised in this proceeding were susceptible to a mutually agreed upon resolution. After lengthy joint discussions were held between the parties, they were able to construct terms for a tentative Settlement Agreement for review by Petitioner and Respondent. Pursuant to those terms, the Respondent would submit a final, binding and irrevocable resignation from employment with the District as part of a lengthy and comprehensive Settlement Agreement. The Settlement Agreement

would also include the withdrawal of the tenure charges by the District subject to mutual ratification and adoption and upon approval of the Settlement Agreement by the Arbitrator pursuant to N.J.S.A. 6A:3-5.6.

The arbitrator is required under N.J.A.C. 6A:3-5.6 to issue a decision approving the settlement of tenure charges and to explain why the arbitrator is approving the terms of settlement. I have approved these terms for the reasons that follow.

I am persuaded that the issues that were raised in the Statement of Tenure Charges and the Statement of Evidence filed by the Petitioner and the Answer to Tenure Charges filed by the Respondent have been satisfactorily addressed and resolved by the terms of settlement. In addition to the fact that these terms are mutually acceptable to the parties, I conclude that the interests of the public will be served as well by the Settlement Agreement. The Agreement will avoid extended litigation not only in this tenure arbitration proceeding but also any potential litigation that could result from any claims, now waived, that could be made by the Petitioner or Respondent under various employment related statutes.

The parties have agreed that the interests of all interested parties will be served by Respondent's separation from employment through voluntary resignation as one condition precedent to the withdrawal of the tenure charges. The parties have acknowledged that the terms they have agreed upon are

without admission by either party as to the merits of the claims raised in the District's tenure charges or in the Respondent's defenses to the charges.

I also note that the Settlement Agreement furthers the interests of the public by avoiding the potential for students having to testify during class time and by avoiding the distress that can often accompany the rigors of students being subject to an adversarial legal proceeding. The Settlement Agreement also eliminates the loss of instructional and/or work time that would accompany the preparation and presentation of the parties' respective submissions at formal hearings. The public will further benefit by the avoidance of substantial litigation costs and the uncertainties attendant to litigating the tenure charges, including any potential for judicial review after the issuance of an Award. I also conclude that the terms of the Settlement Agreement will not compromise the interests of the public, the District, its staff and/or students in any way.

Accordingly, and based upon all of the above, I hereby approve the parties' Settlement Agreement.

Dated: May 23, 2018
Sea Girt, New Jersey

James W. Mastriani

State of New Jersey }
County of Monmouth } ss:

On this 23rd day of May, 2018, before me personally came and appeared James W. Mastriani to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Gretchen L Boone
Notary Public
New Jersey
My Commission Expires 8-24-2022
No. 50066778

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Agreement is entered by and between the STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON BOARD OF EDUCATION ("Board"), and NATHANIEL T. GERSON ("Gerson"). The parties hereby agree as follows:

WHEREAS, Gerson and the Board desire fully and finally to resolve the pending Tenure Charges amicably;

NOW THEREFORE, in consideration of the mutual covenants, promises and agreements set forth herein, and with the intention of the parties to be legally bound, the parties **AGREE AS FOLLOWS:**

1. Gerson agrees to sign a full release and waiver of any and all claims against the Board as set forth in Paragraphs 3 and 4 below.
2. Gerson hereby agrees that he will submit an irrevocable letter of resignation of his employment with the State-Operated School District of the City of Paterson ("District") with an effective date of March 21, 2018. A copy of the resignation letter is attached hereto as Appendix A and is incorporated into and made part of this Agreement. Gerson agrees and acknowledges that as of that date he will no longer be an employee of the District. It is understood that Gerson's resignation from his position with the District is final, binding and irrevocable. Gerson agrees that he will not take any step, file any action, or authorize anyone else to file an action on his behalf, to challenge the resignation of his employment with the District.
3. Gerson on his own behalf and on behalf of his heirs, executors, administrators, successors and assigns (hereinafter collectively referred to as "Gerson") hereby releases and forever discharges the District and all of its present and former Board members, administrators, officers, employees, agents, representatives, insurance carriers, successors and assigns and the estate and/or heirs thereof (hereinafter collectively referred to as the "District") from any and all claims, known and unknown, resulting from anything which has happened up through the date of his execution of this Agreement, including claims for attorneys' fees. Gerson hereby represents that he has not filed, and will not institute, any

claims or actions of any kind against the District and/or Board, and its officers, employees and/or agents.

4. Without limiting the scope of the foregoing provision in any way, Gerson specifically releases all claims relating to or arising out of any aspect of his employment with or service to the District up to the effective date of this Agreement and General Release and the cessation of his employment, including, but not limited to, all claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq., as amended by the Older Workers' Benefit Protection Act, specifically § 626; Title VII of the Civil Rights Act of 1964 and 1991, as amended, 42 U.S.C. § 2000e, et seq. and laws amended thereby; the Civil Rights Act of 1966, 42 U.S.C. § 1981, et. seq.; the Civil Rights Statutes contained in 42 U.S.C. §§ 1983, 1985, and 1986 and any related laws; the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et. seq.; the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1, et. seq.; the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et. seq.; the New Jersey Family Leave Act, N.J.S.A. 34:11b-1, et seq.; the Federal Family and Medical Leave Act, 29 U.S.C. § 2601, et. seq.; the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq.; the Rehabilitation Act of 1973, 29 U.S.C. § 791, et. seq.; the Occupational Safety and Health Act, 29 U.S.C. § 651, et seq.; the Fair Labor Standards Act, 29 U.S.C. § 201, et seq.; the Equal Pay Act, 29 U.S.C. § 206(d); the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a, et seq.; the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1, et seq.; New Jersey Civil Rights Act, Title 18A, and any other Federal, State or local equal employment opportunity laws, regulations, or ordinances; contract, quasi-contract, negligence, interference with contract/business advantage; fraud; intentional infliction of emotional distress; and/or any other duty or obligation of any kind or description. This release shall apply to all known, unknown, unsuspected, and unanticipated claims, liens, injuries and damages. Gerson is not waiving his right to enforce the terms of this Agreement or any claim that may be waived as a matter of law.

5. The pending tenure charges filed by the Board and assigned Docket No. 19-1/18 by the Commissioner of Education shall be deemed withdrawn subject to the approval of this Agreement by the assigned arbitrator, James Mastriani, as required by N.J.A.C. 6A:3-5.6. This Agreement shall constitute a full and final release and discharge of any and all civil

claims or causes of action the Board may have against Gerson in connection with his employment with the Board through the date of this release. The release shall not apply to third party claims made against the Board for the actions and/or conduct of Gerson while he was employed by the Board for which the Board retains all rights of indemnity and contribution arising from or relating to such claims.

6. Gerson agrees that he will not seek reemployment with the Board now or in the future, and if he does the Board has no obligation to consider his request for re-employment or reinstatement without any ability on Gerson's behalf to challenge or otherwise institute an action over the Board's failure to process or consider said application for reemployment or reinstatement.

7. Gerson agrees and understands that as of the date of the conclusion of his employment, March 21, 2018, he is not owed any further monies from the Board, whether by way of collective bargaining agreement, Board policy, or otherwise, and the Board is not obligated to make any further payment to Gerson.

8. This Agreement shall not restrict access to information or records deemed public by law or nor require the District to communicate any information that would result in any misrepresentation of the reason for separation from service. In accordance with Board policy and practice, in response to any inquiries from prospective employers, the District will provideonly the date of hire, date of resignation, and salary range, except as otherwise required by law or upon receipt of consent from Gerson for the release of additional information.

9. Gerson agrees that on or before March 21, 2018 he will return to the District all Board property including, but not limited to, keys, identification cards, computers, cellphones, etc. The Board agrees that arrangements will be made for Gerson to retrieve any personal property remaining in Board buildings and/or facilities.

10. Gerson acknowledges that he had the opportunity to consult with his attorney before agreeing to these terms and signing this Agreement and General Release; that he has carefully read and fully understands all of the provisions of this Agreement; that he has had adequate time to review the Release and the provisions contained herein; and that he fully understands and voluntarily agrees to the terms of this Agreement and the Release.

11. This Agreement and General Release constitutes the entire agreement with respect to the subject matter hereof and shall not be amended, modified, or amplified except in writing signed by both parties.

12. The parties agree that the terms of this Agreement are in the interests of both sides and in the public interest. By this agreement Ms. Gerson's employment with the District will end. Further, the agreement will avoid the significant time and expense required to fully adjudicate this matter and will avoid the need for staff members, administrators, and students to lose instructional and/or work time to testify if this matter went forward to hearing.

13. The terms of this Agreement are confidential to the extent permitted by law, and the parties agree that, unless otherwise required by law and as noted in Paragraphs 15 and 16 below, they will not discuss or disclose this Agreement, or its terms, with anyone, except that Gerson may discuss it with his spouse, attorneys or financial planners.

14. Both parties acknowledge that the provisions of this Agreement include valuable and sufficient consideration for the obligations undertaken herein, including, but not limited to the District's withdrawal of its tenure charges.

15. Gerson acknowledges that pursuant to N.J.A.C. 17:1-6.3, the Board may be required to disclose this agreement to the Division of Pensions.

16. Gerson acknowledges that pursuant to N.J.A.C. 6A:3-5.6 and N.J.A.C. 6A:9B-4.3 this matter will be referred to the State Board of Examiners for its consideration of any further action it deems appropriate.

17. It is agreed that in resolving this matter, Gerson is not admitting to any liability or wrongdoing in any fashion.

18. It is further agreed that in resolving this matter, the Board, together with its present and past members, administrators, employees, representatives, servants, and agents, are not admitting to any liability or wrongdoing in any fashion.

19. ADEA WAIVER

Gerson acknowledges that he is releasing all rights and claims arising under the Age Discrimination in Employment Act. To satisfy the requirements of the Older Workers' Benefit Protection Act, 29 U.S.C. § 626(f), the parties agree as follows:

a. Gerson acknowledges that he has read and understands the terms of this Agreement.

b. Gerson is hereby advised to consult with an attorney prior to executing this Agreement. Gerson represents that he has consulted with his attorney of record in this matter, Jerry Tanenbaum, Esq., and has received all advice he deems necessary concerning this Agreement.

c. Gerson acknowledges that he has twenty-one (21) days to consider this Agreement, although he may, in the exercise of his own discretion, sign or reject it at any time before the expiration of the twenty-one (21) day period. Gerson acknowledges that he has taken as much time as necessary to consider whether to enter into this Agreement and has chosen to enter this Agreement freely, knowingly, and voluntarily.

d. For a seven (7) day period following the execution of this Agreement, Gerson may revoke this Agreement by delivering a written revocation to the Board's counsel in this matter, Apruzzese, McDermott, Mastro & Murphy, P.C., 25 Independence Blvd., Warren, NJ 07059, attention: Kyle J. Trent, Esq. This Agreement will not become effective or enforceable until after the end of this revocation period.

20. This Agreement is subject to Board approval. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

Date: 4/1/2018

NATHANIEL T. GERSON

STATE OF NEW JERSEY:
SS:
COUNTY OF PASSAIC:

I CERTIFY that on April 1st, 2018, Nathaniel T. Gerson personally came before me and acknowledged under oath, to my satisfaction that he is named in and personally signed this document.

I certify that on May 21, 2018, Oshin Castillo came before me and acknowledged under oath to my satisfaction that she is named in and personally signed this document

~~Notary Public~~ Robert E. Murray Esq 5/21/2018
Attorney at Law
State of New Jersey

State-Operated School District of the City of Paterson

Oshin Castillo, Board President

Appendix A

Eileen Shafer. Acting Superintendent
State-Operated School District of the City of Paterson
90 Delaware Ave.
Paterson, NJ 07503

Dear Ms. Shafer:

This letter will serve as my official notification to the State-Operated School District of the City of Paterson that I hereby resign my position as a teaching staff member in the District effective March 21, 2018.

Sincerely,



Nathaniel T. Gerson

AUDREY PRESS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

The petitioner contended that her tenure rights were violated when the respondent Board reduced her compensation following a reduction in force (RIF). Petitioner previously served as Director of Special Services/Guidance K-12 from the 2012-2013 school year through to the end of the 2015-2016 school year, when the Board abolished the Director of Guidance K-12 position pursuant to a RIF; subsequently, the Board stopped paying petitioner an additional sum of $8,000. Petitioner asserted that she had been reassigned from one director position to another, and was improperly reduced in compensation. The parties filed opposing 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; the Director of Guidance K-12 position was separate and apart from the Director of Special Services position, and was appropriately eliminated pursuant to a RIF; petitioner was originally appointed as "Director of Special Services/Guidance, K-12" at a salary of "$126,838 plus $8,000 additional compensation," and her annual reappointment letters separately listed her salary for "Special Services Director" and "Director of Guidance, K-12"; language relating to the responsibilities of the "Director of Guidance, K-12" was removed from petitioner's job description after the position was eliminated in the RIF; petitioner has not contested the fact that the Director of Guidance K-12 position was eliminated and that all associated guidance responsibilities were, likewise, removed from petitioner's job description; and petitioner's claim that her District Bullying Coordinator responsibilities were part of the Director of Guidance K-12 position is without merit. The ALJ concluded that the position of Director of Guidance K-12 was a separate position, lawfully eliminated as part of a RIF, and petitioner is therefore not entitled to the salary associated with the Director of Guidance position. Accordingly, the ALJ granted the Board's motion for summary decision.

Upon comprehensive review, the Commissioner concurred with the ALJ's determinations herein and adopted the Initial Decision as the final decision in this case, with modification. The Commissioner found, *inter alia*, that petitioner's arguments evolved during the course of the litigation, first conceding that the Director of Guidance position was an "additional assignment" for which she received "additional compensation" in the amount of $8000, but later arguing that "Director of Special Services/Guidance K-12" was a single position, and when the RIF resulted in a "decoupling" of the former title, she was "reassigned" as Director of Special Services and improperly reduced in compensation. The facts, however, establish that the additional assignment was, in fact, a separate position which was separately enumerated from petitioner's base salary as Director of Special Services, such that when this position was abolished, petitioner was no longer eligible to receive the additional sum of $8,000 that was attached to the duties of the Director of Guidance K-12 position; since petitioner's base salary as Director of Special Services was never reduced, petitioner's tenure rights were not implicated. 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.

May 31, 2018

OAL DKT. NO. EDU 13152-16
AGENCY DKT. NO. 206-7/16

AUDREY PRESS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY	:	DECISION
RESPONDENTS.	:	

The record of this matter, along with the Initial Decision of the Office of Administrative Law (OAL), have been reviewed. Petitioner's exceptions, and respondent's reply thereto, were also considered by the Commissioner.[1] This dispute concerns whether respondent violated petitioner's tenure rights when the Board reduced petitioner's compensation following a reduction in force (RIF). Specifically, petitioner – who had been serving as Director of Special Services/Guidance K-12 from the 2012-2013 school year through to the 2015-2016 school year – contends that the Board violated her tenure rights when it stopped paying her an additional sum of $8000 following abolishment of the Director of Guidance K-12 position at the conclusion of

[1] *N.J.A.C.* 1:1-18.4 provides, in pertinent part, that exceptions to the Initial Decision must be filed with the agency head within 13 days from the mailing date of the decision. Furthermore, as the parties are aware, *N.J.A.C.* 1:1-18.4 requires that the exceptions be served on all parties. The understanding – and practice – is that all parties are served at the same time. The Initial Decision was mailed on March 1, 2018; therefore, the last possible day for filing of the exceptions was March 14, 2018. The Commissioner received a copy of petitioner's exceptions on March 13, 2018, and therefore, deemed the exceptions as timely. The Commissioner notes, however, that the exceptions did not include proof of service to respondent or the judge; nor has petitioner provided a certification of service or an affidavit acknowledging that respondent was duly served on or about March 13, 2018. The only proof of service made available to the Commissioner was dated March 26, 2018, and therefore, respondent was provided an opportunity to file its reply outside of what would have been the timeframe had the proper timelines been followed. Although the Commissioner has accepted petitioner's exceptions – as it was timely filed with the agency – the parties are reminded that adherence to the Administrative Code, and professional candor, are expected of all parties before this tribunal. Litigants are directed to ensure proper compliance with the rules to avoid procedural defects and unnecessary delays.

the 2015-2016 school year, pursuant to a RIF.[2] The Administrative Law Judge (ALJ) determined that "Director of Guidance K-12" was a separate position from "Director of Special Services" and was eliminated pursuant to a RIF; therefore, petitioner was not entitled to the additional compensation associated with the abolished position. Upon comprehensive review, the Commissioner is in accord with the ALJ's determinations, as modified herein.

While reflecting her obvious disagreement with the findings and conclusions contained within the Initial Decision, petitioner's exceptions are unpersuasive, and substantially recast and reiterate the arguments made below.[3] In her exceptions – which are identical to petitioner's brief in support of her motion for summary decision before the OAL – petitioner primarily argues that she acquired tenure in the "Director" position and category; therefore, following the RIF – when she was "reassigned" from one director position to another – she was improperly reduced in compensation.[4] Petitioner also argues that – since she did not have two separate job descriptions or two distinct assignments, operated under a single title, and was paid

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[2] Petitioner was receiving $8000 – in addition to her annual base salary (inclusive of incremental increases) – each year from the 2012-2013 school year through to the 2015-2016 school year, when she served as Director of Special Services/Guidance K-12. Prior to the 2012-2013 school year, petitioner had served as Director of Special Services. At the inception of the 2012-2013, petitioner was additionally assigned the role of Director of Guidance K-12 and her title in the District was revised from "Director of Special Services" to "Director of Special Services/Guidance K-12," to reflect the additional assignment. Petitioner oversaw two different departments and carried out duties specific to each position. The record reflects that petitioner was provided an additional sum of $8000 for her duties related to "Guidance K-12." At the conclusion of the 2015-2016 school year, however, the Board abolished the "Guidance K-12" position and ceased payment of the additional $8000 to petitioner effective with the 2016-2017 school year. Petitioner continued to serve in her position as Director of Special Services as it was not affected by the RIF, and was paid the annual base salary commensurate with her tenured position as Director of Special Services.

[3] In reviewing the record of this matter, the Commissioner observes petitioner's evolving arguments through the course of this litigation. In petitioner's *corrected* petition of appeal and the joint stipulation of facts submitted by the parties, petitioner concedes that "Director of Guidance K-12" was an "additional assignment" for which she received "additional compensation" in the amount of $8000. Petitioner also acknowledges that the Director of Guidance K-12 position was abolished following a RIF at the conclusion of the 2015-2016 school year. In petitioner's motion for summary decision and in her exceptions to the Initial Decision, petitioner argues that "Director of Special Services/Guidance K-12" was a single position, and when the RIF resulted in a "decoupling" of the former title, she was "reassigned" as Director of Special Services.

[4] As will be addressed below, there is no evidence of a reassignment from one director position to another.

one salary – reduction in compensation was improper following elimination of the guidance position pursuant to a RIF. Petitioner further contends that the additional $8000 does not constitute a stipend, as it was not treated as such by the Board. Petitioner submits that, even if the additional compensation was a stipend, decisional law prohibits reduction of a tenured staff member's stipend following "reassignment."

In its reply, respondent argues that petitioner's exceptions were not properly filed as they were untimely served upon the Board.[5] Respondent further contends that the positions of Director of Special Services and Director of Guidance K-12 were "two distinct positions" where petitioner "administered and supervised two separate departments with two separate staffs" and "[i]n no meaningful way can they be characterized as a single position, even if the two job titles were at one time combined."[6] Respondent further argues that petitioner was not reassigned; rather, the Director of Guidance K-12 position was subject to a RIF and petitioner's compensation was, therefore, properly reduced.

In the context of a RIF, a tenured staff member may be dismissed or reduced in salary "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. . . ." *See N.J.S.A.* 18A:28-9; *see also Carpenito v. Bd. of Educ. of Boro of Rumson, Monmouth County*, 322 *N.J. Super.* 522 (App. Div. 1999); *Bassett v. Bd. of Educ. Boro of Oakland, Bergen County*, 223 *N.J. Super.* 136 (App. Div. 1988); *Reinertsen v. Bd. of Educ. of Twp. of East Brunswick, Middlesex County*, 1998 *N.J. AGEN LEXIS* 302 (May 27, 1998).

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[5] As discussed above, petitioner's exceptions were considered timely filed by the Commissioner.

[6] It is unclear why the Board chose to combine the two positions under one title, but it is evident from the Commissioner's review of the record that the Board intended for the two positions to be separate, as will be addressed below. Additionally, it is improper to rely on a "title" within a district to validate (or invalidate) tenure rights. *See Stilwell v. Bd. of Educ. of the Twp. of North Brunswick, Middlesex County*, 2017 *N.J. AGEN LEXIS* 604 (Aug. 14, 2017).

In this matter, it is undisputed that a RIF was conducted, but the parties diverge in their understanding of the effect of the RIF. The Board represents that although "Director of Special Services/Guidance K-12" was a single title, it was in fact two distinct positions encompassing separate duties, and only the Director of Guidance K-12 position was eliminated by way of a RIF. The Board further argues that the compensation for the two positions was separate.[7] Petitioner argues that "Director of Special Services/Guidance K-12" was a combined, single position, and petitioner was simply reassigned as Director of Special Services after the combined Director of Special Services/Guidance K-12 position was eliminated.[8] As noted above, petitioner's assertions deviate from her representations in the joint stipulation of facts that Director of Guidance K-12 was an additional assignment, concomitant with which was an additional compensation of $8000.

The facts in this matter, and the evidence in support thereof, establish that – although petitioner's *title* was revised from "Director of Special Services" to "Director of Special Services/Guidance K-12," reflecting the additional assignment, and her job description was also revised to include the duties related to the "Guidance K-12" position – the additional assignment was, in fact, a separate position: petitioner's job duties were distinct, she was provided additional compensation for the Director of Guidance K-12 position, which was separately enumerated from her base salary as Director of Special Services, and her annual contracts and renewal letters reflected the same.[9] Therefore, when the Director of Guidance K-12 position was

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[7] Petitioner may have been paid for both positions through the same paychecks, but the record supports a finding that each position had a separate compensation amount attached to it.

[8] Nothing in the record supports a finding that petitioner's position of "Director of Special Services" was eliminated or that the Board took action to abolish any position entitled "Director of Special Services/Guidance K-12." The record supports a finding that "Guidance K-12" was the only position subject to the RIF.

[9] It is undisputed that petitioner's base salary as Director of Special Services was not increased by $8000, as said sum was specifically provided to her *in addition* to her annual salary, and was strictly related to the Director of

abolished by the Board at the conclusion of the 2015-2016 school year, petitioner was no longer eligible to receive the additional sum of $8000 that was attached to the duties of the Director of Guidance K-12. Significantly, at no point was petitioner's base salary as the Director Special Services – which position she retained – reduced. As such, petitioner's tenure rights were not implicated.

Petitioner's reliance on *Reinertsen, supra* and *Baldwin, infra* are improper, as both of those matters dealt with reassignment and transfer, not RIF. *Baldwin v. Bd. of Educ. of the Town of West New York, Hudson County*, 2017 *N.J. AGEN LEXIS* 983 (June 5, 2017). Likewise, petitioner's argument that removal of the additional compensation is a violation of her tenure rights – even if it was a stipend – is inapplicable in this matter because, unlike *Baldwin, supra,* the additional compensation was attached to the abolished Guidance K-12 position, and not related to her position or duties as Director of Special Services. Similarly, *Bassett, supra* and *Casey, infra* do not apply here because following the abolishment of the Director of Guidance K-12 position, petitioner was not "reassigned" to another guidance position or another director position. *Casey v. Bd. of Educ. of the Twp, of Cinnaminson, Burlington County*, 1993 *N.J. AGEN LEXIS* 1678 (Dec. 19, 1993). Instead, petitioner remained in her position as Director of Special Services and her annual salary for the position of was not reduced.[10]

Guidance K-12 assignment. Furthermore, any change to petitioner's annual base salary during that time period was the result of increments, which remains unchanged. The fact that the Board did not issue separate paychecks – which was not unreasonable for the Board – has no bearing in this matter, as it is clear from the record that petitioner held two different positions with differing compensation for each position. *See Stallone v. Bd. of Educ. of the Camden Cnty Tech Sch. Dist., Camden County*, 2012 *N.J. AGEN LEXIS* 444 (Sept. 10, 2012); *see also Ciamillo v. Bd. of Educ. of the Boro of Ridgefield, Bergen County*, 2005 *N.J. AGEN LEXIS* 389 (Jul. 15, 2005).

[10] While the duties related to the "Guidance K-12" position were altogether eliminated from petitioner's job description following the RIF, petitioner maintains that her guidance-related duties as the "District Bullying Coordinator" from the former combined title remains. The Commissioner finds that the duties related to her role as the District Bullying Coordinator are not related to Guidance K-12. *N.J.S.A.* 18A:37-15 requires every school district to appoint an "anti-bullying specialist" and "anti-bullying coordinator," and such positions – *unrelated* to guidance – are assigned to employees at the school district's discretion. Therefore, the Commissioner is

Accordingly, the recommended decision of the OAL is adopted – as modified herein – as the final decision in this matter, and the petition is dismissed.

IT IS SO ORDERED.[11]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/31/18

Date of Mailing: 6/04/18

unpersuaded that petitioner's appointment as "District Bullying Coordinator" is related to her previous title and role as Director of Guidance K-12.

[11] 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

INTITIAL DECISION
SUMMARY DECISION

OAL DKT. NO. EDU 13152-16
AGENCY DKT. NO. 206-7/16

AUDREY PRESS,

Petitioner,

v.

MANVILLE BOARD OF EDUCATION,

Respondent.

Robert M. Schwartz, Esquire, for petitioner (Schwartz Law Group, LLC, attorneys)

Carol Smeltzer, Esquire, for petitioner (NJPSA Foundation for Educational Administration, attorneys)

Stephen J. Christiano, Esquire, for respondent (Sciarrillo, Cornell, Merlino, McKeever & Osbourne, LLC, attorneys)

Record Closed: January 15, 2018 Decided: March 1, 2018

BEFORE **DEAN J. BUONO,** ALJ:

PROCEDURAL HISTORY AND STATEMENT OF CASE

Petitioner, Audrey Press (Press), challenges respondent, Manville Board of Education (Board), for its elimination of the Director of Guidance, K-12 position on June 30, 2016. (Joint Stip., para. 13.) The reduction in workforce and resulting reduction in salary was challenged by Press. On August 31, 2016, this matter was transferred to the Office of Administrative Law (OAL) from the New Jersey Department of Education for a hearing as a contested case. After several telephone conferences, the parties agreed that no issues of fact existed and that this case was ripe to file cross-motions for summary decision on the narrow issue of the reduction of salary as a violation of her tenure and seniority rights.

On November 21, 2017, Press filed a motion for summary decision and on December 20, 2017, respondent filed its motion for summary decision. On January 17, 2017, petitioner submitted a brief in opposition to the motion for summary decision.

STIPULATIONS OF FACT

There are no divergent facts in this case that address the issue for this motion for summary decision. The parties entered the following Joint Stipulations of Facts and as such **I FIND as FACTS:**

1. Petitioner began her employment with respondent in or about July 2001, as the Director of Special Services.
2. The principal certification is required for the title of Director of Special Services.
3. Petitioner possesses the principal certification.
4. Petitioner obtained tenure as Director of Special Services in or about July 2004, in accordance with N.J.S.A. 18A:28-5.
5. Petitioner continued to serve solely in the title of Director of Special Services through June 2012.

6. On or about July 17, 2012, petitioner was given the additional assignment of Director of Guidance.
7. The principal certification is required for the position of Director of Guidance.
8. Beginning with the 2012-2013 school year, after petitioner was given the additional assignment of Director of Guidance, respondent agreed to add $8,000 to petitioner's salary for a total compensation of $134,838.
9. Petitioner earned tenure in the position of Director of Guidance in 2014 in accordance with N.J.S.A. 18A:28-6.
10. Throughout the time in which petitioner was assigned the titles of Director of Special Services/Director of Guidance she received single annual contracts with each containing a single annual salary.
11. In each contractual year following the 2012-2013 school year, petitioner received increases in compensation.
12. For the 2015-2016 school year, petitioner's total compensation was $144,660.
13. On or about June 30, 2016, respondent voted to remove the guidance component, or most of the guidance components, from petitioner's job responsibilities.
14. Petitioner did not request to have the guidance component, or most of the guidance components, removed from her job responsibilities.
15. As a result of the removal of the guidance component, respondent reduced petitioner's compensation from the $144,660 which she received in the 2015-2016 school year to $140,416 for the 2016-2017 school year.
16. Accordingly, petitioner suffered a loss of pay in the amount of $4,244 for the 2016-2017 school year.

FACTUAL DISCUSSION

The facts surrounding this matter are not in dispute and represent the history of this case by their respective parties. Having reviewed the briefs in support of their respective motions for summary disposition, I **FIND as FACTS:**

The instant dispute arises out of the Manville Board of Education's elimination of the Director of Guidance, K-12 position on June 30, 2016. (Joint Stip., para. 13.) Press does

not offer another reason the position was eliminated other than due to a reduction in work force. Press was originally appointed by Manville as the Director of Special Services in June 2001. (Id. at para. 1.) On July 17, 2012, Press was appointed to the additional assignment of Director of Guidance, K-12. (Id. at para. 6.) Press thereafter assumed the responsibilities of both the Director of Special Services and Director of Guidance for the 2012-13, 2013-14, 2014-15 and 2015-16 academic years. (Id. at para 12.)

Press's employment contract letters for 2012-13, 2013-14, 2014-15 and 2015-16 separately list her regular salary as Director of Special Services and $8,000 compensation for performing the role of Director of Guidance, K-12. (Id. at para. 8–11.) While Press' salary increased from year to year, the compensation for the Director of Guidance position remained at $8,000 for all four years. Ibid. Her contracts, likewise, separate her compensation for Director of Special Services and Director of Guidance.

Press's employment contract letter for the 2016-17 school year did not include the $8,000 for the eliminated Director of Guidance position. (Id. at para. 13.) Taking raises into account, Press's take-home salary decreased by $4,244 compared to the 2015-16 academic year.

Press had a single job description before, during, and after her appointment as Director of Guidance, K-12. (See Pet. Exh. 1–3.) After her appointment as Director of Guidance, K-12, Press's job description listed her position as "Director of Special Services/Guidance, K-12." (Pet. Exh. 2.) Thereunder, in the "Job Goal" sub-section, the additional goal of "supervision and leadership for the student counselors" was appended to reflect her additional role. Ibid. "Performance Responsibilities" was, likewise, updated to include the supervision and professional growth coordination of guidance counselors, assumption of the role of "District Bullying Coordinator" and related responsibilities and coordination and implementation of "career and college planning" for students. (See Id. at para. 28-37.) After the Director of Guidance, K-12 position was eliminated, the additional responsibilities related to guidance counselors were removed. (Pet. Exh. 3.) However, the assignment to the "District Bullying Coordinator" and related HIB responsibilities were not removed. Ibid.

On August 2, 2016, Press appealed her reduction in salary to the New Jersey Department of Education. On August 31, 2016, the matter was transmitted to the OAL as a contested case. On November 22, 2017, Press moved for summary decision and on December 20, 2017, Manville cross-motioned for summary decision.

Again, the issue presented by these cross-motions is whether a person who previously held both the positions of Director of Special Services and Director of Guidance is entitled to the $8,000 Director of Guidance salary after the Director of Guidance position was eliminated due to a reduction in work force. Based on the arguments of both parties above, the Board is correct.

Once a position is eliminated, pursuant to a reduction in force, the previous occupant of that position is not entitled to the compensation associated with the position because reductions in force are designed as a cost saving measure, which would be entirely frustrated by requiring a district to continue paying for an eliminated position. The petitioner occupied two separate positions and is not entitled to her salary for the eliminated position based on the undisputed record available.

LEGAL ARGUMENT AND CONCLUSION

Pursuant to N.J.A.C. 1:1-12.5(b), a summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules, R. 4:46-2. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In connection therewith, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Id. at 75. In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the

> motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial".
>
> [Brill, 142 N.J. at 540 (citations omitted).]

Furthermore, the purpose of teaching staff tenure laws is "to aid in the establishment of a competent and efficient school system by affording teaching staff members 'a measure of security in the ranks they hold after years of service.'" Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528–29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949)). Thus, generally, tenured teaching staff members "shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause." N.J.S.A. 18A:28-5. However, notwithstanding the tenure laws, a school board may reduce the number of teaching staff members for reasons of economy. N.J.S.A. 18A:28-9; Maywood Bd. of Educ. v. Maywood Educ. Assoc., 168 N.J. Super. 45, 55 (App. Div. 1979). If any teaching staff member is dismissed as a result of such reduction, commonly known as a reduction-in-force, or RIF, 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. N.J.S.A. 18A:28-12.

Press argues that her "assignment to the combined position of Director of Special Services/Guidance K-12 merely represented an additional assignment — additional duties — within her tenure posit[i]on [sic] of director." (Pet. Brief, 6.) Therefore, Press argues that Manville improperly reduced her salary with "the removal of the guidance duties from her portfolio." (Id. at 8.) Further, Press points out that duties "pertaining to HIB such as ¶29 pertaining [to] [sic] her role as the District Bully[ing] [sic] Coordinator, ¶30 evaluating and coordinating the district nurses and HIB specialists, ¶31 coordinating professional development for nurses and HIB specialists and . . . coordinating and monitoring the district IR&S process" remained a part of her job description after Director of Guidance, K-12 was eliminated. Ibid. Press urges that "[w]hile the position of

the Director of Guidance may have been eliminated, [Press] nevertheless remains a director having the same full-time status she had previously." Essentially, Press seeks to characterize the Director of Special Services and Director of Guidance as one position and the elimination of the latter as merely a "reduction in pay" based on a change in assigned duties rather than a "reduction in force." (Id. at 9.)

To that end, Press cites to Bassett v. Bd. of Educ. of the Bor. of Oakland, 223 N.J. Super. 136 (App. Div. 1988) for the argument that a "tenured staff member who was reassigned within the same tenured position as [Press] was in the instant matter could not be reduced in compensation, notwithstanding that the reassignment resulted from a reduction in force."[1] (Id. at 6) (emphasis removed). Further, Press seeks to rely on Reinertsen v. Bd. of Educ. of the Twp. of East Brunswick, EDU 10328-97, Initial Decision (May 27, 1988), adopted, Comm'r (July 8, 1998), affirmed, State Bd. (October 7, 1998), <https://njlaw.rutgers.edu/collections/oal/html/initial/edu10328-97.html> and Baldwin v. Bd. of Educ., EDU 8132-16, Initial Decision (April 19, 2017), adopted (June 5, 2017), <https://njlaw.rutgers.edu/collections/oal/final/edu08132-16_1_1.pdf>, for the proposition that the $8,000 Director of Guidance compensation does not "constitute[] a stipend which can be removed without violating [Press's] tenure rights." (Id. at 10.)

Manville, however, argues that the Director of Special Services and the Director of Guidance are separate positions subject to termination under a RIF. Res. Brief, section C. Manville argues "[Press] administered and supervised two disparate departments with two different staffs." Ibid. Manville points to Teresa Stallone v. Bd. of Educ. of the Camden Cty. Tech. Sch. Dist., EDU 13690-11, Initial Decision (September 10, 2012), adopted, Comm'r (October 25, 2012),

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[1] In Bassett v. Bd. of Educ. of the Bor. of Oakland, 223 N.J. Super. 136 (App. Div. 1988), the Appellate Division upheld the State Board of Education's determination that a full-time tenured reading teacher whose position was eliminated by a RIF, but who was then appointed as a part-time reading teacher, was entitled to be paid in proportion to the full-time salary she would have received but for the RIF. Bassett does not apply here because the Director of Guidance concerns an entirely separate set of responsibilities from the Director of Special Services and Press was not reassigned—the guidance was simply eliminated.

Press also cites to Jeannette Williams v. Plainsboro Bd. of Educ., 176 N.J. Super. 154 (App. Div. 1980) (affirming the validity of a transfer from one principalship to another at the same salary but with different salary growth expectancy). However, because Williams addresses transfer to an equivalent position and not an alleged RIF or demotion there is no need to address the case further.

http://www.nj.gov/education/legal/commissioner/2012/oct/416-12.pdf, as being analogous to the instant matter and urges that, likewise, the Director of Guidance position was properly eliminated and Press is no longer entitled to the associated $8,000 of compensation.[2]

In Stallone, Stallone served as principal of adult education at Camden and principal at Gloucester when the Camden program was eliminated for cost saving reasons. Both positions were listed separately in district materials with individual descriptions, responsibilities and salary. Subsequently, the district moved to reduce the petitioner's total salary by $10,000, the amount designated for the Camden position. On appeal, Stallone argued she "held one position as principal, and the district merely removed a duty from her list of job responsibilities." The ALJ determined that Stallone had held two distinct positions based on the separate descriptions of the positions, that the positions were at different schools, and that the "district's action did not just remove a duty from Stallone's roster of responsibilities, it eliminated an entire school." The ALJ relied on Ciamillo v. Bd. of Educ. of the Bor. of Ridgefield, EDU 1805-04, Initial Decision (July 15, 2005), adopted, Comm'r (August 31, 2005), affirmed, State Bd. (January 4, 2006), <https://njlaw.rutgers.edu/collections/oal/final/edu1805-04.pdf>, in which a guidance counselor and "Guidance Consociate Teacher" was found to have occupied two separate positions where salary notices indicated a separate salary for each respective position.[3] In conclusion, the ALJ found that "allowing petitioner's total compensation to remain the same would have reaped the anomalous result of cutting a position for cost saving while still paying for it."

In Reinertsen, a school employee who acquired tenure as a janitor was found to be entitled to his former salary because the school board had improperly reduced his salary when he was demoted from "Head Custodian" to "Custodian." The school board argued that Reinertsen "was always paid the normal janitor's salary pursuant to the appropriate pay schedule, and that the additional pay increase for the head custodian

[2] While the decision is not available on Rutgers the final is available at the link above.
[3] Ciamillo was ultimately decided on the basis that the petitioner had violated the ninety-day rule for filing a timely appeal of the RIF. Further, the Commissioner therein noted that, assuming the RIF was valid under N.J.S.A. 18A:28-9, petitioner would have no right to the associated salary.

position was paid as a 'stipend;'" Reinertsen maintained that "this stipend was actually part of his base salary and was subject to pension payments."

The ALJ concluded that the additional money was not a stipend, because "[a] stipend is more closely associated with compensation to employees providing additional services than those normally included in their regular employment duties" like "a teacher who doubles as a coach of a school's sports team." Rather, Reinertsen "was compensated for work directly related to his custodial duties, and the compensation was subject to pension payments." Thus, as salary, the ALJ concluded that the school board could not effect a reduction thereof without abiding by tenure laws. Nonetheless, the ALJ noted that "[i]t is assumed that the petitioner could suffer a reduction in salary if the position of 'head custodian' was abolished pursuant to a reduction in force (RIF)."

In Baldwin, as in Reinertsen, a head custodian was subsequently demoted from the position to a "Second Shift Custodian" and had his salary reduced by the additional amount paid to him when he was the head custodian. Relying extensively on Reinertsen, the ALJ determined Baldwin was entitled to the salary he had received as head custodian because

> . . . this "stipend" is not paid for activities that are unrelated to or outside of Baldwin's "primary employment as a custodian" and pension deductions were taken from the entire compensation, not only from the "base salary." The letters noticing Baldwin as to the compensation refer only to "salary" and do not separate out from that term, the so called 'stipend.' [Baldwin.]

The Commissioner subsequently adopted the initial decision without modification.

In the instant matter, the record supports finding that the Director of Guidance was a separate position that was appropriately eliminated pursuant to a RIF. Thus, the record supports finding that Press is not entitled to the $8,000 of additional compensation associated with the Director of Guidance, K-12 position. Press was originally appointed as "Director of Special Services/Guidance, K-12" at a salary of "$126,838 plus $8,000 additional compensation." The letters sent to Press each year, confirming her reappointment, separately list her salary for "Special Service Director"

and "Director of Guidance, K-12." Press's job description after her appointment lists her title as "Director of Special Services/Guidance, K-12." (Pet. Exh. 2.) A comparison with the Director of Special Services' job goals shows that the Director of Guidance was "[t]o provide supervision and leadership for the student counselors for grades K-12." (Pet. Exh. 2, 3.) This language was removed from her job description after the Director of Guidance, K-12 position was eliminated. Unlike in Reinertsen and Baldwin, Press was paid a separately listed amount for work falling outside her primary employment as Director of Special Services. And, unlike in Reinertsen, the Director of Guidance, K-12 position was actually eliminated. As Stallone concludes, "allowing petitioner's total compensation to remain the same would [reap] the anomalous result of cutting a position for cost saving while still paying for it."

Further, Press does not contest that the Director of Guidance, K-12 position was, in fact, eliminated and that all additional guidance-related responsibilities were, likewise, removed from Press's job description. Press's attempt to link her District Bullying Coordinator responsibilities with the Director of Guidance responsibilities is unconvincing because the record demonstrates that all additional responsibilities under the "supervision and leadership for the student counselors" job goal were, in fact, removed when the Director of Guidance position was abolished. Press has not demonstrated that the HIB-related responsibilities were part of the Director of Guidance, K-12 position. At best, Press has only shown that HIB responsibilities were added to her job description concurrent to her Director of Guidance title. Likewise, because the HIB responsibilities come with the subtitle of District Bullying Coordinator—a separate position mandated by N.J.S.A. 18A:37-15—the weight of the evidence supports finding that the HIB responsibilities were not part of the Director of Guidance, K-12 position and do not create an entitlement to her salary notwithstanding the RIF.

Therefore, having reviewed the parties' submissions in support of, and opposition to, the within motions, I **CONCLUDE** that issues of material fact do not exist. I **FURTHER CONCLUDE** that Press's motion for summary decision should be **DENIED** and Manville's motion for summary decision should be **GRANTED** because the Director of Guidance, K-12 was a separate position, which was eliminated pursuant to a RIF

and, therefore, Press is not entitled to the salary associated with the Director of Guidance, K-12 position.

It is therefore hereby **ORDERED** that the respondent's motion for summary decision be and hereby is **GRANTED.** It is further **ORDERED** that appellant's motion for summary decision be and hereby 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.

March 1, 2018
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 3/1/18

Date Sent to Parties: 3/1/18

/dw

BRIEFS RELIED ON

For petitioner

- Petitioner's Motion for Summary Decision
- Petitioner's reply, in opposition to Motion for Summary Decision

For respondent

- Respondent's Motion for Summary Decision

172-18IM

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Acting Commissioner

June 8, 2018

Sabino Valdes, *pro se*
P.O. Box 463
Paramus, New Jersey 07653

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

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 Sabino Valdes' Motion for Reconsideration and Clarification of the Commissioner's May 17, 2018 decision denying Mr. Valdes' fifth motion to reopen the above-captioned matter.[1]

Based on my review of the present motion and the arguments set forth therein, and pursuant to the reasons addressed in the Commissioner's January 11, 2018 and March 20, 2018 decisions, Mr. Valdes' Motion for Reconsideration and Clarification is denied – without need for further adjudication – as he has not established any of the bases set forth in *N.J.A.C.* 6A:3-1.15(b)(2), and has further failed to demonstrate good cause to reopen this matter.

Accordingly, the motion for reconsideration is hereby DISMISSED.[2]

Sincerely,

Lamont O. Repollet, Ed.D.
Acting Commissioner of Education

c: County Superintendent
State Law Library

LOR/SLP/ATA
VIA REGULAR MAIL

[1] The procedural history of this matter has been fully set forth in the January 11, 2018 and March 30, 2018 decisions, and is incorporated herein by reference.

[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).

K.A., ON BEHALF OF MINOR CHILDREN, D.B., D.A., AND K.A.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF LODI, BERGEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

In August 2017, *pro se* petitioner appealed the determination of the respondent Board that her minor children were not eligible for a free public education in the Lodi school district during the 2016-17 school year. Petitioner argued that the family had undergone hardships, and their living arrangements had changed; however, she claimed that they still lived in Lodi. The Board contended, however, that – based on the results of a residency investigation – D.B., D.A. and K.A. are transported by petitioner from a Wallington address associated with the children's father to their schools in Lodi. The Board sought tuition for the period of the children's ineligible attendance in Lodi schools. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case. Prior to the scheduled hearing date, the Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: there were no genuine issues of material fact regarding the 2016-17 school year; accordingly, an order on the motion for summary decision was issued in February 2018, granting the motion as to the 2016-17 school year, but denying as to the 2017-18 school year; that order included a tuition calculation for the 2016-17 school year totaling $36,209; the residency investigation in this case was initially triggered when a District official received an anonymous tip that K.A. and her children do not live in Lodi; the results of the investigation supported the finding that D.B., D.A., and K.A. – though at one time apparently domiciled in Lodi – are now domiciled outside of the school district, but continued to attend Lodi public schools for the 2017-2018 school year; pursuant to *N.J.S.A.* 18A:38-1(b)(2), petitioner has the burden of proof in a determination of residency; petitioner could not provide any documentation other than a lease to verify that she and her children live in Lodi; petitioner testified that she was homeless, but also testified that she lives with her father in Lodi; she further testified that she goes to the home of her estranged husband in Wallington after she takes the children to school. The ALJ concluded that: there is no evidence that the petitioner is homeless; petitioner was not domiciled in the Lodi School District for the 2017-2018 school year; and the respondent Board is entitled to reimbursement of tuition in the amount of $19,823.

Upon review of the record in this matter, the Commissioner concurred with the ALJ's findings and conclusion, and adopted the Initial Decision as the final decision, with modification to include tuition reimbursement for each day beyond February 9, 2018 that the minor children remain enrolled in the District's schools – to be calculated at the rate of $69.74 per day for both D.B. and D.A., and $65.28 per day for K.A. 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 7, 2018

OAL DKT. NO. EDU 11902-17
AGENCY DKT. NO. 157-7/17

K.A., ON BEHALF OF MINOR CHILDREN, D.B., D.A., AND K.A.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF LODI, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter – including the February 16, 2018 Summary Decision Order – and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed,[1] as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by petitioner and the Lodi Board of Education's (Board) reply thereto.[2]

In her exceptions, petitioner argues that her situation constitutes a hardship because she was displaced from her home after a flood, forcing her to live with her father and sometimes with her husband, from whom she is separated. She maintains that she does not have any bills or utilities in her own name as her father owns the home that she now lives in. Further, she forwards her mail to a "safe place." Accordingly, she is unable to provide certain documentation as to her address. Petitioner emphasizes that she has lived in Lodi for ten years and her children are involved in extracurricular activities, so she hopes to provide stability rather than removing them from the school that they have attended their whole lives. Petitioner asks

[1] The Commissioner was not provided with a transcript of the March 2, 2018 hearing at the OAL.

[2] A response to a reply is not contemplated by *N.J.A.C.* 1:1-18.4. Accordingly, the response filed by petitioner to the Board's reply exceptions will not be considered by the Commissioner.

that the Commissioner allow her children to remain in the district for the remainder of the school year. She explains that she is in the process of searching for another apartment and plans to move in immediately so that she can establish residence before the 2018-2019 school year begins.[3]

In reply, the Board contends that although petitioner claims a hardship exception, she did not argue hardship at the hearing before the Administrative Law Judge (ALJ). Instead, the Board points out that petitioner argued that she resided in Lodi with her father. Although petitioner testified that she was homeless, the ALJ found no evidence of that. As such, the Board argues that the ALJ appropriately found that the minor children do not reside in Lodi and assessed tuition for the time of ineligible enrollment in the district.

Upon review, the Commissioner concurs with the ALJ that petitioner failed to sustain her burden of establishing that she was a domiciliary of Lodi for the 2016-17 and 2017-18 school years. The Commissioner further concurs with the ALJ's conclusion that the minor children were, therefore, not entitled to a free public education in the district's schools during this time. The Commissioner does not find petitioner's exceptions to be persuasive. Although petitioner argues that she was undergoing a financial hardship, she did not establish that she was homeless. Further, although petitioner wants to provide stability for her children and keep them in the school they have attended, such an argument does not establish that petitioner is domiciled in Lodi or that her children are entitled to attend school in the district.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against K.A. for the time period during which the minor children were ineligible to attend school in Lodi. Therefore, the Commissioner concurs with the ALJ – as she concluded in the Summary

[3] The Commissioner makes no determination as to the future domicile of petitioner, as this petition only involves the 2016-17 and 2017-18 school years.

Decision Order dated February 16, 2018 – that the Board is entitled to tuition reimbursement for the children's ineligible enrollment during the 2016-17 school year in the amount of $36,209 ($12,553 for D.B., $11,905 for D.A., and $11,751 for K.A.). The Commissioner further agrees with the ALJ's findings in the Initial Decision that the Board is entitled to tuition reimbursement for the 2017-18 school year through February 9, 2018 in the amount of $19,823.44 ($6,745.34 each for D.B. and D.A., and $6,332.76 for K.A.). It appears from the parties' submissions that the minor children have continued to attend school in Lodi beyond February 9, 2018. Review of the record indicates that the cost per day for the children to attend school in Lodi is $69.74 each for D.B. and D.A. and $65.28 for K.A. As such – in addition to the tuition reimbursement ordered by the ALJ – the Board is also entitled to tuition in the amount of $69.74 each for D.B. and D.A. and $65.28 for K.A. for each day beyond February 9, 2018 that the minor children remain in Lodi's schools.

Accordingly, the Initial Decision of the OAL is modified as stated herein. Petitioner is directed to reimburse the Board in the amount of $55,032.44 – plus $69.74 each for D.B. and D.A., and $65.28 for K.A., for each day beyond February 9, 2018 that the minor children remain enrolled in the District's schools – for tuition costs incurred during the time period that D.B., D.A., and K.A. were ineligible to attend school in Lodi. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/07/18
Date of Mailing: 6/11/18

[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 11902-17

AGENCY DKT. NO. 157-7/17

K.A. ON BEHALF OF MINOR CHILDREN
D.B., D.A., AND K.A,

Petitioner,

v.

BOROUGH OF LODI BOARD OF EDUCATION,
BERGEN COUNTY,

Respondent.

K.A., petitioner, pro se

Alisa Nunno DiChiara, Esq., for respondent (Law Offices of William R. Nunno)

Record Closed: March 2, 2018 Decided: March 19, 2018

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE

Petitioner, K.A., challenges the residency determination of respondent, Borough of Lodi Board of Education (Respondent or Board). During the Board's June 26, 2017, meeting it voted to remove minor children D.B., D.A., and K.A. from its school claiming they were not residents of Lodi. Petitioner appealed the matter and the students

remained in the school pending the outcome of this case. On August 18, 2017, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. On February 9, 2018, respondent's counsel filed a Motion for Summary Decision. On February 14, 2018, petitioner filed a response in opposition to the motion. I granted partial summary decision as to the 2016-2017 school year in favor of respondent on February 16, 2017. The hearing was held on March 2, 2018, at which time I closed the record.

STATEMENT OF FACTS

Based upon a consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following uncontested **FACTS**:

1. The Board is the elected governing body for the Lodi Public School district. D.B., D.A., and K.A. are the minor children of Ms. K.A.

2. D.B., D.A., and K.A. currently attend school in the Lodi School District.

3. In April 2017, Brian Long, the residency officer for the Board, received an anonymous tip that K.A. and her children did not live in Lodi.

4. Upon further investigation it was found that at that time the New Jersey Driver's Licenses for both Ms. A and her husband were registered at Wallington, New Jersey.

5. Petitioner was sent a notice dated May 2, 2017, of initial determination of ineligibility because they did not live in the school district.

6. On June 26, 2017, the Board determined that D.B., D.A., and K.A. were ineligible to attend school in Lodi because they did not live in the school district.

7. The matter was transmitted to OAL for a hearing as a contested case on August 18, 2017. A prehearing conference was held on September 12, 2017. At that time a date of December 22, 2017, was given for the completion of discovery.

8. On November 3, 2017, respondent sent interrogatories and a notice to produce to petitioner requesting all documents verifying that the children were residents of Lodi for the 2016-2017 and 2017-2018 school years.

9. On December 20, 2017, counsel for respondent requested more specific answers to interrogatories. Petitioner supplied additional documents, most of which were from 2015. She also supplied a letter addressed to her and her husband dated January 24, 2017, which did not include an envelope; an envelope addressed to the parents of D.B. from Life Touch, the official school photographer, which lists the photo date as September 27, 2017; and two letters from Medicaid addressed to petitioner using her maiden name, dated June 30, 2017. However the envelopes were not included.

10. During the January 31, 2018, conference, petitioner indicated that her only witness is her husband, D.A., Sr., who she states she is separated from and resides at the Wallington address.

11. D.B. and D.A. attend Lodi High School. K.A. attends Washington Elementary School. The pro-rated tuition for the 2017 to 2018 school year to February 9, 2018, for the three students is as follows: D.B. and D.A. Lodi High School $6,745.34 each and K.A. Washington Elementary School $6332.76.

12. On February 16, 2018, an Order for Summary Decision was issued by the undersigned finding no proof of residency for the 2016-2017 school year and ordering total tuition of $36, 209 to be paid for petitioner's three children.

TESTIMONY

Thomas Gervasi

Thomas Gervasi (Gervasi) has been the Lodi school safety officer since October 2017. Part of his duties as school safety officer is to do residency investigations. On October 26, 2017, he received a file for a residency investigation for D.B. and D.A. A residency investigation of D.B. and D.A. had been done the previous school year.

On November 14, 2017, November 16, 2017, November 21, 2017, November 30, 2017, and December 21, 2017, Gervasi conducted surveillance on the Wallington address. Each surveillance began between 7:00 am and 7:30 am. On November 21, 2017, he saw the father of D.B., D.A., and K.A. at the Wallington address waving good-by to them. On each surveillance, Gervasi saw D.B., D.A., or both along with K.A. exit the Wallington address and enter a red Ford Explorer between 7:03 a.m. and 7:45 a.m. Petitioner K.A. was the driver of the Ford Explorer on all above occasions. She drove D.A. and D.B. to Lodi High School, except on November 14, 2017, when D.B. did not go to school that day. After D.B. and D.A. were dropped off at school, petitioner drove back to the Wallington address.

On February 7, 2018, February 9, 2018, and February 13, 2018, Gervasi went to the Wallington address. On February 7, 2018, and February 9, 2018, he arrived between 6:20 a.m. and 6:30 a.m. On February 12, 2018, he arrived at 9:37 a.m. On each occasion the red Ford Explorer was parked in the driveway. He did not see anyone exit the Wallington address on these dates.

On February 7, 2018, and February 9, 2018, Gervasi did surveillance on the Lodi address. On February 7, 2017, he arrived at approximately 6:45 a.m. The property appeared abandoned. There was a Buick and a black vehicle in the driveway. He did not see a red Ford Explorer. On February 9, 2018, he took photos of the Lodi house and the driveway. The red Ford Explorer was not in the driveway.

Rachel Yzqierdo

Rachel Yzqierdo (Yzqierdo) is the vice principal of Lodi High School. D.B. and D.A. are currently students at Lodi High School. K.A. goes to Washington School, which is also a Lodi public school.

D.A.

D.A. is the father of D.B., D.A., and K.A. He is married to K.A.; however, they are separated. D.A. testified that he moved to Wallington in March or April 2016. His children visit him and his wife picks them up. There is no legal visitation agreement. When he goes to work, his wife sometimes stays at the Wallington address. There is one vehicle between him and K.A. that they share. The dates that Gervasi saw the children leaving the Wallington address were when they were visiting him. He initially stated he did not know that there was a residency issue until June 26, 2016, at the hearing before the Board. He later testified that he knew that D.B. was questioned about residency in April 2016.

D.A. rents a room at the Wallington address. It has one room and no kitchen. He does not have a lease. His room is in a two-family house with two other tenants. He does not have access to the other apartments. When his children stay with him they sleep on air mattresses. The children stay with him once or twice a week.

D.A. lived at the Lodi address from 2008 to 2015. The Ford Explorer is registered to K.A. D.A. does not have a bank account or pay utilities. He works as a security guard. He is paid on a pre-paid debit card. The Lodi property has a two-bedroom apartment and a four-bedroom apartment. When he lived there the family lived in the two-bedroom apartment. After he left the conditions in the two-bedroom became uninhabitable and K.A. and their children moved into the four-bedroom apartment with her father.

D.A. receives his mail at the Wallington address because his sister-in-law steals mail from the Lodi address. He changed the address on his driver's license to the Wallington address on April 29, 2016.

K.A.

K.A. lives with her father in Lodi. They share a four-bedroom apartment with her children. She enters through the back door or side door. She previously lived in the two-bedroom apartment on the same property but it became uninhabitable. When she has arguments with her father she stays with her husband in Wallington. Her father is bipolar. Her sisters steal her mail. K.A. forwarded her mail to the Wallington address after it could not be held at the post office any longer. She has her mail forwarded because of her sisters. Her children do not live with their father in Wallington, they live in Lodi.

The superintendent of schools in Lodi told her to go online to see what documents were needed for her to register. She produced a lease and a PSE&G bill in her father's name. K.A. owns the red Ford Explorer.

Lodi High School classes start at 8:10 a.m. Sometimes she brings the children to school in the Ford Explorer. Other times she has taken an Uber to get the children to school. K.A. pays insurance on the Ford Explorer. She does not receive public assistance. Her children spend different amounts of time with their father. D.B. is with her father twice a week. D.A. is with his father three times a week and K.A. is with her father twice a week. She spends time in her husband's apartment to feed and walk the dog.

Based on the foregoing I **FIND** the following additional **FACTS**:

K.A. is married to D.A. D.B., D.A., and K.A. are their minor children. On five occasions between November 14, 2017, and December 21, 2017, Gervasi saw D.A. on each occasion and D.B on four occasions exit the Wallington home between 7:00 a.m. and 7:45 a.m. and enter a red Ford Explorer driven by K.A. On those dates K.A. drove

D.B. and D.A. to Lodi High School. Gervasi also saw the minor K.A. enter the Ford Explorer. On February 7, 2018, and February 9, 2018, Gervasi went to the Wallington and Lodi addresses. He saw the red Ford Explorer at the Wallington address. He saw two cars at the Lodi address. The property at the Lodi address appeared abandoned.

D.A., the father of the children, changed the address on his driver's license in April 2015. K.A. does not have any bills sent to her at the Lodi address. K.A. provided Lodi with a lease to the Lodi property dated June 28, 2017, to June 28, 2018. K.A. had her mail forwarded to the Wallington address. She later testified that she receives mail at the Lodi address.

K.A. provided a pay stub of D.A. dated July 29, 2017, listing his address as the Lodi address. This contradicts his testimony that he moved to Wallington in April 2015. Petitioner provided a letter from Lodi High School dated January 24, 2017, and a letter from Medicaid dated June 30, 2017, both addressed to her at the Lodi address. However, she did not provide the envelope for either of these letters. Petitioner provided copies of envelopes from Life touch with a photo date of September 27, 2017, and an envelope from the Law Offices of William R. Nunno post-marked November 3, 2017.

Respondent provided copies of three envelopes it sent to petitioner at the Lodi address dated August 2, 2017, December 20, 2017, and January 2, 2018. These envelopes state "Forward Time Exp RTN to Send" and lists the forwarding address as the Wallington address. Lodi requires three forms of documentation to prove domicile. The only document that petitioner provided that meets the requirement is the lease. Petitioner did not provide any rent receipts or cancelled checks or money orders verifying that she paid rent.

Petitioner alleged that she was homeless. She testified that she lives with her father and Gervasi saw her taking the children to school from the Wallington residence and returning to the Wallington residence after she dropped the children off at school.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

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

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

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

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

In support of its claim, respondent produced School Safety Officer Gervasi, who testified in its behalf. The results of the investigation supported the finding that D.B., D.A., and K.A. are domiciled out-of-district, but continued to attend public schools in the district for the 2017-2018 school year. Petitioner could not provide any documentation other than a lease that verifies that she and the children live in Lodi. Although she provided a lease from June 2017 to June 2018 that she signed with her father, she did not provide any rent receipts or copies of cancelled checks or money orders that she

paid the rent with. She provided two envelopes addressed to her in Lodi from Life Touch and Law offices of William Nunno, but respondent provided three copies of envelopes that were sent to petitioner at the Lodi address that were returned stating "Forwarding time exp. RTR to Send."

Petitioner testified that she was homeless. She also testified that she lives with her father. Gervasi testified that petitioner drives the children to school. In addition, petitioner testified that she goes to the home of her husband after she takes the children to school. I **CONCLUDE** there was no evidence that petitioner is homeless.

The pro-rated tuition for the 2017 to 2018 school year to February 9, 2018, for the three students is as follows: D.B. and D.A. Lodi High School $6,745.34 each and K.A. Washington Elementary School $6332.76.

The Board asserts that it is entitled to be reimbursed for tuition for the period of D.B., D.A., and K.A.'s ineligible enrollment the 2017-2018 school year. Whereas here, the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a), which provides as follows:

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

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

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that petitioners were not a domiciled in the Lodi School District for the

2016-2017 school year and that respondent is entitled to reimbursement for the costs of audited tuition in the amount of $19,823.

ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's determination that petitioner and her children were not residents and domiciliary in Lodi, New Jersey, and were not domiciled within its school district during the 2017-2018 school year is hereby **AFFIRMED**. It is further **ORDERED** that respondent be reimbursed tuition from petitioner in the amount of $19,823.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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, 2018

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: March 19, 2018

Date Mailed to Parties:

ljb

WITNESSES

For Petitioner:

D.A.

For Respondent:

Thomas Gervasi

Rachel Yzqierdo

EXHIBITS

For Petitioner:

P-1 Letter from Lodi High School dated January 24, 2017

P-2 Pay Stub of D.A. from Tiffany and Company dated July 29, 2017

P-3 Copy of Envelope from Life Touch with a Photo date of September 27, 2017

P-4 Copy of Envelope from the Law Offices of William Nunno date post-marked November 3, 2017

P-5 Letter from Division of Medical Assistance and Health Services dated June 30, 2017

For Respondent:

R-1 Lease dated June 28, 2017

R-2 Copies of envelopes post-marked August 2, 2017, December 20, 2017, and January 2, 2018, which state "Forwarding Time Exp, RTN to Send"

174-18

OAL DKT. NO. EDU 01137-18
AGENCY DKT. NO. 286-12/17

I.V., ON BEHALF OF MINOR CHILD, F.V.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, it is noted that the settlement makes reference to an initial payment to be made at the time of signing the agreement, followed by a monthly payment schedule. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the proposed terms.

Subject to the foregoing, 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 – provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/07/18

Date of Mailing: 6/11/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01137-18
AGENCY DKT. NO. 286-12/17

I.V. ON BEHALF OF MINOR CHILD
F.V.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,
Respondent.

Joel Bacher, Esq., for petitioner

Paul Green, Esq., (Schenck Price Smith & King, attorneys) for respondent

Record Closed: April 30, 2018 Decided: May 1, 2018

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

On January 22, 2018, 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.

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.

May 1, 2018
DATE

ERNEST M. BONGIOVANNI., ALJ

Date Received at Agency: 4-3-18

Date Mailed to Parties: APR 3 2018
id

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SETTLEMENT AGREEMENT

I.V. o/b/o minor child F.V.
v.
Fair Lawn Board of Education

OAL Docket No.
01137-2018N
Agency Ref No. 286-12/17

The parties agree to settle this matter on the following basis:

1. Petitioners agree to pay the Board of Education the sum of $5,000, with an initial payment of $500.00 to be made today, and the balance to be paid at the rate of $25.00 per month without interest charges.

2. Petitioner F.V. will be permitted to finish the 2017-18 school year at Fair Lawn High School. F.V. will attend the Lakeland Regional School District for the 2018-19 school year, will be disenrolled from Fair Lawn, and will not seek to re-enroll in the Fair Lawn School District.

3. This constitutes the parties' entire settlement.

PETITIONERS:

Dated: April 30, 2018

FOR THE FAIR LAWN BOARD OF EDUCATION:

Marc H. Green, Esq.

OAL DKT. NO. EDU 11005-17
AGENCY DKT. NO. 152-7/17

LAKECIA HYMAN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC 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 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: 6/07/18

Date of Mailing: 6/11/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11005-17

AGENCY DKT. NO. 152-7/17

LAKECIA HYMAN,

Petitioner,

v.

CITY OF ATLANTIC CITY BOARD OF EDUCATION, ATLANTIC COUNTY,

Respondent.

Louis Barbone, Esq., for petitioner (Jacobs and Barbone, PA, attorneys)

Tracy L. Riley, Esq., for respondent (Riley and Riley, attorneys)

Record Closed: April 11, 2018 Decided: April 18, 2018

BEFORE **DOROTHY INCARVITO-GARRABRANT,** ALJ:

This matter was transmitted to the Office of Administrative Law on August 2, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have executed a Settlement Agreement and Board Approval, which is attached hereto.

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

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

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

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

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

April 18, 2018
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: 4/24/18

Date Mailed to Parties: 4/24/18

tat/lam

Louis M. Barbone, Esquire (N.J. Attorney ID# 014891986)
JACOBS & BARBONE, P.A.
A Professional Corporation
Attorneys at Law
1125 Pacific Avenue
Atlantic City, New Jersey 08401
(609) 348-1125
Attorneys for Plaintiff
lbarbone@jacobsbarbone.law

LAKECIA C. HYMAN, Petitioner v. ATLANTIC CITY BOARD OF EDUCATION, Respondent	OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU 11005-2017S STIPULATION OF DISMISSAL

Petitioner, Lakecia C. Hyman having filed before the Commissioner of Education for Reinstatement, back pay and reimbursement of the costs of criminal and administrative fees by way of Petition on July 7, 2017, and Respondent having reinstated Petitioner to her position, having paid Petitioner's salary from time of suspension to time of restoration, and having further paid to reimburse Petitioner for the cost of her criminal defense and administrative fees in bringing this action, the parties agree to dismiss the instant Petition and therefore the entire matter before the Office of Administrative Law, upon the following terms and conditions:

1. Petitioner agrees to dismiss this administrative action conditioned upon the agreement of Respondent, Board of Education to the terms which follow.

2. Respondent, Board of Education acknowledges that Petitioner maintains and argues entitlement to additional restoration and payment of benefits and emoluments of office that have yet to be addressed or paid; specifically, healthcare expenses incurred during the time frame of her suspension, repayment of health insurance paid by Petitioner during the aforenoted suspension, as well as monies Petitioner maintains she would have otherwise been paid for overtime throughout the period of suspension. This remains an issue in dispute in civil litigation by Respondent

3. The instant Stipulation of Dismissal makes no finding with regard to Petitioner's remaining claims, and does not constitute any admission with regard to any liability on the claims that Petitioner asserts as a continuing damage herein.

4. Presently pending before the Superior Court of New Jersey, Law Division, Civil Part, Atlantic County is Petitioner's Law Division Complaint filed pursuant to the New Jersey Conscientious Employee Protection Act. That matter continues in litigation before the Superior Court and, in fact, is pending on Motion for Summary Judgment.

5. The parties agree and stipulate herein, that dismissal of this administrative action in no way impairs, limits, constitutes waiver or that the dismissal will be asserted as having any preclusive effect with regard to any potential damage within that lawsuit by virtue of this Order of Dismissal.

6. The Respondent agrees that the Dismissal herein finally and fully resolves all issues before the Commissioner of the Department of Education, but in no way serves as an objection, impediment or limitation on any and all appropriate damages available to the Plaintiff in the aforenoted civil lawsuit including but not limited to those items of alleged loss as set forth above.

7. The parties therefore agree that the instant matter should therefore be dismissed with prejudice as to all proceedings before the Commissioner of Department of Education.

JACOBS & BARBONE, P.A.

Dated: 1/8/18

Louis M. Barbone, Esquire

RILEY & RILEY

Dated: 1/8/2018

Tracy L. Riley, Esquire

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

November 27, 2017

At the regular meeting of the Atlantic City Board of Education held on September 19, 2017, the following resolution was approved:

Personnel #29

On a motion made by Ms. Bassford and seconded by Ms. Zappia, the Atlantic City Board of Education voted to approve the back pay for LaKecia Hyman in the amount of $252,115.27. At the call of the roll the vote was as follows: Mrs. Bailey-yes; Ms. Bassford-abstain; Mrs. Byard-yes; Mrs. Days-Chapman-yes; Mr. Thomas-yes; Mr. Weekes-yes; Ms. Zappia-yes. Of seven members present, six voted in the affirmative and one abstained. The motion carried.

Respectfully submitted,

Angela Brown

Angela Brown
Board Secretary

J.G., on behalf of minor children, C.G. AND E.G.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Pro-se petitioner appealed the determination of the respondent Board that his children were not residents of Randolph Township during the 2016-2017 school year, and therefore were not eligible for a free public education in respondent's school district. The Board alleged that the children were not residing at the address provided by petitioner, but rather at a home in Mt. Olive, and accordingly sought repayment of tuition for the 2016-2017 school year. On April 13, 2018, the Commissioner issued a decision in the matter, adopting the Administrative Law Judge's (ALJ) determination that C.G. and E.G. were not eligible to attend school in the District between January 7, 2017 and the end of June 2017; however, the Commissioner remanded the matter to the OAL for a determination as to the exact amount of tuition due to the Board for the period of C.G. and E.G.'s ineligible attendance.

On remand, the ALJ found, *inter alia*, that: based on the evidence in this case, C.G. and E.G. have not been domiciled in the Randolph School District since January 7, 2017, the date upon which their residency in Mt. Olive commenced; the non-resident tuition rate in Randolph for the 2016-2017 school year was $13,921.00 per child; the monthly tuition rate for that period was $1,546.77 per child; and the audited annual non-resident tuition per child in respondent's district for the 2016-2017 school year was $8,740.16. The ALJ concluded that the Board is entitled to tuition reimbursement from petitioner for the period of his children's ineligible attendance in the total amount of $17,480.32, and so ordered.

Upon review, the Commissioner, *inter alia*, concurred with the determination of the ALJ that petitioner's children were not eligible to attend school in respondent's district between January 7, 2017 and June 2017, and ordered petitioner to reimburse the Board in the amount of $17,480.32 for C.G. and E.G.'s ineligible attendance in Randolph schools. In so deciding, the Commissioner rejected two of the ALJ's factual findings which were inconsistent with the record and final determination in this matter. Accordingly, the Initial Decision was adopted with modification.

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

June 7, 2018

OAL DKT. NO. EDU 5658-18
(EDU 17578-17 ON REMAND)
AGENCY DKT. NO. 265-11/17

J.G., on behalf of minor children, C.G. AND E.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) on remand have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, J.G., and the Randolph Board of Education's (Board) reply thereto.[1] On April 13, 2018, the Commissioner issued a decision adopting the Administrative Law Judge's (ALJ) determination that C.G. and E.G. were not eligible to attend school in the District between January 7, 2017 and June 2017. The Commissioner also found that the Initial Decision did not adequately and completely address the tuition costs that the petitioner was required to reimburse the Board for C.G. and E.G.'s ineligible attendance in the District. Therefore, this matter was remanded to the OAL exclusively for a determination as to the exact amount of tuition costs that the petitioner owes the Board for C.G. and E.G.'s ineligible attendance in the District between January 7, 2017 and June 2017. On remand, the ALJ found that the Board is entitled to

[1] Despite the fact that the petitioner's exceptions were filed one day late, the arguments were considered.

reimbursement from the petitioner in the amount of $17,480.32 for his children's ineligible attendance in the District.

Upon review of the revised record on remand, the Commissioner finds that the non-resident tuition rate for the 2016-2017 school year for the Randolph School District is $15,127.00 per pupil for grades 1-5.[2] *See*, Affidavit of Eric Burnside. Thus, the daily tuition rate is $84.04 for a 180-day school year. The Commissioner further finds that C.G. and E.G. attended school in the District for 104 days between January 7, 2017 and June 2017. *Id.* Therefore, the cost for each child's ineligible attendance in the District for the 2016-2017 school year was $8,740.16, which equals a total of $17,480.32 in tuition costs owed by petitioner to the Board.

In the Initial Decision, the ALJ similarly found that the total tuition amount owed by the petitioner is $17,480.32; yet the ALJ made two factual findings that were not supported by the information in the record. First, in factual finding number 8, the ALJ erroneously stated that the "[n]on-resident student tuition rate for the 2016-2017 school year is $13,921.00 per child ...." Initial Decision at 3. Factual finding 8 is clearly inconsistent with the actual tuition rate of $15,127.00 per pupil for the 2016-2017 school year.[3] Additionally, factual finding number 10 states that "[t]he monthly rate for the 2016-2017 school year is $1,546.77." *Ibid.* It is not possible to establish an accurate monthly tuition rate because there is not a set number of school days in

[2] On August 15, 2017, in the Board's Resolution for the Residency Hearing of C.G. and E.G., the Board assessed tuition in the amount of $13,921.00 per child for the ineligible attendance in the District for the 2016-2017 school year. At that time, the Board used the tuition rate for the 2014-2015 school year because the 2016-2017 tuition rate was not yet available. On February 26, 2018, the Department of Education determined that the District's costs per pupil in grades 1-5 for the 2016-2017 school year is $15,127.00. Despite the Board's initial assessment, the Board was not precluded from seeking the actual tuition costs for the 2016-2017 school year.

[3] The ALJ did later state in the Initial Decision that the $13,921.00 tuition rate was based upon the 2014-2015 school year. Initial Decision at 5.

each month. There is nothing in the record that supports either finding; therefore, factual findings number 8 and number 10 are rejected.

Accordingly the Initial Decision is adopted as modified. J.G. is hereby ordered to reimburse the Board tuition costs in the amount of $17,480.32 for the period of C.G. and E.G.'s ineligible attendance in the District between January 7, 2017 and June 2017.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/07/18
Date of Mailing: 6/11/18

[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 05658-18
AGENCY DKT. NO. 265-11/17
(ON REMAND EDU 17578-17)

J.G. ON BEHALF OF MINOR CHILDREN C.G. & E.G.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,

Respondent.

J.G, petitioner, pro se

Matthew J. Donahue, Esq. for respondent, board of Education of the Township of Randolph (Schenck, Price, Smith & King, LLP)

Record Closed: April 24, 2018 Decided: May 7, 2018

BEFORE **JOANN LASALA CANDIDO,** ALAJ:

STATEMENT OF THE CASE

Petitioner J.G., the father of the minor children C.G. and E.G., appeals the determination of the Randolph Township Board of Education (the "Board"/respondent)

that J.G. does not reside within the Randolph Township school district and that tuition reimbursement is required. The Board alleges that the minor children were not residing at the address provided by the petitioner but rather were residing in their home in Mt. Olive and seeks repayment of tuition.

PROCEDURAL HISTORY

On July 10, 2017, the Board notified J.G. that the children were ineligible to continue to attend school within the district and they were not domiciled in Randolph for the 2016-2017 school year. On or about November 15, 2017, the petitioner filed a timely notice of appeal after receiving a Notice of Residency Hearing Determination on August 16, 2017. The Board filed an answer on November 27, 2017. On November 30, 2017, 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 February 26, 2018, and following the receipt of the copies of rental receipts, the record closed on February 28, 2018. The undersigned rendered an Initial Decision under OAL Docket Number EDU 17578-17 on March 5, 2018. However, the matter was remanded to the OAL by the Commissioner by Order dated April 13, 2018, for a determination as to the exact amount of tuition costs that the petitioner owes the Board for C.G. and E.G.'s ineligible attendance in the District between January 7, 2017 and June 2017.

FINDINGS OF FACT

Based on the credible testimonial and documentary evidence, I **FIND** the following as **FACTS** in this matter:

1. At the start of the 2016-2017 school year, C.G. and E.G. were enrolled in Randolph school district as non-residents.

2. J.G. was advised that he had to secure residence in Randolph within one month of the start of the school year to avoid being accessed tuition pursuant to District Policy 5111. J.G. was granted an additional month extension to secure a Randolph residence. P-1 He had been residing in Westwood.

3. J.G. rented a one-bedroom apartment in Randolph, as a seven-month tenant effective November 19, 2016 and ending June 18, 2017, $1340.00 rent per month. Rental payment receipts have been provided by J.G. through January 2017.

4. J.G. closed on a home in Mt. Olive, New Jersey on December 9, 2016. Utility service was effective December 15, 2016 at the Mt. Olive residence.

5. Furniture was delivered to the Mt. Olive home on January 4 and 6, 2017. P-8 and 9. A home repair was done on January 7, 2017. P-11

6. A Default Judgement was entered in Special Civil Part, Superior Court of New Jersey, Morris County on March 24, 2017, for non-payment of rent at the Randolph apartment in the amount of $1600.00. R-1

7. J.G.'s Mt. Olive residence is effective January 7, 2017.

8. Non-resident student tuition rate for the 2016-2017 school year is $13,921.00 per child in Randolph school district, based upon the State Tuition Rate Notice.

9. C.G. and E.G. were domiciled in Mt. Olive in January 2017 and therefore ineligible to continue to attend its school District.

10. The monthly rate for the 2016-2017 school year is $1,546.77 per child.

11. Tuition must be assessed from January 7, 2017 through June 2017.

12. Petitioner was not assessed tuition for school holidays or inclement weather, for a total of 104 days at $8,740.16 per child. Personal vacation days are not deducted.

Petitioner bears the burden to prove that his children were domiciled in the Township of Randolph for the 2016-2017 school year. Failure to sustain that burden leaves in place and affect the findings of Board at its hearing regarding domicile.

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

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

From the evidence submitted, C.G. and E.G. have been domiciled in Mt. Olive while attending school in Randolph Township from January 2017 through the end of the 2016-2017 school year. J.G. has provided no proof by a preponderance of the credible evidence to sustain his burden that the Randolph apartment was considered his and the children's true and fixed permanent residence even after he closed on his Mt. Olive home.

The Board asserts that it is entitled to be reimbursed for tuition for the period of C.G. and E.G.'s ineligible enrollment in its school. 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), which provides as follows:

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

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

Respondent provided a Resolution for the Residency Hearing of C.G. and E.G. that stated the per student tuition rate for the 2016-2017 school year is $13,921.00 per child. R-7. However, that amount was based upon the 2014-2015 school year.

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that C.G. and E.G. have not been domiciliary in the Randolph School District since January 7, 2017 and that respondent is entitled to reimbursement from petitioner for the costs of audited tuition at a rate of $8,740.16 per child.

DECISION AND ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's determination that petitioner, J.G. and his children are not residents and domiciliary in Randolph, New Jersey, and were not domiciled within its school district during the period of January 7, 2017 through June 2017 is hereby **MODIFIED** to reflect this time period. It is further **ORDERED** that respondent is entitled to reimbursement from petitioner for the cost of audited tuition for his two children in the amount of $17,480.32.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 7, 2018
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: May 7, 2018

Date Mailed to Parties: May 7, 2018

ljb

APPENDIX

LIST OF EXHIBITS

Joint:

J-1 Apartment Lease Contract

For Petitioner:

P-1 District Policy – 5111 – Eligibility of Resident/Nonresident Students

P-2 E-mail from petitioner to Fano dated September 19, 2016

P-3 E-mail to petitioner from Fano dated October 14, 2016

P-4 J.G. residency timeline

P-5 E-mail to Fano from Gerry Eckert dated February 2, 2017

P-6 Wells Fargo account

P-7 Optimum statement

P-8 Packing invoice dated 7-28-16 and Atlas moving invoice delivery signed 1-4-17

P-9 Home and Kids furniture delivery dated 1-6-17

P-10 Home Inspection Report dated October 28, 2016

P-11 Smart Home Solutions dated 1-7-2017

P-12 NJ Natural Gas invoice for Dec. 16 to January 25, 2017 in the amount of $333.03

P-13 JCP&L service start date 12-15-2016

P-14 Notice to Vacate Westwood apartment.

P-15 Cashier Checks to Center Grove

P-16 Renters Insurance Application effective date 11-16-2016

P-17 E-mail to Fano from Paul Bachrach dated 2-1-2017

P-18 E-mail payment confirmation from Randolph apartment to S.G. dated January 7, 2017

For Respondent:

R-1 Default Judgement dated March 24, 2017

R-2 Notes dated 8-15-17

R-3 JCP&L dated 12-29-2016

R-4 JCP&L dated 1-31-2017

R-5 JCP&L dated 1-16-2017

R-6 Affidavit

R-7 Resolution for the Residency Hearing of C.G. & E.G.

R-8 Deed dated 12-9-2016

BOARD OF EDUCATION OF THE CUMBERLAND COUNTY TECHNICAL EDUCATION CENTER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL HIGH SCHOOL DISTRICT, CUMBERLAND COUNTY AND BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioner, the Board of Education of the Cumberland County Technical Education Center (CTech), sought to compel the respondent Boards of Education to permit its full-time students who reside within either the Cumberland Regional High School District or the Millville School District to participate in their home district's athletic programs. The respondent Boards denied CTech's request, citing financial and other concerns, and contending that they were not required to permit CTech students to join their athletic programs. CTech asserted that the respondent Boards' denials were arbitrary, capricious and unreasonable.

The ALJ found, *inter alia,* that: school districts have the discretion to determine whether they will allow technical/vocational school students to participate in their athletic programs, as long as the decision is based on legitimate considerations; the superintendents of the two respondent districts formulated the policy regarding technical/vocational students participating in school district athletics after meetings between the respective superintendents, principals and others; the decision not to allow CTech students to participate was based on financial, disciplinary and eligibility factors, all of which were reasonable; because the respondents did not adopt formal or written policies addressing the participation of vocational students in their athletic programs, the policies of the NJSIAA govern; and under NJSIAA rules, vocational/technical students may participate in sports in their home district upon agreement of the high school principals. The ALJ concluded that both respondents have demonstrated by a preponderance of credible evidence that they had legitimate concerns in reaching the decision to deny CTech's request for its students to participate in district athletic programs; further, CTech's allegations that the respondent Boards were deliberately trying to negatively impact the decisions of students considering enrollment at CTech are unfounded. Accordingly, the ALJ denied CTech's request to compel respondents to admit CTech students into district sports programs.

Upon review, the Commissioner, *inter alia,* concurred with the ALJ's determination as it pertained to the 2016-2017 school year. However, the Commissioner found that the parties' inability to reach an agreement to enable CTech students to play sports in their home Districts is unacceptable; accordingly, the parties were directed to meet within 20 days to address logistical concerns, etc., in this regard. If an agreement cannot be reached, CTech may file another petition with the Commissioner.

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 12, 2018

OAL DKT. NO. EDU 12252-16
AGENCY DKT. NO. 214-8/16

BOARD OF EDUCATION OF THE CUMBERLAND COUNTY TECHNICAL EDUCATION CENTER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL HIGH SCHOOL DISTRICT, CUMBERLAND COUNTY AND BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Cumberland County Technical Education Center Board of Education (CTech), and the reply exceptions filed by the Cumberland Regional High School District Board of Education (Cumberland) and the Millville Board of Education (Millville).[1] In this case, CTech is seeking an order that requires Cumberland and Millville to allow CTech students who reside in those districts to participate in their athletic programs because CTech does not offer its own athletic programs.

The Administrative Law Judge (ALJ) found that school districts have the discretion to determine whether they will allow technical/vocational school students to participate in their athletic programs as long as the decision is based on legitimate considerations. The ALJ also determined that both Cumberland and Millville demonstrated by a preponderance of the evidence that each District had "valid, legitimate, reasonable or practicable concerns when they determined to deny CTech students the ability to participate in their athletic programs." Therefore, the ALJ found that Cumberland and Millville's decision to deny CTech students the ability to participate in their athletic programs was not arbitrary, capricious or unreasonable.

[1] The record did not include a transcript from the hearing held at the OAL on September 20, 25 and 26, 2017.

In its exceptions, CTech reiterated the arguments advanced before the ALJ, contending that there was no legitimate reason for Cumberland and Millville to bar CTech students from participating in the Districts' sports programs. CTech maintains that the harsh policies of Cumberland and Millville, which were formulated by the superintendents, force a student to choose between attending a public vocational high school and reaping the benefits associated with participation in interscholastic sports. Moreover, the principals of both Cumberland and Millville have been deprived of the ability to enter into an agreement with the principal of CTech to allow participation in their sports programs, which is contrary to the applicable New Jersey Interscholastic Athletic Association (NJSIAA) rule. CTech also argues that Cumberland and Millville's decision disallowing CTech students from participation in district sports programs was not based on bona fide legitimate considerations. Instead, Cumberland and Millville are simply trying to discourage students from attending CTech in an effort to keep the students enrolled in their local school district. Thus, the Commissioner should reject the Initial Decision and direct both Cumberland and Millville to allow CTech students residing in their Districts to participate in their sports programs.[2]

The controlling NJSIAA rule in this case provides that where a sport is not offered at a vocational/technical school, a student attending the vocational/technical school may participate in that sport at the student's home district upon agreement of both principals. See, Article V, Section 4(G) of NJSIAA's Bylaws, Rules and Regulations. The principal of the home school district has discretion when determining whether or not to enter into an agreement with the vocational/technical school principal, however, that discretion is not unlimited. The decision to deny a student's ability to participate in interscholastic sports in his or her home district must be based on bona fide legitimate concerns. *G.W.S., on behalf of minor child, A.F.S. v. William Petrino, Superintendent and Rahway Board of Education, Union County*, Commissioner Decision No. 388-99, decided November 29, 1999.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons outlined in the Initial Decision – that Cumberland and Millville's decision barring CTech students from participating in the Districts' athletic programs for the 2016-2017 school year was not

[2] In their reply exceptions, both Cumberland and Millville recast the arguments made below asserting that the Initial Decision should be adopted as the final decision in this matter.

arbitrary, capricious or unreasonable. The evidence in the record indicates that both Cumberland and Millville had a sound rational basis for precluding CTech students from participating in their athletic programs based on the lack of sufficient information from CTech, coupled with financial, logistical and disciplinary concerns. *See*, *G.W.S.*, *supra*, at 8.

Notably, in the Initial Decision, the ALJ directly addressed the petitioner's primary theory that Cumberland and Millville are simply furthering their own interests by creating a barrier to discourage students from attending CTech. The ALJ found that the "loss of students (and the financial loss) was at least one consideration expressed by [Cumberland] and Millville. But the overriding concerns of finances, logistics, eligibility, and discipline expressed by both CR and Millville were significant and outweighed the concern about loss of students." Initial Decision at 32. The ALJ further found that all of the witnesses testified credibly, and neither Cumberland nor Millville "engaged in deception about its motives for its determination." Initial Decision 26-27. Insofar as her opinion on this issue is a credibility determination, the Commissioner may not disturb such determination unless a review of the record discloses that it is arbitrary, capricious or unreasonable. *N.J.S.A.* 52:14B-10c; *D.L. and Z.Y., on behalf of minor children, T.L. and K.L. v. Board of Education of the Princeton Regional School District,* 366 *N.J. Super.* 269, 273 (App. Div. 2004). There is nothing in the record that suggests the ALJ's determination relating to her assessment of witness testimony and her findings regarding Cumberland and Millville's motivation for denying CTech student's the ability to participate in the Districts' athletic programs should be modified.

Although the Commissioner is in accord with the ALJ's determination for the 2016-2017 school year, the Commissioner finds that the failure of the Districts to reach an agreement to enable CTech students to participate in sports programs in their home Districts is unacceptable. It is evident from the record that all three of the Districts herein are at fault in this situation, as they bear responsibility for failing to cooperate in the development of an acceptable agreement that would allow CTech students to participate in athletic programs – to the detriment of the students. For example, it is clear that CTech has not provided Cumberland and Millville with sufficient information related to the number of students interested in participating in the sports programs, nor with a plan for handling disciplinary scenarios. Likewise, Cumberland and Millville have expressed transportation concerns, yet it appears that CTech may be willing

to provide transportation for its prospective student athletes. Initial Decision at 23. As the ALJ noted, there "are legitimate, rational concerns that can and should be resolved prior to permitting CTech students to participate in [Cumberland] and Millville's sports programs ... [and] there is no reason to believe that they could not be." Initial Decision at 27.

Therefore, the principals of Cumberland and Millville are directed to meet with the principal of CTech within 20 days after the date of this decision to address the logistical concerns and to develop an agreement that will enable the CTech students to participate in sports programs in their homes Districts during the 2018-2019 school year. During the negotiation process, Cumberland and Millville should be guided by the fact that a blanket ban barring CTech students from participating in the Districts' athletic programs is absolutely impermissible. *See*, *G.W.S.*, *supra*, at 7-8. Moreover, concerns regarding the impact on student enrollment at Cumberland and Millville and corresponding State funding do not equate to bona fide legitimate reasons for denying CTech students the opportunity to participate in sports programs. CTech, on the other hand, must provide Cumberland and Millville with all of the information necessary to facilitate meaningful discussions. If after an opportunity for such meaningful dialogue, an agreement cannot be reached – or one of the parties fails to participate in the process – CTech may file another petition of appeal.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/07/18
Date of Mailing: 6/12/18

[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 12252-16
AGENCY DKT. NO. 214-8/16

BOARD OF EDUCATION OF THE CUMBERLAND COUNTY TECHNICAL EDUCATION CENTER,
Petitioner,
v.
BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL HIGH SCHOOL DISTRICT, CUMBERLAND COUNTY,
and
BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,
Respondents.

Mitchell H. Kizner, Esq., appearing for petitioner Board of Education of the Cumberland County Technical Education Center (Flaster Greenberg, attorneys)

John G. Geppert, Jr., Esq., appearing for respondent Board of Education of the Cumberland Regional High School District, Cumberland County (Scarinci Hollenbeck, attorneys)

Arnold Robinson, Esq., appearing for respondent Board of Education of the City of Millville, Cumberland County (Robinson and Robinson, attorneys)

Record Closed: December 4, 2017 Decided: March 29, 2018

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

STATEMENT OF THE CASE

The petitioner, the Board of Education of the Cumberland County Technical Education Center (CTech), seeks to compel the respondents, the Board of Education of the Cumberland Regional High School District (CR) and the Board of Education of the City of Millville (Millville) (collectively, the respondents), to permit its full-time students who reside within those districts to participate in their athletic programs. Citing financial and other concerns, CR and Millville denied CTech's request, contending that they were not required to permit CTech students to join their athletic programs. CTech contends that the denials were arbitrary, capricious, and unreasonable.

PROCEDURAL HISTORY

On August 11 or 16, 2016, petitioner CTech filed a Petition for Emergent Relief arguing that respondents CR's and Millville's decisions to bar petitioner's full-time students from participating in respondents' athletic programs were arbitrary, capricious, and unreasonable. The matter was transmitted to the Office of Administrative Law (OAL), where on August 16, 2016, it was filed as a contested case under docket number EDU 12252-16.[1] N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

[1] In a related matter, D.M.T., the parent of A.R.T., a student at CTech, filed a Petition for Emergency Relief on September 8, 2016, seeking to compel respondent CR to permit A.R.T. to participate in CR's athletic programs. This matter was also transmitted to the OAL, where it was filed on September 13, 2016, under docket number EDU 13766-16. This emergent petition was denied on September 22, 2016. The two matters were subsequently consolidated upon the agreement of the parties by Order entered on January 23, 2017. On August 24, 2017, D.M.T. withdrew his petition, and CTech proceeded on its petition.

On August 23, 2016, the Petition for Emergent Relief was denied.

On September 20, 2016, respondents filed a motion to dismiss (or for summary decision). Petitioner filed opposition to the motion on December 8, 2016. On August 25, 2017, respondents moved for dismissal also based on petitioner D.M.T.'s withdrawal of his petition. Petitioner responded by moving for denial of the motion. On September 19, 2017, respondents' motion to dismiss was denied.

The hearing was held on September 20, 25, and 26, 2017. The record remained open for the receipt of briefs until December 4, 2017.[2]

FACTUAL DISCUSSION

Background

(Uncontested facts)

CTech operates one of the five public high schools located in Cumberland County, New Jersey. From its inception in the 1970's until the school year ending June 30, 2016, CTech operated as a part-time educational program whereby students would attend academic courses at the schools in their home districts (presumably where they resided), and would attend vocational courses at CTech.

Commencing in September 2016, CTech began operating a full-time program for ninth graders, consisting of both vocational and academic courses, in new, larger facilities. Within four years, all students attending grades nine to twelve at CTech will be transitioned to full-time students. CTech does not presently offer an athletic program for its students, although it has some athletic and sports facilities. The Bridgeton and Vineland school districts have permitted their CTech students to participate in their athletic programs. No formal protocol to handle disciplinary or other matters is in effect with those two districts and CTech.

[2] An extension of time was granted for the filing of this decision. Additional correspondence received from CTech on March 14, 2018, was not relevant to this matter and was not considered.

CTech initially told prospective students and their parents that its students would be able to engage in athletic programs in their home school districts. Some students expressed an interest in playing in their home school districts' athletic programs. CTech does not know how many of its students would want to play sports, or in which sports they would seek to participate. CTech did not communicate at any level with CR or Millville regarding participation, nor have the schools engaged in any dialogue concerning sports.

In April 2016, Steven W. Price, the superintendent of the CR district, sent a letter to eighth-grade students advising them that if they chose to attend CTech, they would be unable to participate in sports at CR. Superintendent David Gentile of Millville communicated the same message to that district's students and their parents. No formal written board policy has been adopted by either CR or Millville; rather, the policy was formulated after meetings with the respective superintendents, principals, and others, and reached collaboratively. Both districts cite financial, disciplinary, and eligibility factors as their chief areas of concern.

Both respondents (CR and Millville) are members of the New Jersey State Interscholastic Athletic Association (NJSIAA) and have adopted the bylaws, rules, and regulations of the NJSIAA that govern high-school sports and athletic activities. The applicable NJSIAA rule pertinent to the issues presented here is found in Article V, Section 4(G), CL3, of its bylaws, which provides:

> If a Vocational/Technical High School/Public Academy does not offer the particular sport in which one of its full-time students desires to participate, that student may participate in that sport at his/her home school upon agreement of both Principals, regardless of the number of sports programs offered at the Vocational/Technical High School/Public Academy.
>
> [R-1.]

TESTIMONY

For Petitioner CTech

Gregory McGraw is in his third year as principal of CTech after spending seventeen years at CR as a teacher and administrator.[3] He participated in the transition of CTech to full time, including curriculum development/procedures, hiring of new staff, and meeting with parents and prospective students.

Prior to the school going full time, Dr. Dina Elliott, the superintendent of CTech, presented information to and responded to questions from prospective attendees. Sports came up, and it was indicated that participation in sports would be worked out with the home districts.

In October 2015 a meeting was held with all of the other principals of Cumberland County high schools. The new vocational-technical school was an agenda item. Millville brought up the sports issue and indicated that the NJSIAA provided no reason for Millville to have to allow CTech students to participate in its programs. No other explanation was proffered by Millville. Vineland and Bridgeton were not sure about participation, but indicated that they had to discuss the issue with their superintendents. McGraw was hopeful that it would be a collaborative determination, and that sports would be approved by all home districts.

Vineland and Bridgeton agreed that their CTech students could participate in their sports programs starting in 2016. At another meeting in April 2016 with the high-school principals, Millville and CR said that no CTech students would be accepted in their sports programs, so there was no need to meet with the athletic director. Millville said it was a superintendent's decision. Although McGraw also wanted to reach an agreement with CR, the principal of CR, Ralph Aiello, said the CTech students were not allowed to play at CR.

[3] He had interviewed for the principal position at CR but did not get it.

As for student-athlete expenses, McGraw believed that Vineland and Bridgeton paid for transportation. For athletic screening, the athletes go to their home-school nurses, get their packets, go to their physicians, get medical clearances and physicals, and then go to CTech with their documents. They are transported to the school where they play. CTech students are not guaranteed a position on any team.

As far as logistics, the home districts are advised of the student's grades, which are mailed to the athletic director. If a student is disciplined at CTech, McGraw advises the other district by email. He has received no complaints from either Vineland or Bridgeton.

Presently, thirty CTech students from Vineland and ten to fifteen CTech students from Bridgeton attend athletic programs in their home districts. Some additional students also use the weight room in the off season.

McGraw had no doubt that CTech would be able to comply with CR's policies. If there were a student-activity fee, he saw no reason why the CTech student would not pay it. If CR wanted to use a passive breath-alcohol sensor, it was not a problem. If CR's policy was that students could not use their own cars, CTech would impose the same rule.

McGraw did not recall hearing Dr. Dina Elliott say that CTech students could participate in sports in their home districts. He never separately contacted Aiello, and has not spoken to him about athletics for two years. Since McGraw has not been able to start the process to get CTech students from CR and Millville home districts to participate, he has no idea of how many CTech students would be interested in playing for their home-district teams, or who they are or where they live.

McGraw was involved with parents before CTech opened. CTech had a marketing budget designed to get information to students and parents. It placed ads in newspapers, and held meetings at service clubs like Kiwanis. Its marketing continues, with the goal of informing parents of CTech's offerings, because students have a choice of CTech or their district high school.

CTech handles its own disciplinary matters. CTech does not have a written protocol with either Vineland or Bridgeton as to how to handle issues that may arise, such as disciplinary actions. Millville has a student-athlete code, but McGraw was not familiar with it. However, if Millville held its student-athletes to a higher standard, CTech would hold them to Millville's standard. If a CTech student-athlete were suspended, McGraw believed that CTech would hear the appeal, but no protocols were in place concerning enforcement or consequences. However, suspension issues were not new. The districts have shared students for years and have collaborated on this with no evidence of problems.

McGraw was not aware of any protocol that Millville used for eligibility. McGraw said that CTech would work with the home district to ensure that its policies were followed. Millville students and parents sign a parent contract, but McGraw was not aware whether Vineland and Bridgeton parents had any such contracts.

Gene Mercoli is the business administrator for CTech and its board secretary. His job duties include budget and finance, and calculating related expenses for cafeteria, technology, and transportation.

Mercoli was involved in the opening of CTech on a full-time basis. This involved a substantial increase in staff; a budget increase of $1.5–2 million in the first year; the opening of a cafeteria; and arranging for transportation to the school. The cost of operating a full-time school was 70 percent greater than the cost of operating a part-time vocational program. The CTech budget includes $25,000 for marketing expenses such as newspapers, signs, mailers, and booklets to entice students to attend. He was not involved with the parent meetings. The option for full-time athletic programs for CTech students at CTech had been on the table, but the consensus was reached that CTech would offer none.

In March 2016 the business administrators of the home districts were advised of the number of students who were accepted for the school year commencing in September 2016, and the tuition rates that these home districts would pay for students

going to CTech. Mercoli was involved with arrangements in sports participation when CTech opened, but only regarding the anticipated transportation expenses.

In spring 2016, Mercoli met with business administrators in Vineland and Bridgeton, as those districts had agreed that their students who attended CTech would be permitted to play sports, and that the only issue was the cost of transportation. Mercoli was not aware that either Vineland or Bridgeton had identified any other costs related to or incurred because of athletic participation. CTech has been open for more than one year, and he has not heard of any costs that CTech should be paying for those two districts.

On his recall testimony, Mercoli testified that he could not estimate the number of CTech students who would participate in athletics. Nor could he estimate the expense involved. No survey has been done to ascertain actual student interest. The number of students who play sports is estimated at approximately 17 percent of a high-school's student population, but Mercoli had no definite number of potential athletes who attended CTech.

Mercoli stated that as far as athletic facilities available at CTech, the school had a turf field for lacrosse, soccer, and field hockey; a gym for volleyball and basketball; and a weight room. No tennis courts had been planned. In addition, CTech had an agreement with Camden County Community College (CCCC), which is located next to the CTech campus, to use their athletic facilities at no charge if the space were available, including the tennis courts. CTech had asked CCCC if it could use the baseball and softball fields for gym class, and was told no because of wear and tear.

Dina Rossi Elliott, Ed.D., has been the superintendent of CTech for more than five years. CTech is a vocational and technical high school that includes career and technical education, college and career academic skills, and college readiness. It is a public high school set up by statute.

Until 2016, students attended the vocational school on shared time with their home districts. In 2016, CTech commenced a phase-in period to go full time with ninth

graders, and gradually expand to all high-school grades by 2020, when the phase-in would be complete.

During the development of CTech as a full-time school, numerous meetings were held. Cumberland County was the twentieth in the state to go to a full-time vocational school. The economic consequences to the freeholder board were significant.

CTech always had recruitment. Administrators would go to assemblies and to home schools, and talk about program offerings. They provided literature and information about the application process. Because the building was under construction, they spoke in front of chambers of commerce, the county college, Kiwanis, Rotary, and other business, industry, and community organizations to attract students.

CTech decided on no sports because it came down to numbers. About twenty-four students wanted athletics, but they might be interested in different activities. When they looked at other vocational-technical schools, some had sports programs and some used the home districts' programs.

Some parents asked about sports. Before November 2015, students and parents were advised at two information sessions that CTech had no organized sports and that students would be able to participate in their home districts. In November 2015, Dr. Gentile advised Dr. Elliott in an email that Millville resident students could not participate in Millville's athletic programs, so Dr. Elliott changed her information to indicate that some districts said yes and some no. Dr. Elliott did not recall meeting with Dr. Gentile prior to the November 13, 2015, email. She never heard about logistics and finances as being the reason for no participation.

The then-principal of CR (Stonas) was present at meetings and roundtables until Price arrived in March 2016. In April 2016, parents forwarded their concerns, and then Dr. Elliott learned about CR also not agreeing to athletics.

In April 2016, Price sent a letter to all CR students who had expressed interest about attending CTech to advise them of the opportunities available to them if they

chose to attend the CR high school instead. The letter indicated that CTech students would not be able to participate in CR's sports programs, and that was when Dr. Elliott learned of CR's policy.

In April 2016, Dr. Elliott spoke at the roundtable about athletics generally. She did not recall any attempts to converse with Price in March or April 2016. Price had filed OPRA requests for documents regarding CTech students. CR has been using OPRA to try to get information on students; Millville has not done that. Dr. Elliott understands that CR is also attempting to become a vocational-technical school, and the OPRA requests could be related to that. She had no knowledge of specific requests, but noted that this year another OPRA request had been filed.

Dr. Elliott spoke with Price about CR's policy, and he said there was none. She had no reason to believe that logistics could not be worked out with Millville and CR, considering the collaborative processes they all use. She saw no difference when it came to sports. If Millville and CR had students attending CTech, CTech would pay for transportation, as it did for Vineland and Bridgeton. She had no objection to sharing information in a timely manner about the athletes. CTech would follow Millville and CR requirements, such as the breath sensor and student cars. From what she had seen, she did not think the obstacles for student-athletes to participate in their home districts were insurmountable.

CTech accepts in late March/early April, when students are notified. The students and their parents then decide which school the child will attend.

Dr. Elliott did not make any effort to get Millville or CR to change its position about athletics; it was not her job to get them to do it. The policy of exclusion was given to her by Price and Dr. Gentile. It was not likely that a principal would defy the superintendent and approve athletics if the superintendent had said no.

Dr. Elliott believed that participation in sports has a positive impact on students. Sports help organizations and support academics; they help with character building; and they provide opportunities for teamwork. Participation in sports makes better workers in

life. Dr. Elliott did not know how many CTech students would want to participate in Millville and CR athletics; she had no way of knowing. Her board felt that students should be permitted to have the same choice that other vocational-technical students have and should be able to participate in their home communities. She felt that students should not be discriminated against for their choice of school.

Dr. Elliott last spoke with CR administrators in October, and they made specific requests to her. She did not recall saying to them, "Don't fight, you will lose."

The CTech admissions policy has five components: attending an information session; the application; transcripts; administrative assessment in language and math; and fitting into an appropriate program. Students are accepted or placed on a wait list. Higher performing students are more likely to be admitted.

For school year 2016–2017, 238 students enrolled as freshmen and there was a waiting list. For school year 2017–2018, 239 students enrolled, and the wait list expired. The lack of sports has had no negative effect on CTech enrollment.

Athletics are not offered at CTech, even though they are valuable and important to students. CTech presently has only 480 full-time students; the remaining part-time students go to their home districts. The decision was made not to offer sports while building the student population to a complete full-time school. By 2020, when the school is completely full time, athletics will be discussed, but there are no formal plans for sports at this time. The new track and field will be opened if the board decides to.

Elliott did not know how many students at CTech wanted to or would like to play sports in their home districts, because the student population has not been surveyed. She did not want to give students the impression they could participate, or create false hope that they would be able to.

As for discipline, if a student committed a violation with CTech, the CTech Board of Education would handle it. If the infraction were within CTech walls, then CTech was responsible for discipline. If a student had been suspended in the home school, such

as Millville, then the student could not go to CTech during the suspension. If a CTech student from Millville committed an infraction under sports, then Millville would handle it. The action of suspending for something that is related to academics during the in-school day is different from suspending for a sports-team violation. She could see how complications could arise, but did not see how they could not be overcome. She did not foresee conflicting board decisions as potentially causing a problem.

Timothy McCorkell is the assistant superintendent of the Monmouth County Vocational School, which runs seven full-time programs all over the county. Monmouth County has eighteen school districts and twenty-three high schools. The county includes four former Abbott districts (Neptune, Asbury Park, Long Branch, and Keansburg), and was severely impacted by Superstorm Sandy.

The Monmouth County Vocational School has been in existence for fifty years. It provides career and technology training, and outstanding programs for its students. Since 1983 it has had both full-time and shared-time students. It does not offer athletics; it has no gyms or athletic fields.

Vocational students are permitted to participate in sports with their home high schools. He knew of no financial drawbacks, nor had any of the districts expressed concerns of a financial burden to them. As far as transportation, there was no requirement that students be transported back after the activity. Because of having seven vocational programs located throughout the county and twenty-three high schools, trying to bus students would be impossible. Some schools will bus the students back, but the parents must check, since this can be an issue.

As far as logistics, Monmouth County has so many vocational schools and high schools that it is worked out on a local level, but generally the logistical aspects run smoothly. There are always some issues, depending on the sport. For example, ice hockey and swimming have specific training times. The vocational schools try to release the student and work with the local district, and then try to work things out with the parents. Even in one district with six high schools, it would be difficult because of the different start times.

As far as eligibility, all full-time students and administrators are aware of the NJSIAA, and communicate back to the home school. Usually this is done by the athletic directors, and principals are seldom involved.

With regard to discipline, all principals are aware of the code of conduct for students involved in sports that the students must sign. Student infractions are reported. This has not been an issue, since discipline seldom happens, but when it does, the local districts are advised.

Nurses handle the medical records and coordinate with the students and others who must be involved.

McCorkell acknowledged that the 2 percent tax cap came into being within the past six to seven years. Issues involving athletics have never come up between the vocational school and the academic high schools, at least not in the context of where students should be playing. Some issues come up at principals' meetings, and they try to work them out. Occasionally, a situation cannot be resolved, such as if a student cannot make the practice on time. In that case, the parents must decide.

With regard to discipline, the vocational school makes the disciplinary decisions. He agreed that the potential for different disciplines remained, and that two students could commit the same offense and get different disciplines. He also agreed that the home-district superintendent could make that a consideration in determining what decision was best for that district.

Judy Savage is the executive director of the New Jersey Council of County Vocational-Technical Schools (Council). The Council is a member, dues-supported, organization for the twenty-one county vocational-technical schools, and exists to promote and advise its members. Savage reports to the Council.

Savage took an informal survey by downloading information of the vocational-technical superintendents as to whether students can play in their home districts while

attending vocational-technical school. All counties, except Cumberland, permitted students to play in their home districts or to play in sports not offered by their vocational-technical schools. Bergen had some instances where participation was denied, but Bergen vocational-technical offered thirteen sports; Cape May had had some issues, but there was no current prohibition on participation in sports not offered by the vocational-technical school in the home district. All districts said it was handled by the principals or athletic directors. It varied county by county, and was handled without blanket prohibitions against participating.

However, of the twenty-one counties, thirteen vocational-technical schools have their own sports programs. CTech is in the minority by not having its own sports program.

M.T. testified that he resides in Upper Deerfield in the CR home district. He has been a teacher for twenty-four years and has a master's degree in administration and leadership. He has three children: his two older children attended CR, and his youngest, A.T., an honors-level student who wants a career in medicine, attends CTech.

When he first heard of the full-time vocational-technical school, he was in favor of it for several reasons: students receive credit at the CCCC (his daughter has six credits already); Rowan University grants automatic admission if the student meets academic criteria; and CTech is affiliated with Inspira Health Network for real-world experience. Dr. Elliott promised rigorous and high-level thinking in CTech's program, and his daughter has had high-level homework.

M.T. was not happy with the level of rigor at CR, even though he works for that district. CR was not the right choice for his daughter. His two other children attended CR: his older daughter needed help and did not get it, so he was forced to hire a tutor; his son was not challenged in the honors program. He was not happy with the SAT (Scholastic Aptitude Test) scores or the PARCC (Partnership for Assessment of Readiness for College and Careers) results, as CR ranked low.

M.T. was concerned about his younger daughter not having a complete college application if it showed no interscholastic sports. Sports teaches children life lessons—they learn how to get along, how to learn from adversity, how to work toward a team goal. A.T. is being denied the opportunity to form friendships in sports by CR's decision to exclude CTech students from participating in their home district's sports programs.

He learned about the CTech full-time program, and attended a parent information session at CCCC, where Dr. Elliott spoke. It was his understanding that students would be able to participate in sports in their home districts. A.T. wanted to attend CTech.

In April 2016, A.T. received a letter addressed to her from CR that said, "Our students participate in athletic programs—an option not available to students who attend CTech." When M.T. saw that, he was concerned, and contacted Ralph Aiello, the principal of CR, and told him that A.T. wanted to participate in sports at CR while attending CTech. The reply was that only CR students could participate. M.T. felt that this was a blanket rejection.

M.T. thought that he had also emailed Dr. Elliott, who said that she felt that A.T. should be permitted to play. Then Price, the superintendent, got involved. Emails sent by him in June 2016 said nothing about finances or logistics as being the reason for the denial.

In an email of July 6, 2016, Price said that having CTech students participate in CR athletics was not practicable or reasonable, considering related costs, as well as logistical difficulties. M.T. then told Dr. Elliott that CR was finally providing reasons for its denial.

M.T. and Price continued to exchange emails throughout the summer of 2016. The business administrator referred to policy #2430, which addressed extracurricular activities. It seemed to M.T. that the reason for excluding CTech athletes changed from costs and logistics to NJSIAA policy. He told Price that there was no policy, and that it was against the law to have such a policy. Policy #2431, which required CR to meet all the requirements of the NJSIAA, was also involved in the determination.

M.T. kept his daughter in CTech because, although sports are important, academics are more important. His view as a parent was that this should not be a choice that students have to make. Sports should be inclusive, not exclusive, so that the students benefit. It is unfortunate that children were put in the position of having to choose. He has spoken to other parents who share his concern.

He is still hopeful that A.T. will be able to participate in school sports, although she has already missed two full seasons. She is able to play community and travel soccer; she runs; and he works with her in tennis.

Dr. Elliott and Mario Olsen, the CTech assistant superintendent, had led him to believe that A.T. could participate in sports at CTech. M.T. networked with other parents about this situation, and noted that finally Price was providing reasons to justify his refusal.

A.T. testified that she is fifteen years old and in the tenth grade at CTech. She lives in Upper Deerfield and attended the Woodruff Middle School. She was accepted into the CTech allied health program and hopes to pursue a career in that field. She is an athlete, and hoped to be able to play on the CR tennis team.

She did not like having to make a choice between her career goals and athletics, and she did not like that she could not play sports at CTech. It is not fair, since some of her friends were able to play sports in Vineland and Bridgeton. She is hopeful that the determination will be reversed and she will be able to participate in track and tennis at CR.

For Respondent Millville

Dr. David Gentile, superintendent of the Millville School District, testified that Millville is a former Abbott district and is an economically distressed community. Students need a wide range of support, social services, and health care. High school in Millville is a safe haven for many. The high school is located in two buildings, one

containing ninth graders and half of the tenth graders, and the other containing the other half of the tenth graders, as well as the eleventh and twelfth graders.

No one from CTech reached out to Millville for permission for CTech students to participate in Millville's athletics before notifying parents that they could. Dr. Gentile learned about it "through the grapevine." His reaction was to gather his team (the principals and athletic director) to see if this were feasible. They considered factors such as oversight (like dismissal), and the disciplinary code of conduct and how it could be enforced. Certain behavior was expected from athletes: they used a study hall and buddy system, and they were expected to mentor other students. Sports was woven into the fabric of the school system. The "Orange and Blue" was a way to connect everyone. Athletic programs are important for children in poverty or who have behavioral challenges; athletics incentivizes academics and is a way out of poverty, through scholarships, for many.

Dr. Gentile's team discussed the transportation issue: how would CTech students get to Millville? Discipline was an issue: would there be two sets of rules? What about the appeals process? Could there be two different cultures in discipline?

The business administrator and the athletic director considered the financial costs, including insurance and the cost of administrative time and oversight. This was critical, as the district was struggling financially. Millville had lost State aid every year, and had lost $3 million in State aid for the last eight years. Incurring additional expenses was not in the district's best interest.

They also considered the impact on Millville's enrollment if CTech students were able to participate in Millville sports. This sort of competition for students was not good for the public schools, and they had to consider its impact. Millville was not considered a "choice" school, and had to market itself on what it did well, which was to make academics and sports integral to success. Millville budgets for these programs, and CTech students should not be able to tap into these scarce resources. Dr. Gentile's team had to make sure it represented the interests of the board, and it decided that Millville sports would be for Millville students only. The various factors were weighed,

and they decided that they would lose more than they would gain if CTech students were to participate in Millville's athletic programs. No formal board action was taken. Dr. Gentile believed this decision was in the best interests of the district.

The decision that CTech students would not participate in Millville sports was made by November 2015, after several meetings were held.[4] No minutes were maintained from the meetings. The decision was ultimately supported by his board. The principals of the high school had input into the decision and contributed to the final determination. The pros and cons were weighed by everyone involved; this included logistics and costs.

Various emails were exchanged that referenced student and faculty attrition due to CTech, and the marketing campaign of CTech. Millville tried to formulate its own marketing campaign to inform the community as to why Millville students should choose its high school and not CTech. Athletic activities were considered, as well as the plans of other school districts that had opted to let their students participate. But the final decision was to not permit CTech students to participate in Millville sports.

David LaGamba has been the athletic director at Millville for thirteen years. In the fall of 2015 he was contacted by Dr. Gentile about CTech students playing sports in Millville. Many meetings, at least five or six, were held to discuss this issue with Gentile, the business administrator, and both of the principals at the time (Procopio and DeRose). LaGamba did not recall the exact dates of the meetings, nor were notes taken.

The team considered administrative issues including monitoring students at two different schools, two sets of rules, and the distance between schools. Discipline was a concern, because the same treatment could not be guaranteed.

LaGamba handles eligibility for Millville students with the guidance department to insure compliance with the NJSIAA and local eligibility rules. After the initial screening,

[4] This was reported in the newspaper.

eligibility was ongoing, and the coaches would handle it by speaking with teachers. If CTech students were allowed to play, he would not have direct contact with teachers, which could cause a game to be forfeited.

At these meetings, sports-program issues were also considered. Sports were promoted as an extension of the classroom. Student-athletes were required to mentor other students. Just being present at the school and part of the Millville High School day was important. Upper-class students guided the freshmen and sophomores. Athletes were expected to help their teammates and others. If CTech students were permitted to play at Millville, there would be a disconnect between them and Millville students.

Financial considerations were also discussed, such as the use of fields and the cost of equipment to suit up and equip athletes. Millville has a "zero cut" policy in its athletic programs. If CTech students tried out, and if five were accepted, the cost to the district would increase. Every athlete costs the district money. It would be hard to explain to parents that although the school budget was being cut, Millville's funds would be used for students who do not attend the Millville school.

Medical issues were also a concern. The athletic trainer supervised athletes and came in early to be sure that students could play. He acted as the medical staff for the athletes. If CTech students played for Millville, that would result in another disconnect. The recommendation of the administrative team to Dr. Gentile was a collective one that participation should not be allowed.

In October 2015 an email was exchanged with Procopio and DeRose about sports in Millville. They wanted to promote Millville as the school of choice over any other school in the county.

LaGamba was aware that Vineland and Bridgeton had decided to allow CTech students to participate in their athletic programs. He did not know whether either of those towns had forfeited a game based on eligibility, or whether they had had athletes ejected from a game as the result.

For Respondent CR

Steven Price has been superintendent of the Cumberland County Regional High School District since December 2015. Half of the county feeds into the CR high school. His job is to support and enact policies of its board of education. Price was familiar with CTech at its old facility, and was principal at the middle school when CTech contemplated expansion to a full-time high school.

Price had reached no conclusion about sports involvement until after he became superintendent. He was familiar with the policy and procedures of the board of education, as well as policy #2341 and NJSIAA policy. Price was never officially approached about CTech students participating in CR athletics, but was aware that NJSIAA policy states that vocational-technical students "may" participate if both principals agree.

Aiello, the principal of CR, attended two meetings and asked whether CR would permit CTech students from the CR home district to participate in athletics. As far as Price knew, there had been no discussion or agreement between principals, and CTech had never asked for an agreement from the principal or the athletic director. After consulting with the board of education, it was determined that it was not in CR's best interest to permit participation.

Price had attended the roundtable session in March 2016. Dr. Elliott asked Price if CR would permit CTech students to participate. He told her that logistics would prevent it, and she said to him, "Don't fight, you're going to lose."

The next time Price had contact with Dr. Elliott was at the roundtable of superintendents, where time schedules were discussed. Dr. Elliott asked Dr. Gentile and him, "So are you going to let them play or not?" Dr. Gentile said Millville had financial issues, and CR said it also had financial and logistical concerns. Some of the concerns were early release for home and away sports events; transportation; liability; loss of educational time; and possible lack of adult supervision.

The cost of transportation was a particular issue because CR is a regional high school and handles seven towns and covers 100 square miles. CR asked CTech for the addresses of students accepted by CTech, and CTech indicated that the addresses would not be provided until late April.

The failure of CTech to provide the list of students from CR who planned to attend CTech impacted CR's budget preparation, which had to be completed in the spring. CR could not prepare, nor could it count the number of buses needed. They might be forced to add another bus, and each bus cost an additional $5,400. CR has a budget of $22 million, but is $2.4 million underfunded by the State. Any additional expense is a strain, as the district had to comply with the 2 percent finance cap set by law. If there were no cap, then CR could raise taxes to offset expenses, but it could not. CR had other financial concerns, including student supervision, equipment, and its no-cut sports policy.

Furthermore, CR had never been provided with a list of students who might be interested in participating in sports. In October 2016, CR and Millville had both asked for a list of what sports the students would want or be interested in, but Price has still not received that information. That information could have helped them in budget preparation, but CTech withheld it.

Price then filed OPRA requests for this information during the summers of 2016 and 2017. The information was received late; only half the information was provided; and no information was provided about students with individualized education programs (IEP's). He expected CTech to be in compliance with the request, but it was not in compliance with either the Individuals with Disabilities Education Act or with the Open Public Records Act. Price found it extremely difficult to cooperate with CTech even for part-time students, particularly those with IEP's and transportation issues. Some important information was not received until two years later.

As for the letter to potential freshmen, Price wanted this message to go out so that students and parents could make informed decisions about which school to attend.

One parent had cited the Rahway[5] decision about sports participation to him, so he was concerned that students needed all the facts so they could make an informed decision on which high school to attend. Price's letter stated that those students who chose CTech would not be permitted to participate in athletics at CR. Price became aware that CTech had spent $25,000 on publicity for its school. CR had spent much less, and that was one reason why the letter was sent.

Price was familiar with emails between him, M.T., and Aiello. M.T. wanted his daughter A.T. to participate in athletics and wanted an answer in writing. Price did not discuss athletics with M.T.

Price agreed there was no formal policy on athletics except to comply with the bylaws of the NJSIAA. He was never formally apprised about an athletic agreement. McGraw, the principal at CTech, never offered any potential agreement to Aiello so that the CR team could review it and decide.

In Cape May County, only Lower Cape May Township lets its vocational-technical students participate in their home districts; Middle Township said no. In Bergen County, some districts do not permit vocational-technical students to participate in their sports programs.

Price became CR superintendent in March 2016. He had worked in Millville under Dr. Gentile before that. When Price arrived at CR, he was aware of CTech becoming a full-time school. There was concern that the student population of CR would decline. Full-time vocational-technical students no longer count for financial aid in their home districts. Every school is in a competition to retain its students. CR has made plans to establish its own vocational-technical high school.

By April 2016, Price had told Dr. Gentile that CR had decided that CTech students would not be participating in CR's athletic programs. CR had reached its

[5] G.W.S. ex rel. A.F.S. v. Petrino & Rahway Bd. of Educ., Union Cnty., EDU 09797-99, Comm'r (Nov. 29, 1999), http://njlaw.rutgers.edu/collections/oal/.

decision based on information known to it. Price told Dr. Elliott in March at the roundtable that CR would not let CTech students participate.

The district is small, so the decision was based on conversations with the principals involved. Price had been involved in these discussions since late fall 2015.

The letter that was sent to the students was based on a list of accepted applications, which was not provided by Dr. Elliott until April 2016, after CR's budget process had been completed, and until after the students had indicated their acceptance of CTech's offer.

No formal policy had been adopted by CR against the acceptance of CTech students in its program, but all agreed that CTech students would not be participating in CR's sports programs, as it would not be in CR's best interests. The letter advised the students about the sports tradition at CR. Price thought the students needed to have complete information in making their decisions as to where to attend school.

Aiello just repeated the collective decision to any parent who made inquiry to him, such as M.T. The decision to deny participation was not restricted to A.T., but applied to all students from the district.

Nothing in Price's email to M.T. said anything about logistics and finances being the reason for the denial of participation. M.T. asked for the policy, but no formal policy existed. The board did not need to make policy, as it was already part of its policy adopting the NJSIAA rules. He was familiar with the Rahway decision, but it did not affect the decision that CR had made.

Price recognized that CTech would pay for the bus transportation and that parents would transport the students to games, as Dr. Elliott had assured. He was aware that both Vineland and Bridgeton allowed its CTech students to participate in their home districts, and that the logistics might not be insurmountable, but he had no way to determine if his programs would be affected, because he was getting no information from CTech. CTech has not tried to discuss this matter or to communicate

with CR or Price about these issues, and he cannot answer questions about how CTech students would or could follow their home districts' policies.

Price has spoken with superintendents in Cape May County on multiple occasions over the last eight months. These discussions only strengthened CR's position that it made the right decision. The difficulties of working with the CTech administration have only increased. There were no procedures in place to deal with any issues that may come up, according to McGraw from CTech, and CTech has not begun to even consider any concerns Price has about the effect on his program. It is not in CR's interest to permit CTech students to participate in its sports programs for many reasons, including finances, logistics, and cooperation.

Ralph Aiello, principal of CR, testified that CR first became involved with CTech in 2015 when Dr. Francisco was CR interim superintendent. There were conversations in-house, and together they reviewed the regulations. The principal of CTech has never reached out to Aiello to discuss athletics, although they have communicated about other issues, such as transportation and the school nurse.

Aiello is familiar with the NJSIAA bylaws, including #2431 and #2430, which concern extracurricular clubs and organizations. No agreement has been reached between Aiello and CTech to permit student-athlete participation in their home districts.

Aiello recalled receiving an email from M.T. regarding his daughter and whether she could participate in CR's sports programs. Aiello responded that only CR students could play on CR teams, as that was what had been agreed upon.

At meetings with the superintendent, Aiello raised his many concerns about CTech students participating in CR sports programs:

1. Who would perform the physicals?

2. Who pays?

3. Who would pay for the insurance?

4. Who would be in charge of student discipline?

5. Where would any disciplinary appeals be heard?

6. How would the coaches meet during lunch to discuss strategy, films, and bonding?

7. How would trainers be able to do physical therapy at lunch or at other breaks?

8. If equipment were not turned in, could students be fined, or not graduate, or have their diplomas withheld?

9. What about awards for seniors who were CR students?

10. How could CTech students attend pep rallies that are held during the day? How could CTech students participate in Spirit Week at CR?

11. Whose code of conduct would get followed in disciplinary actions? The coaches were in constant contact; the student-athletes attended athletic study halls at CR.

12. What about NJSIAA sports eligibility? This was a major concern and could cause problems if there were a lack of communication.

13. What about absences and illnesses?

14. What about the different school schedules and calendars of CTech and CR?

All of the above concerns factored into Aiello's opinion when they were discussing whether CR district students who attended CTech would be permitted to participate in CR athletics. These concerns ultimately led to the April 2016 collective decision to deny participation. Once that decision was reached, Price sent the letter to the parents of CR students to advise them. It was not a written policy; rather, it was a collective decision not to let CTech students play sports at CR.

While Aiello had concerns with eligibility, he had not heard of any problem with Vineland or Bridgeton where either high school had to forfeit a game because of this issue.

Findings

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality or 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). Also, "'[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 trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Here, the witnesses all appeared to testify credibly. Each one recalled the events as best as he or she could. Without doubt, each of these educator witnesses

was knowledgeable, insightful, and forthright about his or her respective educational and athletic programs. They all appeared to care deeply for their students and expressed their concern about how their respective programs would be or are being impacted by the decisions being made here.

Indeed, here the dispute is not so much over the sequence of what happened or what the ultimate decision reached by CR and Millville was, but rather whether that decision was made arbitrarily, capriciously, and unreasonably, as urged by CTech.

The denials of participation by CTech students in Millville's and CR's athletic programs appear to have been formulated after meetings and/or discussions with the principals, superintendents, and/or athletic directors. However, no formal written policies were ever adopted by either CR or Millville. No specific reasons for the denials were given until members of the teams were approached by CTech and concerned parents who asked for the basis for the denials, at which time the reasons were finally expressed essentially as financial, discipline, and eligibility. The financial and other considerations expressed by CR and Millville appear rational given the 2 percent tax cap under which they operated. Neither CR nor Millville is in a financial position to lose student population. Concerns about discipline and monitoring of eligibility for schools with strong sports programs were also reasonable.

Principal Aiello succinctly laid out the concerns of both CR and Millville. These are legitimate, rational concerns that can and should be resolved prior to permitting CTech students to participate in CR's and Millville's sports programs. Further, there is no reason to believe that they could not be.

CTech suggests that CR and Millville used these reasons as a sham for denying sports participation simply because these districts were in competition with CTech and did not want to lose students or the resulting State aid or tuition funding that results from students attending their local high schools. I do not find that CR or Millville engaged in deception about its motives for its determination.

Moreover, CTech has not approached either CR or Millville with any proposal for its prospective student-athletes; indeed, CTech did not even know how many of its students would want to participate in their home districts' athletic programs or in which sport they might have an interest, but just an estimated percentage.[6] CTech has also built athletic fields and has some of its own athletic facilities, and has access to some of CCCC's facilities, but has chosen not to utilize them. No rationale was presented for this, except that CTech has decided to not yet offer sports.[7]

LEGAL ANALYSIS

The issue presented by petitioner is whether respondents Cumberland Regional and Millville acted arbitrarily, capriciously, and unreasonably when they reached their separate determinations, based on finances and other considerations, that full-time students who resided in Millville or within the CR regional high school district and who enrolled at CTech would not be able to participate in the athletic and sports programs of their home districts.

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[6] For example, if only two students wanted to play tennis in their local districts, different considerations (for cost, logistics, and eligibility) would be presented than if twenty students wanted to play football. But the level of interest has never been quantified. No reasonable explanation was proffered for the lack of this knowledge. The suggestion that CTech students might get their hopes up if asked about their preferences is not reasonable.

[7] The finding here should be that these three school districts simply cannot deal with each other, due to jealousy, suspicion, and rancor. CR and Millville are struggling districts that do not want to lose any students (and their tuition funding and State aid) to a new school that offers a more competitive program. The principal attraction to prospective students of both CR and Millville high schools is the strength of their respective athletic programs and how they are integral to student learning and academic achievement. The mentoring programs, the study halls, Spirit Week, the no-cut policy, and other athletic activities that are incorporated into the schools' identities and daily structures are their strength. It was not unreasonable for CR and Millville to want to reserve these activities for their local students who chose to attend these schools, given the valid and rational reasons offered for the schools' denials.

CTech, on the other hand, has no idea of how many of its students would even be interested in athletic activities or sports programs, or in which sports, at CR or Millville. And, CTech has not even attempted to communicate with either CR or Millville in any meaningful way to propose any type of arrangement or accommodation (permanent or temporary), at either the superintendent level or the principal level, in an effort to resolve the situation. Moreover, CTech even considered the opening of its own athletic facilities (already built) for its students. Further, CTech did not cooperate with or provide relevant information to CR and Millville in a timely manner to assist with their annual budget preparation in the event an accord was reached.

Although the witnesses agreed on the importance of athletics to students' educations, for two years no progress has been made in achieving that goal for all students who reside in Cumberland County.

Because respondents CR and Millville do not have formal policies addressing the participation of vocational-school students in their athletic programs, the policies of the NJSIAA govern. The parties each rely on G.W.S. ex rel. A.F.S. v. Petrino & Rahway Board of Education, Union County, EDU 09797-99, Comm'r (Nov. 29, 1999), http://njlaw.rutgers.edu/collections/oal/, in support of their positions.[8] In G.W.S., the Rahway school district had permitted vocational students in grades nine through twelve to participate in extracurricular activities and sports programs in their home districts. Starting in September 1999, participation was denied to ninth graders enrolling in the vocational school. The Commissioner noted that under the NJSIAA rules, vocational-technical-school students may participate in the sports programs of their home districts upon the agreement of the (high school) principals. Although the decision to allow participation is discretionary, "that discretionary authority must be reasonably exercised based on bona fide, legitimate considerations." Thus, here the issue is whether CR and Millville had a legitimate reason for denying CTech students the opportunity to play on the sports teams in their home districts.

While neither CR nor Millville appears to have an official written policy addressing the participation of vocational-school students in athletic programs, CR has enacted policies to address co-curricular activities and athletic competitions. Policy #2430 addresses "Co-Curricular Activities," which include "activities conducted on or off school premises by clubs, associations, and organizations of students sponsored by the Board and do not include athletic competitions and practices." (Emphasis added.) The policy specifies that "[t]he Board will not permit students who reside in this district and who are not enrolled in the public school to participate in noncompetitive co-curricular activities." However, this policy does not apply to students who want to participate in athletic programs.

Policy #2431 addresses "Athletic Competition," referring to "all activities relating to competitive sports contests, games, events, or sports exhibitions involving individual students or teams of students when such events occur within or between schools within

[8] The parties commonly referred to this case as the "Rahway decision."

this district or with any schools outside this district." With respect to eligibility standards, the policy notes:

> To be eligible for participation in the interscholastic athletic program of a New Jersey State Interscholastic Athletic Association (NJSIAA) member school, all high school students must meet, at a minimum, all the eligibility requirements of the Constitution, Bylaws, and Rules and Regulations of the NJSIAA.
>
> Home schooled children are not eligible to participate in the high school interscholastic athletic program of this district.
>
> [Cumberland Regional Board of Education, Policy #2431, http://www.crhsd.org/pages/Cumberland_Reg_HS.]

Although this policy explicitly addresses homeschoolers, it does not mention other students who reside in the CR district and who attend public schools but are not enrolled in the district's school, such as students attending a county vocational school. Instead, the policy refers to the eligibility requirements of the Constitution, Bylaws, and Rules and Regulations of the NJSIAA, which it explicitly adopts later in the policy.[9]

Under N.J.S.A. 18A:11-3, a board of education may join a voluntary association, such as the NJSIAA, which regulates the conduct of student activities between and among members. "The said rules and regulations shall be deemed to be the policy of the board of education and enforced first by the internal procedures of the association." N.J.S.A. 18A:11-3. The applicable NJSIAA rule pertinent to the issues presented here is found in Article V, Section 4(G), CL3, of its bylaws, which provides:

> If a Vocational/Technical High School/Public Academy does not offer the particular sport in which one of its full-time students desires to participate, that student may participate in that sport at his/her home school upon agreement of both Principals, regardless of the number of sports programs offered at the Vocational/Technical High School/Public Academy.

[9] The policy reads: "The Board adopts the Constitution, Bylaws, Rules, and Regulations of the New Jersey State Interscholastic Athletic Association as Board policy and shall review such rules on a regular basis to ascertain they continue to be in conformity with the objectives of this Board." Cumberland Regional Board of Education, Policy #2431, http://www.crhsd.org/pages/Cumberland_Reg_HS.

Thus, participation in interscholastic sports is subject to the agreement of the principals of both the vocational school and the public high school. However, "while participation in interscholastic sports is discretionary, . . . that discretionary authority must be reasonably exercised based on bona fide, legitimate considerations." G.W.S., EDU 09797-99, Comm'r (Nov. 29, 1999), http://njlaw.rutgers.edu/collections/oal/. The Commissioner has noted that participation in interscholastic sports may not be practicable or reasonable because of "scheduling constraints, transportation costs or logistical difficulties, or other valid considerations." Ibid.

The question, then, is whether CR and Millville, both members of the NJSIAA, and the superintendents or principals in those high schools expressed and had bona fide, legitimate reasons for denying students of CTech, admittedly a public school located within the county, the opportunity to participate in the athletic programs at their schools.[10]

Superintendent Price cited budgetary issues and the financial burden that would be placed upon CR. The cost of transportation was a particular concern, considering the size of the regional district. He noted that CTech would not cooperate when asked for student information, to such an extent that he was compelled to file OPRA requests for it. He was also concerned about a decline in student population, as well as the logistics of scheduling. He relied on Aiello, who had also expressed concerns about NJSIAA eligibility and discipline for these students. Price also noted that CR had to impose an activity-participation fee on its students because of budgetary constraints.

Dr. Gentile of Millville cited similar concerns, including substantial costs and administrative problems with: transportation logistics and costs; evaluating students for sports eligibility; CTech student safety due to lack of access to Millville's in-district athletic trainer and therapy; Millville coaches' access to CTech students' teachers and records for eligibility monitoring; conflicts in applicability of the Millville disciplinary process to CTech students; and participation of CTech students in Millville sports teams

[10] This is not the changing of a previously established policy as in G.W.S., but, rather, the establishing of a policy or decision ab initio.

in school meetings and programs during the school day. These are all bona fide, legitimate, and reasonable concerns.

Petitioner CTech argues that respondents' decisions were not motivated by the cited issues. Rather, petitioner contends that the sports programs were improperly used as a device to discourage students from attending CTech and to induce students to remain in their home districts, citing to emails between various district personnel over the loss of funding if students enrolled in CTech. It is clear that loss of students (and the financial loss) was at least one consideration expressed by CR and Millville. But the overriding concerns of finances, logistics, eligibility, and discipline expressed by both CR and Millville were significant and outweighed the concern about loss of students.[11]

The Commissioner in G.W.S. was clear that the ability to participate in athletics is permissive. No board is required to take unreasonable or extraordinary steps to accommodate a vocational student's participation in extracurricular activities. But if a board can demonstrate that such participation is not practicable or reasonable because of scheduling constraints, transportation costs or logistical difficulties, or other valid considerations, then the determination to deny participation to the vocational-technical students in their home schools would be appropriate.

CONCLUSION

Because respondents CR and Millville did not adopt formal or written policies addressing the participation of vocational-school students in their athletic programs, the adopted policies of the NJSIAA govern. Under the NJSIAA rules, vocational-school students may participate in the sports programs of their home districts upon the agreement of the principals. Although the decision to allow participation is discretionary, that discretionary authority must be reasonably exercised based on bona fide, legitimate considerations. Here, I **CONCLUDE** that both CR and Millville have demonstrated by a preponderance of the credible evidence that they each had valid,

[11] This is not to say that these hurdles could not be overcome were the parties to discuss student participation in sports in a meaningful way, but that level of cooperation has eluded them.

legitimate, reasonable, or practicable concerns when they determined to deny CTech students the ability to participate in their athletic programs.

I also **CONCLUDE** that CTech's allegations that CR and Millville were deliberately trying to negatively impact the decisions of students in deciding which school to attend are unfounded. CR and Millville were simply extolling the advantages that their schools offered, just as CTech extolled its strengths to prospective students. Indeed, attendance at CTech has not been negatively impacted by its failure to offer sports, as witnessed by the number of students who have chosen to attend CTech without regard to athletic offerings by either CR or Millville, or, indeed, CTech itself. While CR and Millville could have better communicated their respective determinations and decisions regarding athletic participation by CTech students to the CTech administration, the failure to do so should not result in an order compelling CR and Millville to enroll CTech students in its athletic programs.

ORDER

I **ORDER** that the application of the petitioner, Cumberland County Technical Education Center, Cumberland County, to compel the respondents, Board of Education of the Cumberland County Regional High School District, Cumberland County, and the Board of Education of the City of Millville, Cumberland County, to admit its students into their athletic and sports programs, 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.

Susan Scarola

March 29, 2018
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency:

Date Mailed to Parties:

cb

APPENDIX

WITNESSES

For petitioner Cumberland County Technical Education Center:

Gregory McGraw
Gene Mercoli
Dina Rossi Elliott
Timothy McCorkell
Judy Savage
M.T.
A.T.

For respondent Cumberland Regional High School District:

Steven Price
Ralph Aiello

For respondent City of Millville:

Dr. David Gentile
David LaGamba

EXHIBITS

For petitioner Cumberland County Technical Education Center:

P-1 E-mail exchange between C. Nolan and M. Olsen, dated September 8, 2015
P-2 E-mail from M. Olsen to A. Diaz, dated October 7, 2015
P-3 E-mail exchange between S. DeRose and D. Gentile, dated October 7, 2015
P-4 E-mail from S. DeRose to K. Procopio et al., dated October 8, 2015

P-5 E-mail exchange between S. DeRose and K. Procopio et al., dated October 8, 2015

P-6 E-mail between K. McManus and K. Procopio, dated October 8, 2015, with attachments

P-7 E-mail exchange between D. LaGamba and K. Procopio, dated October 8, 2015

P-8 E-mail exchange between S. DeRose and others, dated October 9, 2015, and October 8, 2015

P-9 E-mail exchange between S. DeRose and Z. Wurcel, dated October 9, 2015

P-10 E-mail exchange between D. Gentile and S. DeRose et al., dated October 16, 2015

P-11 Agenda, dated October 28, 2015

P-12 E-mail from S. DeRose to D. Gentile, dated November 3, 2015

P-13 E-mail from K. Hallenback to N. Acosta, dated November 11, 2015, with attachments

P-14 E-mail from D. Gentile to Millville Board of Education, dated November 18, 2015, with attachments

P-15 E-mail from S. DeRose forwarding Millville Daily Journal article, dated November 18, 2015

P-16 E-mail exchange between M. Gruccio and D. Gentile, dated November 18, 2015

P-17 Millville Daily Articles, dated November 19, 2015

P-18 E-mail from H. Sharp to D. Elliott, dated November 20, 2015

P-19 E-mail to D. Elliott from D. Gentile, dated November 23, 2015

P-20 E-mail from D. Elliott to Bridgeton and other school districts, dated January 17, 2016

P-21 E-mail from D. Elliott to Bridgeton et al., dated January 17, 2016

P-22 E-mail exchange between M. Mingin and P. Robbins, dated February 1, 2016

P-23 E-mail from G. Mercoli to Nicole Albanese, et al., dated March 14, 2016

P-24 E-mail exchange between S. Price and D. Gentile, dated April 13 and 11, 2016

P-25 E-mail from V. Charlesworth to D. Appleby, dated April 11, 2016

P-26 E-mail from D. Elliott to P. Nicolosi and W. Knight, dated April 16, 2016

P-27 E-mail from CCTEC Admissions to R. Pettit, dated April 13, 2016

P-28 E-mail from D. Vorndran to S. DeRose, dated April 14, 2016

P-29 E-mail exchange between D. Appleby and V. Charlesworth, dated April 2016

P-30 E-mail from D. Vorndran to J. Derella, dated April 26, 2016

P-31 E-mail exchange between D. Elliott and S. Price on various dates in April 2017

P-32 E-mail from M. Celestin to dkov, dated April 27, 2016

P-33 E-mail from D. Robbins to G. McGraw, dated April 27, 2016

P-34 E-mail exchange between D. Vorndran and N. Russo, dated May 25, 2016 and May 26, 2016

P-35 Industrial Commission minutes, dated June 9, 2016

P-36 E-mail from E. Sherrick, dated June 14, 2016

P-37 E-mail from D. Elliott to M. Taylor, dated June 21, 2016

P-38 E-mail from M. Taylor to G. McGraw, dated June 21, 2016

P-39 E-mail exchange between D. Elliott and S. Price, dated June 23, 2016

P-40 E-mail from M. Taylor to P. Nicolosi, dated June 28, 2016, with attachments

P-41 E-mail from D. Gentile to V. Charlesworth, dated June 29, 2016

P-42 E-mail from D. Vorndran to P. Robbins, dated June 30, 2016

P-43 E-mail from M. Taylor to D. Elliott, dated July 6, 2016, and e-mail from S. Price to M. Taylor, dated July 6, 2016

P-44 E-mail from D. Vorndran to S. DeRose, dated July 5, 2016

P-45 E-mail exchange between D. Vorndran and B. Davis, dated July 6, 2016 and July 5, 2016

P-46 Letter from Lauren Kessler to D. Gentile et al., dated July 8, 2016

P-47 E-mail exchange between K. Redman and A. Diaz, dated July 11, 2016

P-48 E-mail exchange between S. Price and D. Elliot, dated July 12, 2016

P-49 E-mail from S. Wheaton to rhdesq., dated July 20, 2016

P-50 E-mail exchange between M. Olsen and D. Gentile, dated July 20, 2016, and July 28, 2016

P-51 E-mail exchange between S. Price and D. Gentile, dated August 1, 2016 and July 28, 2016

P-52 E-mail from P. Zook to K. Hand, dated August 3, 2016

P-53 E-mail from E. Sherrick, dated August 9, 2016

P-54 E-mail exchange between T. McCann and G. McGraw, dated August 30, 2016, and August 31, 2016

P-55 E-mail exchange between D. Gentile and S. Price, dated October 3, 2016

P-56 E-mail from G. Mercoli to Superintendents and Business Administrators of Cumberland County

P-57 Information Sessions and Applications Data Breakdown

P-58 Statewide Survey as to participation of Vocational Education Students in sports programs in their home districts

P-59 Article from Vineland Millville Daily Journal (undated)

P-60 Answers to interrogatories by Cumberland Regional High School District Board of Education

P-61 Answers to interrogatories by Board of Education of the City of Millville

P-62 Cumberland Regional School District Board of Education—Regular Board Meeting Minutes—November 19, 2015

P-63 Cumberland Regional School District Board of Education—Regular Board Meeting Minutes—December 17, 2015

P-64 Cumberland Regional School District Board of —Regular Board Meeting Minutes—April 28, 2016

P-65 Cumberland Regional School District Board of Education—Regular Board Meeting Minutes—September 22, 2016

P-66 Cumberland Regional School District Board of Education—Regular Board Meeting Minutes—May 25, 2017

P-67 Cumberland Regional School District Board of Education—Regular Board Meeting Minutes—July 27, 2017

P-68 E-mails between Taylor and Aiello, dated June 22, 2016

P-69 E-mails from Steve Price and Michael Taylor, dated August 18, 2016, and August 15, 2016

P-70 E-mail between Bruce Harbinson and Michael Taylor, dated August 15, 2016

P-71 Cumberland Regional Policy 2430

P-72 April 2016 letter from Steven W. Price to eighth-grade students regarding sports participation

P-73 E-mails between Taylor and Price, dated June 23, 2016

P-74 E-mails between Aiello and Price with e-mail from parents, dated July 5, 2016

P-75 E-mail between DeRose and Wurcel, dated August 15, 2016

P-76 November 28, 2016, letter from Robinson to Kizner

P-77 Cumberland County Board of Vocational Education Frosh/Sophomore Athletes

For respondent Cumberland Regional High School District:

R-1 NJSIAA By-Laws, Article V(G) CL.3, p. 44

R-2 Board Policy 2341—Athletic Competition

R-3 Board Policy 2430—Co-curricula

R-4 Board Policy 5200—Attendance

R-5 Board Policy 5514—Student Use Vehicles

R-6 Instructions for Athletic Pre-Participation Forms

R-7 Board Policy 2283—Electronic Communications

R-8 Board Policy 5535—Passive Breath Alcohol

R-9 Board Policy 2436—Activity Participation Fee Program

R-10 Price letter to students re: May 26 meeting

R-11 E-mail from Aiello to M.T. dated June 22, 2016

R-12 Judge's Order—August 23, 2016

R-13 Judge's Order—September 22, 2016

R-14 Commissioner Decision—September 20, 2016

R-15 Commissioner Decision—October 28, 2016

R-16 E-mail from Aiello to Price dated July 5, 2016

R-17 E-mail from Elliott to Price dated March 231, 2017, and Price to Elliott dated March 15, 2017

R-18 Answers to Interrogatories by Cumberland County Board of Education

For respondent City of Millville:

None

180-18

OAL DKT. NO. EDU 16615-17
AGENCY DKT. NO. 245-10/17

K.B., on behalf of minor child, M.B.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER 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.

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 Agreement.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/14/18

Date of Mailing: 6/14/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 16615-17
AGENCY DKT. NO. 245-10/17

K.B. ON BEHALF OF MINOR CHILD M.B.,
Petitioner,
v.
HAMILTON TOWNSHIP BOARD OF EDUCATION, MERCER COUNTY,
Respondent.

K.B., petitioner, pro se

Patrick F. Carrigg, Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Cooley, Lang & Casey, attorneys)

Record Closed: May 15, 2018 Decided: May 16, 2018

BEFORE **MARY ANN BOGAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 9, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

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

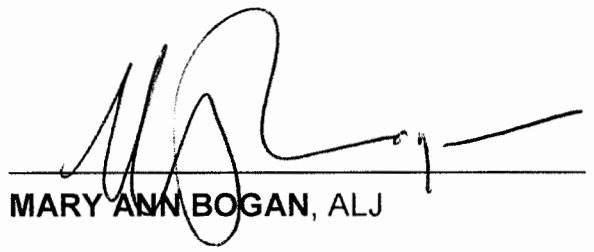
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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



May 16, 2018
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: 5/18/18

Date Mailed to Parties: 5/18/18

MAB/cb

Patrick F. Carrigg. Esq. Atty. No. 035892005
LENOX, SOCEY, FORMIDONI, GIORDANO,
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136 Franklin Corner Road, 2B
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(609) 896-2000
Attorneys for Respondent\Counter Petitioner, Hamilton Township Board of Education

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

K.B. o/b/o M.B., Petitioners vs. Hamilton Township Board of Education, Respondent\Counter Petitioner	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY** **Agency Docket No.: 245-10/17** **OAL Docket No.: EDU 16615-2017S** **SETTLEMENT AGREEMENT**

WHEREAS, K.B. ("Parent") is the parent of M.B.; and

WHEREAS, Hamilton Township Board of Education (hereinafter, "District") is Public School District located in the Township of Hamilton; and

WHEREAS, K.B. filed a Petition of Appeal challenging the District's determination that M.B. had not demonstrated sufficient proof to establish residency in Hamilton Township to allow M.B. to attend the District free of charge; and

WHEREAS, the Parties have resolved this matter and wish to memorialize same herein:

1. Petitioner hereby agrees to withdraw the Petition of Appeal; and

2. Respondent\Counter Petitioner hereby withdraws the Counter-Petition for Tuition with prejudice; and

3. As of the date of this Agreement, Respondent acknowledges and avers that M.B. is a student residing within Hamilton Township and has been so since the date of his enrollment and is thereby entitled to attend Hamilton Township School District free of charge as long as he remains a resident of Hamilton Township or until his graduation therefrom.

K.B. o/b/o M.B.
For Petitioner

Patrick F. Carrigg, Esq.
For Respondent

179=18A

IN THE MATTER OF THE CERTIFICATES	:	COMMISSIONER OF EDUCATION
OF JEAN ST. FORT.	:	DECISION

SYNOPSIS

Appellant Jean St. Fort challenged the determination of the New Jersey State Board of Examiners (Board) that his actions constituted unbecoming conduct and warranted suspension of his teaching certificates for a period of six months. St. Fort had been charged with third degree insurance fraud after filing a false claim with his insurance company, and subsequently completed a Pretrial Intervention Program (PTI), after which the charges against him were dismissed. The State Board of Examiners found appellant guilty of unbecoming conduct, and issued an Order of Suspension on December 8, 2017, suspending appellant's teaching certificates for six months from the date of the decision. On appeal, St. Fort maintained that the Board's decision to suspend his certificates was improper, arguing that the Board erred in finding him guilty of unbecoming conduct without considering the "full context of the allegations." St. Fort contended that: he tried to "nullify" his mistake by withdrawing the inaccurate insurance claim; his conduct did not relate to his employment; he successfully completed PTI and the charges against him were dismissed; and he has demonstrated a fitness to teach. Appellant requested that the Board rescind his suspension, and that he be given no penalty or censure in regard to the insurance fraud incident.

The Board maintained, *inter alia*, that the decision to suspend the appellant's teaching certificates was appropriate given the evidence in this matter, which shows that the appellant engaged in unbecoming conduct when he knowingly submitted a falsified insurance claim – an action that demonstrated a serious lapse of judgment. The Board contended that the penalty of a six month suspension of appellant's certificates was proper and reflected consideration of the nature and gravity of the conduct, as well as the mitigating evidence that St. Fort had voluntarily withdrawn his fraudulent claim. Further, the appellant failed to show that the Board was arbitrary, capricious or unreasonable in finding that St. Fort engaged in unbecoming conduct. Accordingly, the Board urged the Commissioner to affirm the Order of Suspension.

Upon full consideration, the Assistant Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34 – concurred with the Board that just cause exists for suspension of appellant's certificates for a period of six months for engaging in conduct unbecoming a teacher. Accordingly, the decision of the Board was affirmed 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.

Issued 6/11/18

STATE BOARD OF EXAMINERS DOCKET NO. 1617-239
AGENCY DOCKET NO. 13-1/18

IN THE MATTER OF THE CERTIFICATES	:	COMMISSIONER OF EDUCATION
OF JEAN ST. FORT.	:	DECISION

Order of Suspension by the State Board of Examiners, December 8, 2017

For the Respondent-Appellant, William P. Hannan, Esq.

For the Petitioner-Respondent State Board of Examiners, Laurie Fichera, DAG
(Gurbir S. Grewal, Attorney General of New Jersey)

Appellant challenges the determination of the New Jersey State Board of Examiners (Board) that his actions constituted unbecoming conduct, and warranted suspension of his teaching certificates – Teacher of Elementary School in Grades K-6 Certificate of Eligibility, Teacher of English as a Second Language Certificate of Eligibility, and Teacher of Elementary School in Grades K-6 Certificate – for a period of six months.

On appeal, appellant maintains that the Board's decision to suspend his certificates is improper. Appellant argues that the Board erred in finding him guilty of unbecoming conduct without consideration of the "full context of the allegations." Specifically, appellant argues that: he tried to "nullify" his mistake by withdrawing the inaccurate insurance claim; his conduct did not relate to his employment; he successfully completed the pre-trial intervention (PTI) program, and the charges against him were dismissed; and he has demonstrated a fitness to teach. Appellant submits that even if the Board's finding of unbecoming conduct is upheld, suspension is "too harsh" of a penalty. Appellant requests that the suspension be rescinded, and that he be given no penalty or censure.

In opposition, the Board maintains that the decision to suspend appellant's teaching certificates for his conduct was proper. The Board argues that appellant has failed to support his

assertion that the Board was arbitrary, capricious or unreasonable in finding that appellant engaged in unbecoming conduct. The Board submits that the evidence in this matter fully supports the Board's determination that appellant engaged in unbecoming conduct when he knowingly submitted an "inaccurate insurance claim with the intention of having an otherwise uninsurable event become insurable." The Board further contends that such conduct shows "a serious lapse of judgment." The Board submits that the penalty imposed was appropriate and should not be disturbed as it was based on the nature and gravity of the conduct, and is consistent with the Board's consideration of mitigating evidence, such as appellant's "voluntary withdrawal of his fraudulent claim."

The Commissioner's scope of review in matters involving decisions of the Board, including determinations to suspend teaching certificates, is appellate in nature. *N.J.A.C.* 6A:4-4.1(a). In other words, absent a demonstration by appellant that the Board acted in an arbitrary, capricious or unreasonable manner, the Commissioner may not overturn the Board's decision.[1] *See id.*; *see also B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987); *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). Furthermore, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration." *Bayshore*, 122 *N.J. Super.* at 199-200. As such, the Commissioner may not substitute his own judgment for that of the Board where due process has been afforded and where exists sufficient credible evidence in the record to serve as a basis for the decision rendered by the Board.

Upon consideration of the record and all submissions, the Assistant Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34 – concurs with the Board for the reasons thoroughly set forth in the December 8, 2017 Order of Suspension. Appellant's filing of a false insurance claim constitutes unbecoming conduct, and a six-month suspension of his teaching

[1] Arbitrary and capricious means "willful and unreasoning action, without consideration and in disregard of circumstances." *Bayshore Sew. Co. v. Dep't of Envt. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).

certificates is proper as appellant attempted to remedy his fraudulent behavior. It is undisputed that the appellant filed a false claim with his insurance company and was charged with third degree insurance fraud. It is further undisputed that appellant was allowed to participate in PTI for 6 months – after completion of which, the charges were dismissed. The fact that appellant sought to remedy his conduct by later withdrawing his claim, and that the criminal charges against him were dismissed following PTI, do not negate appellant's clearly fraudulent behavior in obtaining additional insurance after an accident – without reporting the accident and the time – and then filing a false claim with the insurance company. The fact that appellant knowingly and intentionally provided inaccurate information to his insurance company is sufficient to constitute unbecoming conduct. The Board was well within its rights to impose a harsher penalty; however, the Board properly took into consideration appellant's remedial efforts. Therefore, the Board's determination is fully supported by the record, and consistent with applicable law and public policy.

The issues raised on appeal were already considered by the Board, and there is nothing in the record to suggest that the Board's decision was arbitrary, capricious or unreasonable; as such, the Commissioner finds no basis upon which to disturb the Board's decision to suspend appellant's teaching certificates for six months for engaging in unbecoming conduct.

Accordingly, the decision of the State Board of Examiners is affirmed for the reasons expressed therein.[2]

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/11/18

Date of Mailing: 6/12/18

[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), and applicable Appellate Division rules.

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
JEAN ST. FORT	:	ORDER OF SUSPENSION
_____	:	DOCKET NO: 1617-239

At its meeting of May 12, 2017, the State Board of Examiners (Board) reviewed information received from the Essex County Prosecutor's Office regarding Jean St. Fort. On November 1, 2016, St. Fort was indicted on a charge of 3rd degree Insurance Fraud. St. Fort allegedly added extra insurance coverage on his motorcycle on August 27, 2015 at 2:56 p.m. He then filed a claim on September 3, 2015, stating that he was in a single vehicle accident on August 31, 2015. When the insurance company investigated, it discovered that St. Fort had called for a tow on August 27, 2015 at 12:44 p.m. due to an accident, thereby misrepresenting the date of loss of his motorcycle in order to obtain insurance benefits to repair it. On March 27, 2017, St. Fort received an Order of Postponement and was accepted into a Pretrial Intervention program (PTI) for 6 months as a result of the incident. St. Fort currently holds a Teacher of Elementary School in Grades K-6 Certificate of Eligibility, issued in April 2014, a Teacher of English as a Second Language Certificate of Eligibility, issued in August 2014 and a Teacher of Elementary School in Grades K-6 certificate, issued in September 2015. Upon review of the above information, the Board voted at its meeting of June 15, 2017 to issue St. Fort an Order to Show Cause as to why his certificates should not be suspended.

The Board sent St. Fort the Order to Show Cause by regular and certified mail on June 20, 2017. The Order provided that St. Fort must file an Answer within 30 days. St. Fort filed an Answer on July 18, 2017.

In his Answer, St. Fort stated that the Order to Show Cause misrepresented the facts of the reporting of his accident. (Answer, ¶ 3). He acknowledged making a statement on September 3, 2015, regarding a motor vehicle accident and noted that "the information I provided regarding the accident were [*sic*] not completely accurate." (Answer, ¶ 3). St. Fort added that he never completed the process and "subsequently contacted the insurance company to voluntarily withdraw my statement at that time

(without any known investigations or charges)." (Answer, ¶ 3). He noted that he did not receive any financial compensation or benefit from any insurance disbursements. (Answer, ¶ 3). St. Fort indicated that he accepted the prosecutor's offer of a deferred disposition "after understanding a 3rd degree charge wouldn't affect my employment status." (Answer, ¶ 4). He also stated that his charges would be dismissed after six months and there would be no conviction. (Answer, ¶ 4). St. Fort noted that his charges would be dismissed before the beginning of the 2017-18 school year and that his record could be expunged six months after the completion of PTI. (Answer, ¶ 5). He also reminded the Board that although he made a mistake, he remedied it and withdrew his statement voluntarily "not because of a court decision or investigation." (Answer, ¶ 5). St. Fort emphasized that while his criminal charges could be expunged, any suspension of his certificates "would negatively impact potential growth, leadership opportunities and the wonderful things I do with my students in my district and others." (Answer, ¶ 6). He therefore asked the Board not to suspend his certificates. (Answer, ¶ 6).

Thereafter, pursuant to *N.J.A.C.* 6A:9B-4.6(e), on August 1, 2017, the Board sent St. Fort a hearing notice by regular and certified mail. The notice explained that it appeared that no material facts were in dispute. Thus, St. Fort 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 found just cause to take action against his certificates. St. Fort was also offered the opportunity to appear before the Board to provide testimony on the sanction issue. St. Fort filed a response on September 14, 2017.

In that response, St. Fort argued that suspension of his certificates was not warranted. He claimed that he tried to remedy his mistake in giving inaccurate information to his insurance company by seeking to withdraw his claim soon thereafter and before he had knowledge that his claim had been denied. (Hearing Response, pp. 6-8). St. Fort also emphasized that his conduct did not arise out of or during the course of his employment as a teacher. (Hearing Response, pp. 8-9). Moreover, he noted that he had successfully completed his PTI early and the charges against him had been dismissed, indicating that he was "worthy of a second chance" to prove himself a productive member of society. (Hearing Response,

pp. 9-14). St. Fort argued that he was fit to be teaching public students as he had taught successfully for two years since the conduct at issue and had been rehired for a third year in his district. (Hearing Response, p. 13). He added that he had been rated as an effective teacher and was deeply involved in the school and at-large community in Essex County, devoting his time to helping young people. (Hearing Response, p. 13). St. Fort opined that, contrary to his one-time lapse in judgment, he had proven himself to be a role model for the past two years since the insurance claim was filed and any action against his certificates would be purely punitive and would not serve his students or the public. (Hearing Response, pp. 13-14). He added that the Board could rely upon his record from the past two years to determine whether he was fit to teach and pointed out that his charge was minor enough that he never had a break in employment. (Hearing Response, p. 14). Moreover, St. Fort noted that it would defeat the purpose and policy behind PTI to have him successfully complete the program, have his charges dismissed only to be "double-punished" through his profession's licensing agency. (Hearing Response, p. 16). Finally, he argued that if the Board determined a suspension was warranted in his case, it should be minimal, perhaps three months or less. (Hearing Response, pp. 17-20).

The threshold issue before the Board in this matter is whether St. Fort's conduct constitutes conduct unbecoming a certificate holder. At its meeting of November 1, 2017, the Board considered the allegations in the Order to Show Cause as well as St. Fort's Answer and Hearing Response. The Board determined that no material facts related to St. Fort's offense were in dispute since he did not deny that he had engaged in the some of the conduct alleged in the Order to Show Cause. Thus, the Board determined that summary decision was appropriate in this matter. *N.J.A.C.* 6A:9B-4.6(h).

The Board must now determine whether St. Fort's conduct, as set forth in the Order to Show Cause, represents just cause to act against his certificates pursuant to *N.J.A.C.* 6A:9B-4.4. 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:9B-4.4. "Teachers... are professional employees to whom the people have entrusted the care and

custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321.

St. Fort argues that he should retain his certificates since the incident did not implicate his teaching responsibilities. It is well established that the State Board of Examiners has the right to revoke a certificate where the teacher was involved in criminal activities, even if the activities were unrelated to the classroom. *See Cox v. State Board of Examiners,* (App. Div. Docket No. A-3527-81T3) (November 18, 1983); *State Board of Examiners v. Krupp,* 3 *N.J.A.R.* 285 (1981).

Moreover, the Commissioner has long held that teachers serve as role models for their students. Therefore, a teacher's whole life is subject to scrutiny, not just his/her actions within the schoolhouse doors:

> [R]espondent's argument that, because the occurrence happened in the evening away from school premises, both the Board and the Commissioner have no authority to act, is without merit. Individuals who must comport themselves as models for young minds to emulate choose the teaching profession. This heavy responsibility does not begin at 8:00 a.m. and conclude at 4:00 p.m., Monday through Friday, only when school is in session. Being a teacher requires, *inter alia,* a consistently intense dedication to civility and respect for people as human beings. The Commissioner has, on past occasions, determined tenure charges arising from incidents which happened in the evening both on and off school property. *See In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland,Cumberland County,* 1965 *S.L.D.* 159, *aff'd,* State Board of Education 1970 *S.L.D.* 448; *In the Matter of the Tenure Hearing of John H. Stokes, School District of the City of Rahway, Union County,* 1971 *S.L.D.* 623.

[*In the Matter of the Tenure Hearing of Robert H, Beam*, 1973 *S.L.D.* 157, 163.] St. Fort therefore cannot exclude his "out-of-school" behavior from this tribunal's examination.

Furthermore, unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 *N.J.L.* 369, 371 (1943), *aff'd*, 131 N.J.L. 326 (E & A 1944). In this instance, St. Fort's actions in filing a false insurance claim is conduct that indicates a serious lapse in judgment. Nonetheless, it is clear that St. Fort tried to correct his behavior relatively quickly, an action that was acknowledged by the court in imposing a short PTI term and thereafter releasing him early. Moreover, although his teaching career has been short, he has shown himself to be

very involved with his students and community. In light of this mitigating evidence, the Board therefore concludes that the appropriate response to St. Fort's breach is a six-month suspension of his certificates.

Accordingly, on November 1, 2017, the Board voted to suspend Jean St. Fort's Teacher of Elementary School in Grades K-6 and Teacher of English as a Second Language Certificates of Eligibility and his Teacher of Elementary School in Grades K-6 certificate for a period of six months. On this 8th day of December 2017 the Board voted to adopt its formal written decision and it is therefore ORDERED that St. Fort's certificates be suspended for six months, effective immediately. It is further ORDERED that St. Fort return his certificates to the Secretary of the State Board of Examiners, Office of Certification and Induction, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Robert R. Higgins, Secretary
State Board of Examiners

RRH/MZ/th

Date of Mailing:

Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-38.4.

181-18

OAL DKT NO. EDU 01344-18
AGENCY DKT NO. 282-11/17

KEITH BENSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY; PAYMON ROUHANIFARD, SUPERINTENDENT; THERESA ATWOOD; FELISHA REYES-MORTON; MARTHA WILSON; KATHRYN BLACKSHEAR; JOSE BRITO BUENO; DOROTHY BURLEY; TAISHA MINIER; WASIM MUHAMMAD,	:	DECISION
RESPONDENTS.	:	

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

Upon review, the Commissioner approves the consent order and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/14/18

Date of Mailing: 6/14/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 01344-18

AGENCY DKT. NO. 282-11/17

KEITH BENSON,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY; PAYMON ROUHANIFARD, SUPERINTENDENT; THERESA ATWOOD; FELISHA REYES-MORTON; MARTHA WILSON; KATHRYN BLACKSHEAR; JOSE BRITO BUENO; DOROTHY BURLEY; TAISHA MINIER; AND WASIM MUHAMMAD,

Respondents.

Keith Benson, petitioner, pro se

Teresa M. Lentini, Esq., for respondents (Florio, Perrucci, Steinhardt and Cappelli, LLC)

Record Closed: May 14, 2018 Decided: May 15, 2018

BEFORE **DOROTHY INCARVITO-GARRABRANT,** ALJ:

This matter was transmitted to the Office of Administrative Law on January 24, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a dismissal and a Consent Order Dismissing the Complaint has been executed by both parties, which is attached hereto.

I have reviewed the dismissal and I **FIND**:

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

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

I **CONCLUDE** that the Consent to Dismiss the Complaint meets the requirements of N.J.A.C. 1:1-19.1 and that the dismissal should be approved. I approve the dismissal of the complaint herein and therefore **ORDER** 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 15, 2018
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: 5/17/18

Date Mailed to Parties: 5/17/18

tat/lam

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Attorneys for The Camden City School District, Paymon Rouhanifard, Superintendent of the Camden City School District; Camden Advisory Board of Education Members Theresa Atwood, Felisha Reyes-Morton, Martha Wilson, Kathryn Blackshear, Jose M. Brito Bueno, Dorothy Burley, Taisha Minier, Wasim Muhammad

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY:

DR. KEITH E. BENSON, PRESIDENT OF THE CAMDEN EDUCATION ASSOCIATION, THE CAMDEN EDUCATION ASSOCIATION, Petitioners v. THE CAMDEN CITY SCHOOL DISTRICT; PAYMON ROUHANIFARD, SUPERINTENDENT OF THE CAMDEN CITY SCHOOL DISTRICT; CAMDEN ADVISORY BOARD OF EDUCATION MEMBERS THERESA ATWOOD, FELISHA REYES-MORTON, MARTHA WILSON, KATHRYN BLACKSHEAR, JOSE M. BRITO BUENO, DOROTHY BURLEY, TAISHA MINIER, WASIM MUHAMMAD Respondents	:	Case: 282-11/17 **CONSENT ORDER DISMISSING COMPLAINT**

It is hereby stipulated by and between Petitioners, appearing pro se, and Respondents, by and through their counsel, that the above-referenced matter is hereby dismissed without costs or fees to any party.

FLORIO PERRUCCI STEINHARDT & CAPPELLI, LLC

By: _____
Teresa M. Lentini, Esquire
Attorneys for Respondents
Dated: April MAY 14, 2018

_____
Dr. Keith Benson
On behalf of Petitioners
Dated: April MAY 14, 2018

APPROVED BY THE COURT:

_____
DOROTHY INCARVITO-GARRABRANT, ALJ

183-18

H.C., on behalf of minor child, B.Y.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the determination of the respondent Board that B.Y. committed an act of harassment, intimidation or bullying (HIB) in violation of the New Jersey Anti-Bullying Bill of Rights Act (the Act), *N.J.S.A.* 18A:37-13 *et seq.* Petitioner contended that the Board's determination of HIB was arbitrary, capricious and unreasonable, and asserted that the Board failed to comply with the procedural safeguards set forth in the Act; further, petitioner sought expungement of any reference to the alleged act of HIB from B.Y.'s school record. The respondent Board contended that there were no procedural violations of the Act in this matter, and that the finding of HIB was proper. The petitioner filed a motion for summary decision.

The ALJ found, *inter alia*, that: the motion record herein presented factual disputes that would typically require a hearing; the incident in question occurred during a game of tag in October 2016, when B.Y. was in third grade; B.Y. was reported to have said things to a classmate, and behaved toward him in a manner that was understood by investigators and administrators to fall within the parameters of the Act; the school district assigned discipline for the alleged behavior, including a required apology, recess suspension for three days, and attendance at counseling; however, B.Y. transferred to another school without completing the discipline; petitioner requested a review of the HIB findings before the Board, which hearing occurred on December 20, 2016; the Board affirmed the actions of the school administration, finding that B.Y. had engaged in HIB; this determination was conveyed to the petitioner by letter from the Board attorney dated December 21, 2016; and that this letter cannot be considered a written decision in satisfaction of the procedural requirements of the Act. The ALJ concluded that the Board failed to issue a final written decision in this matter, which he deemed an "irreparable" procedural flaw. Accordingly, the ALJ returned the matter to the Metuchen Board of Education for preparation of a written decision.

Upon review, the Commissioner rejected the Initial Decision and remanded the matter to the OAL for a hearing to resolve factual disputes and to determine whether the Board was arbitrary, capricious or unreasonable in its finding of HIB. In so doing, the Commissioner determined that the Board Attorney's letter to petitioner explicitly set forth the Board's consideration of this matter and its decision to affirm the superintendent's HIB determination, and does, in fact, constitute a written decision pursuant to *N.J.S.A.* 18A:37-15(b)(6)(e).

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 6/22/18

OAL DKT. NO. EDU 05202-17
AGENCY DKT. NO. 53-3/17

H.C., on behalf of minor child, B.Y.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, 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 by the parties pursuant to *N.J.A.C.* 1:1-18.4. Petitioner alleges that the Board's determination that B.Y. committed an act of harassment, intimidation and bullying ("HIB") is arbitrary, capricious and unreasonable, as the Board failed to comply with the procedural safeguards set forth in the Anti-Bullying Bill of Rights Act ("the Act"). Petitioner further alleges that the Board improperly found B.Y.'s conduct to rise to the level of HIB under the Act, and seeks expungement of any reference to the alleged act of HIB from B.Y.'s school records. Respondent contends that the Board did not violate the procedural requirements under the Act, and that the finding of HIB was proper.

The ALJ found that the Board failed to issue a final decision in this matter, which was an "irreparable" procedural flaw.[1] The ALJ concluded that the proper remedy is to return the matter to the Board, and directed respondent to issue a final decision. The ALJ further noted that the factual disputes and the other procedural violations alleged present questions of fact –

[1] The ALJ found that Board minutes reflecting its vote on the HIB matter, followed by a letter from the Board Attorney advising petitioner of the Board's decision, were insufficient to constitute a *written* decision by the Board.

typically requiring a hearing – and cannot be determined until the matter has concluded at the Board-level.

Petitioner takes exception to the ALJ's recommendation that the matter be returned to the Board. Petitioner argues that there is no provision in the Act which allows for such a remedy. Petitioner further argues that the Board's failure to issue a final decision is the "most substantive violation," which cannot be remedied. Petitioner also notes that the ALJ disregarded the Board's other procedural violations. Petitioner submits that allowing the Board to "fix" its violations of the Act is unfair. Additionally, petitioner argues that the HIB finding is "patently erroneous" as there is no evidence that the incident "substantially disrupted or interfered" with orderly operation of the school or the rights of other students. In response, the Board maintains that it properly found HIB in this matter and that it did not violate the procedural safeguards of the Act. Furthermore, respondent seeks modification of the Initial Decision to reflect that the Board issued a final decision when the Board Attorney sent a letter to petitioner's counsel on December 21, 2016 ("the Letter"), relaying the Board's final determination in the matter.

Upon a comprehensive review of the record, the Commissioner rejects the Initial Decision and remands the matter to the OAL for a hearing to resolve the factual disputes and determine whether the Board was arbitrary, capricious or unreasonable in its finding of HIB.

N.J.S.A. 18A:37-15(b)(6)(e) provides that the board "shall issue a decision, in writing, to affirm, reject, or modify the superintendent's decision." Here, respondent argues that the Letter following the Board's review of the matter satisfies the requirements under *N.J.S.A.* 18A:37-15(b)(6)(e). During the course of litigation, respondent also argued that the Board minutes reflecting the vote on the HIB matter was also sufficient to constitute a final written decision of the Board. The Commissioner finds that the Board minutes certainly do not

constitute a *written decision* by the Board in accordance with *N.J.S.A.* 18A:37-15(b)(6)(e).[2] The Letter, however, meets the requirements of *N.J.S.A.* 18A:37-15(b)(6)(e): it *explicitly* sets forth the Board's consideration of the matter and its decision to affirm, reject or modify the superintendent's determination. Furthermore, the Letter was issued on behalf of the Board by an authorized agent – *i.e.*, the Board Attorney – notifying petitioner of the Board's decision on the HIB matter. Therefore, the Board issued a written decision pursuant to *N.J.S.A.* 18A:37-15(b)(6)(e).

With regard to petitioner's allegations that the Board committed other procedural violations, the record before the Commissioner does not support same.[3] Further exploration of the facts may reveal that the alleged procedural violations did occur, but such factual inquiry and subsequent findings are appropriately conducted by the ALJ. Additionally, whether the Board's ultimate HIB determination was arbitrary, capricious or unreasonable, cannot be ascertained without a thorough consideration of the facts, which deliberation the ALJ admittedly did not undertake.

Finally, the Commissioner is unpersuaded that the remedy set forth in *Edward Sadloch, et. al. v. Bd. of Educ. of the Twp. of Cedar Grove, Bergen Cnty*, Commissioner Decision No. 216-15 (June 23, 2015), is proper in determining the possible remedies in this matter. Petitioner argues that like *Sadloch*, the Board failed to follow the procedures under the Act, and the sole remedy under the law is to reverse the HIB determination and to remove any reference of HIB from B.Y.'s records. In a HIB appeal, where the record is sufficient for a fact

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[2] The requirement for a *written* decision affirming, rejecting, or modifying the superintendent's decision is clear. As addressed in *J.L., on behalf of minor child, A.L. v. Bd. of Educ. of the Bridgewater-Raritan Reg'l Sch. Dist., Somerset Cnty*, Commissioner Decision No. 416-16 (Dec. 9, 2016), "under no circumstances can any board minutes be substituted for a requirement of a written decision by a board" in a HIB matter.

[3] The record reflects that a HIB investigation was conducted and reported in a timely manner, and petitioner was on notice through the duration of the investigation process. Furthermore, petitioner was notified of the outcome, and was never denied a hearing before the Board. Therefore, at this time – without verification of the facts – the Commissioner is unable to render a finding of deprivation of B.Y.'s due process rights.

finder to determine whether an act of HIB occurred and the procedural violations did not deprive the petitioner of their right to notice and a hearing, such a remedy would curtail the legislative intent behind the Act. In *Sadloch*, reversal was appropriate because the board failed to comply with basic investigatory procedures under the Act. Additionally, the state of the record in that case was such that a fact finder could not properly determine whether an act of HIB occurred. Here, the Board gave petitioner notice of the allegations, conducted an investigation and notified petitioner of the results of the same, and also afforded petitioner with an opportunity to appear before the Board. *See Stephen Gibble v. Bd. of Educ. of the Hunterdon Central Reg'l Sch. Dist., Hunterdon Cnty*, Commission Decision No. 254-16 (July 13, 2016). Significantly, the Board provided petitioner its decision in writing on December 21, 2016. Therefore, the Commissioner finds that the ALJ erroneously ordered that the matter be returned to the Board for issuance of a final decision. The ALJ further erred in not determining whether there were, in fact, other procedural violations, and whether the Board's finding of HIB in this matter was arbitrary, capricious or unreasonable.

Accordingly, the recommended decision of the ALJ is rejected and the matter is remanded to the OAL for a hearing on the remaining issues.

IT IS SO ORDERED.[4]



COMMISSIONER OF EDUCATION

Date of Decision: 6/22/18

Date of Mailing: 6/22/18

[4] 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 5202-17
AGENCY DKT. NO. 53-3/17

H.C., on behalf of minor child, B.Y.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,
Respondent.

Bruce C. Licausi, Esq., and Randall J. Peach, Esq., for petitioner

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

Record Closed: April 30, 2018 Decided: May 8, 2018

BEFORE **SOLOMON A. METZGER**, ALJ (Ret., on recall):

This matter arises out of a decision by the Metuchen Board of Education finding that B.Y., at the time an eight-year-old third grader, committed an act of harassment, intimidation, or bullying (HIB) in violation of N.J.S.A. 18A:37-14. A hearing was sought before the Commissioner of Education, and the matter was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15.

Petitioner has filed a motion for summary decision, N.J.A.C. 1:1-12.5; Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

The motion record presents factual disputes that would typically require a hearing; however, the matter turns now on a procedural flaw that is irreparable in the current posture of the case. The incident in question took place on October 28, 2016, during a game of tag. B.Y. was reported to have said some things to a classmate and behaved toward him in a manner that was understood by investigators and administrators to fall within the HIB statute. He was disciplined by way of a required apology, recess suspension for three days, and attendance at counseling. The District's interrogatory answers relate that some of these measures were realized, but that in the meantime B.Y. transferred to another school. Petitioner through counsel sought review of the HIB findings before the Board of Education. At a meeting of December 20, 2016, the Board heard the matter and affirmed the decision of its administrators in a vote that was recorded in its minutes. No written decision was produced. On December 21, 2016, then-counsel for the Board provided then-counsel for petitioner with a letter relaying the Board's action. This is the substance of the motion record.

N.J.S.A. 18A:37-15(b) sets forth the minimum procedural safeguards attendant to HIB cases. Among these is the requirement for a written decision by the Board affirming, modifying, or rejecting the recommendations of school administrators. Board counsel suggests that this was accomplished by recording the vote in minutes and by the follow-up letter of counsel. I disagree. Boards of education commonly pass upon matters by voice vote recorded in minutes. Were that the threshold, the Legislature needn't have spoken further. Nor can the letter from counsel communicating the Board's affirmation serve as a substitute. Written decisions following a proceeding are designed to give interested parties a measure of insight into the tribunal's evaluative process. The Legislature deemed this to be salutary in HIB cases, and we cannot gloss past it.

Petitioner asserts other multiple procedural failures. It is apparent from the motion record, however, that these present fact questions. Petitioner maintains, for example, that she was not given certain relevant information in advance of hearing. The District cites to telephone conferences, e-mails, and in-person meetings where the issues were discussed. Moreover, petitioner was represented by counsel and discovery was exchanged. Petitioner asserts further that the underlying conduct does not rise to the level of HIB. Yet, reading the record in a manner most favorable to the non-moving party, it appears that demeaning references were made about the victim's weight during this game of tag and that B.Y. devised special rules to humble him. The victim subsequently wrote that he was distressed by the interaction. It is entirely plausible that this conduct, if proven, might rise to "substantial" interference with the victim and other students playing, see N.J.S.A. 18A:37-14. That the context was a game of tag does not diminish the statutory concern with HIB. As is evident, a lot can happen during tag.

Finally, petitioner argues that a remand will merely reward the Board's mistakes and undoubtedly result in a writing affirming its "preordained" conclusion. Petitioner relies on Sadloch v. Board of Education of Cedar Grove, EDU 619-14, Initial Decision (March 26, 2015), adopted, Comm'r (June 23, 2015), http://njlaw.rutgers.edu/collections/oal/. There, the administrative law judge (ALJ) found multiple procedural errors, including the absence of a written Board opinion, vague charges, and a generally muddled record. Given the passage of time and the difficulty of recreating the facts, the ALJ determined that reversal and expungement of the HIB record was the preferred course. The instant matter does not share most of these problems; the nature of the offense is known and the evidence is available. Sadloch should be understood as the exception, not the rule. Boards of education enjoy wide latitude in the exercise of discretion, and their decisions may not be disturbed unless arbitrary, Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288 (App. Div. 1960). The motion record does not support that conclusion. The parties might do well at this juncture to disengage their legal arguments and weigh the cost-benefit of continuing on this path. That of course is their choice.

Based on the foregoing, the matter is remanded to the Metuchen Board of Education for preparation of a written 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.

May 8, 2018
DATE

SOLOMON A. METZGER, ALJ (Ret., on recall)

Date Received at Agency: 5-8-18

Date Mailed to Parties: 5-8-18

mph

STATE OF NEW JERSEY COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ARBITRATION OF THE TENURE CHARGE	
between	DOE DOCKET NO. 52-3/18
TRENTON PUBLIC SCHOOLS BOARD OF EDUCATION, MERCER COUNTY	
Petitioner,	**CONSENT AWARD**
-and-	
CHARLES OWENS,	
Respondent	

BEFORE: Michael J. Pecklers, Esquire, Arbitrator

DATE OF HEARING: April 23, 2018 (Telephonic)

DATE OF CONSENT AWARD: June 19, 2018

APPEARANCES:

For the Petitioner:

Adam S. Herman, Esq., ADAMS, GUTIERREZ AND LATTIBOUDERE, LLC

For the Respondent:

Michael T. Barrett, Esq., BERGMAN & BARRETT
Charles Owens

WHEREAS, following the preferring of tenure charges by the Petitioner to the Commissioner of Education, and the assignment of the case to the undersigned, a discovery schedule including the propounding of interrogatories was set during an initial April 9, 2018 conference call; and

WHEREAS, the parties subsequently entered into negotiations concerning the charges, with the SETTLEMENT AGREEMENT resulting *inter alia* in a four (4) month unpaid suspension placed on the record during an April 23, 2018 conference call and Mr. Owens signing the same at that time; and

WHEREAS, the SETTLEMENT AGREEMENT was adopted by the Trenton Public Schools Board of Education and executed by the Board President on June 4, 2018, the terms of which are incorporated by reference herein; therefore

BE IT RESOLVED, that the attached SETTLEMENT AGREEMENT is accepted in full and final resolution of the instant tenure charges, with a recommendation made to the DOE that the same be adopted, as it complies with the *Cardonick* criteria set forth at N.J.A.C. 6A:3-5.6, as applicable.

Dated: June 19, 2018
NORTH BERGEN, N.J.

MICHAEL J. PECKLERS, ESQUIRE
ARBITRATOR

STATE OF NEW JERSEY
SS}
COUNTY OF HUDSON

ON THIS 19TH DAY OF JUNE, 2018, BEFORE ME PERSONALLY CAME AND APPEARED **MICHAEL J. PECKLERS, ESQ.,** TO BE KNOWN TO ME TO BE THE INDIVIDUAL DESCRIBED HEREIN AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND HE DULY ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME.

NOTARY PUBLIC

OFFICIAL SEAL
ANGELICA SANTOMAURO
NOTARY PUBLIC - NEW JERSEY
My Comm. Expires July 29, 2019

ADAMS GUTIERREZ & LATTIBOUDERE, LLC
The Legal Center
1037 Raymond Blvd., Suite 900
Newark, New Jersey 07102
(973) 735-2742
Attorneys for Petitioner, Trenton Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST CHARLES OWENS,	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
TRENTON PUBLIC SCHOOLS BOARD OF EDUCATION, MERCER COUNTY	Agency Dkt. No. No. 52-3/18 *Administrative Action* **SETTLEMENT AGREEMENT**

The Trenton Board of Education (the "District"), whose principal office is located at 108 North Clinton Avenue, Trenton, New Jersey 08609, and its successors, assigns, officers, employees, agents and representatives (collectively, "School District"), Charles Owens, having an address at 30 Richey Place, Trenton, New Jersey 08618 ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

WHEREAS Respondent is a tenured teacher employed by the District; and

WHEREAS Respondent is a member of the Trenton Education Association ("TEA"); and

WHEREAS the District certified tenure charges of Unbecoming Conduct, Corporal Punishment and Other Just Cause to the Commissioner of Education of the State of New Jersey, captioned *In the Matter of Tenure Charges Against Charles Owens, Trenton Board of Education* ("Tenure Charges"), and such charges were assigned Docket No. 52-3/18 and Respondent filed an answer opposing the charges; and the Commissioner of Education, having reviewed the charges

and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator Michael Pecklers ("Arbitrator") for a hearing; and

WHEREAS, Respondent has denied the allegations set forth in the tenure charges; and

WHEREAS, the Parties are aware of the uncertainty of the outcome of arbitration; and

WHEREAS, the District with stringent budget limitations and due to the expenditure of resources due to multiple days of hearings with numerous witnesses, including several students, and the concern that students will be removed from school to testify and that school administrators will be removed from their educational duties and responsibilities during that time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

WHEREAS the proposed Stipulation of Settlement is in the best interest of the Parties and the public because Respondent agrees to serve a four (4) month unpaid suspension, thereafter to resume his teaching duties, upon the formal approval of this stipulation of settlement by the Trenton Board of Education; and

NOW, THEREFORE, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Respondent shall serve a four (4) month unpaid suspension from February 27, 2018 through June 30, 2018. This suspension shall serve as the entire discipline for Respondent with respect to these tenure charges. Respondent agrees not to, and waives any right to, challenge or otherwise contest this suspension.
2. The District shall provide Respondent with the opportunity to maintain his normal health insurance coverage during the unpaid suspension period. Respondent shall be

responsible for his employee contribution for all health insurance provided pursuant to this paragraph. Respondent will receive an invoice for his contributions for said coverage and will solely be responsible for making prompt payments to maintain his coverage.

3. Upon resumption of his teaching duties effective September 1, 2018, Respondent agrees to accept an assignment as a teaching staff member at any school within the District that the District finds to be appropriate and in the best interest of the District. An assignment to a school location other than the Gregory Elementary School shall not be deemed to be a disciplinary transfer.
4. Respondent further agrees to attend any and all professional development courses identified by the District.
5. Respondent shall not earn any paid days (e.g. sick, personal or vacation) for the period from February 27, 2018 through June 30, 2018. As such, Respondent's sick day bank shall be reduced by five (5) days. In addition, Respondent's personal day bank shall be reduced by one (1) day.
6. Respondent understands and agrees that the District may use this stipulation of settlement and unpaid suspension in any future disciplinary proceeding involving Respondent.
7. The District agrees to dismiss the instant tenure charges with prejudice, subject to the approval required in Paragraphs 19 and 20.
8. In exchange for the consideration set forth above, the sufficiency of which is hereby acknowledged, Respondent hereby waives, releases and discharges as against the School District any and all claims or causes of action, known or unknown, suspected or unsuspected, arising through the date of his execution of this Agreement, including, without limitation, any claim for attorneys' fees, costs or other monetary relief;

discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, personal day pay, wages, attorneys' fees, costs, and/or

future wage loss. Notwithstanding this release of claims / causes of action, Respondent retains all of the rights and protections of a tenured staff member of the District.

9. Respondent agrees to withdraw with prejudice any and all claims, petitions, suits that he or a representative may have previously filed on his behalf against the District that are still pending in any and all courts and/or before any and all agencies with the exception of workers compensation claims. This Settlement is intended to be the final resolution of all outstanding matters between the District and Respondent. Should Respondent fail to submit letters of withdrawals for any such pending claims or suits, this Stipulation of Settlement will serve as Respondent's formal written notice of withdrawal of those pending claims or suits, except for workers compensation claims.

10. Notwithstanding Paragraphs 8 and 9 of this Stipulation of Settlement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims, Respondent agrees not to seek or accept any resulting relief whatsoever.

11. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that he: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives her right

to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has 7 days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that he may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the 7 day period.

12. This agreement shall not constitute a precedent in any matters involving other District employees.

13. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

14. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

15. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

16. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures

or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

17. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

18. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

19. Additionally, this Stipulation is subject to final approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

20. This Stipulation of Settlement is also subject to formal Board of Education approval.

21. Upon formal approval of this stipulation of settlement by the District and the Arbitrator, a copy of same will be placed in Respondent's personnel file.

Dated: 4/23/18

CHARLES OWENS

TRENTON BOARD OF EDUCATION

Dated: 6/4/18

GENE BOUIE
Board President

CERTIFICATION

I, Charles Owens, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this 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: 5/1/18

CHARLES OWENS

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):

Dated: 6/7/18

Adam S. Herman, Esq.
ADAMS GUTIERREZ & LATTIBOUDERE
Attorneys for the Trenton Board of Education

APPROVED:

Dated: June 19, 2018

Michael Pecklers Arbitrator

184-18

R.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Pro se petitioner challenged the determination of the respondent Board that his son, A.N., was not subjected to harassment, intimidation or bullying (HIB) under the provisions of the New Jersey Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 *et seq.* (the Act). Petitioner alleged that A.N. – a student at Columbia High School during the period in question, who attained the age of eighteen prior to the filing of the petition – was subjected to HIB and retaliation by the respondent's varsity baseball coaches. The Board previously filed a motion to dismiss for lack of standing on the part of R.N.; the motion was denied by order of the previous judge in this matter, ALJ Bedrin-Murray. Said order found that R.N. was entitled to bring a petition in his own right, and required that the petitioner: file a motion to amend his petition to name only himself as petitioner; and bring the petition on his own behalf rather than on behalf of A.N. This order was never filed, and petitioner did not file an amended petition. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there were no material facts at issue in this case, and the matter is ripe for summary decision; the Act seeks to protect students; the petition herein only named R.N. as petitioner; petitioner's son, A.N., was never named a party to the within action, and the petition seeks relief only on behalf of A.N.; the instant petition, however, was filed after A.N. reached the age of eighteen; R.N. failed to assert claims on his own behalf, and only sought relief for alleged violations of the Act against his adult son; petitioner failed to file a motion to amend the petition and set forth a claim on his own behalf, as the previous ALJ had ordered. The ALJ concluded that the petitioner lacked standing to bring this matter. Accordingly, the ALJ granted respondent's motion for summary decision and further vacated ALJ Bedrin-Murray's order providing petitioner an opportunity to amend his petition.

Upon review, the Commissioner disagreed with the ALJ's finding that petitioner lacks standing, and remanded the matter to the OAL for further proceedings. In so doing, the Commissioner found that the ALJ erred in vacating ALJ Bedrin-Murray's order and dismissing the petition for lack of standing. The substantive issues in the underlying petition – *i.e.*, petitioner's allegations of retaliation implicating his rights under the Act and the Board's policy on HIB – remain unresolved, and require further exploration of the facts for proper adjudication of 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 6/22/18

OAL DKT. NO. EDU 09346-16
AGENCY DKT. NO. 115-4/16

R.N.,	:	
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. Petitioner's exceptions, and respondent's reply thereto, have also been reviewed and considered by the Commissioner.

The Administrative Law Judge ("ALJ") found that petitioner lacked standing to "bring this matter in his own right." The ALJ concluded that petitioner failed to assert claims on his behalf and only sought relief for alleged violations of the Anti-Bullying Bill of Rights Act ("the Act") against his adult son. The ALJ further noted that petitioner never filed a motion to amend the petition of appeal and set forth a claim on his own behalf, as directed by ALJ Bedrin-Murray in her order on July 28, 2017. The ALJ, therefore, granted respondent's motion for summary decision and further vacated ALJ Bedrin-Murray's order of July 28, 2017, wherein – in addition to providing petitioner the opportunity to amend the petition to bring a claim solely on his behalf – ALJ Bedrin-Murray had concluded that, although petitioner could not bring a petition on behalf of his adult son, he could assert a claim for alleged violations of *his* rights under the Act.

Upon review, the Commissioner disagrees with the ALJ's finding that petitioner lacks standing, and remands the matter to the OAL for further proceedings, for the reasons set forth herein.

In the petition of appeal, petitioner claims that in August 2014 he raised concerns with the school district regarding alleged violations of the Act, and reported incidents of harassment, intimidation and bullying ("HIB") allegedly committed by the baseball coaches. Petitioner further asserts that in March 2015, his then-minor son – who was a starter on the high school baseball team the year prior – was cut from the team, which petitioner argues was in retaliation for his involvement with the prior HIB allegations. *N.J.S.A.* 18A:37-16(a) provides, "[a] member of a board of education, school employee, student or volunteer shall not engage in reprisal, retaliation or false accusation against a victim, witness or one with reliable information about an act of harassment, intimidation or bullying." Additionally, Board Policy No. 5512 states in relevant part that "a Board member, school employee, or contracted service provider who has contact with students, school volunteer, or student" is prohibited from "engaging in reprisal, retaliation, or false accusation against a victim, witness, one with reliable information, or any other person who has reliable information about an act of harassment, intimidation, or bullying or who reports an act of harassment, intimidation, or bullying." Petitioner, therefore, is within his rights to assert a claim – on his behalf – based on the allegations pertaining to retaliation in his petition. Whether the allegations possess any merit is a separate issue, and same should have been considered at the OAL.

ALJ Betancourt, therefore, erred in vacating ALJ Bedrin-Murray's order of July 28, 2017, and dismissing the petition of appeal for lack of standing. The substantive issues in the underlying petition – petitioner's allegations of retaliation implicating his rights under the

Act and the Board's policy on HIB – remain unresolved, and further exploration of the facts is required for proper adjudication of this matter.

Accordingly, the recommended decision of the ALJ is rejected and the matter is hereby remanded to the OAL for a hearing on the remaining issues.

IT IS SO ORDERED.[1]



COMMISSIONER OF EDUCATION

Date of Decision: 6/22/18

Date of Mailing: 6/22/18

[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
SUMMARY DECISION
OAL DKT. NO. EDU 09346-16
AGENCY REF. NO.115-4/16

R.N.,

Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT,

Respondent.

R.N., Petitioner, pro se

Howard M. Nirenberg, Esq., for Respondent (Nirenberg & Varano, attorneys)

Record Closed: April 9, 2018 Decided: May 11, 2018

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner parent challenges the District's HIB determination.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on June 23, 2016, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A prehearing conference was held on August 8, 2016, before the Honorable Joan Bedrin-Murray, ALJ, who issued a prehearing order dated August 9, 2016.

Respondent filed a motion to dismiss the petition based on lack of standing on March 14, 2017. Petitioner filed a responsive brief on March 27, 2017. Respondent filed a sur-reply brief on April 3, 2017. By order dated July 28, 2017, Judge Bedrin-Murray denied the motion. In said order Judge Bedrin-Murray limited the petition to only those claims that R.N. could assert in his own right, and not any claims on behalf of his now adult son. Judge Bedrin-Murray further ordered that R.N. file a motion to amend the petition to name only himself as the petitioner. It appears that motion was never filed.

Respondent then filed a motion for interlocutory review with the Commissioner of the Department of Education, which was denied by letter of the Commissioner dated August 14, 2017.

Petitioner filed a motion for summary decision on February 8, 2018. Respondent filed his response in opposition to the motion on March 26, 2018. Petitioner filed its sur-reply on April 9, 2018.

The matter was transferred to the undersigned on January 17, 2018.

A status conference was conducted by the undersigned on January 18, 2018, and respondent was permitted to file a motion for summary decision on or before February 20, 2018.

Respondent filed a summary decision motion on February 20, 2018. Petitioner filed his response thereto on March 29, 2018. Respondent filed its sur-reply brief on April 25, 2018. All responses filed past times permitted by rule were with consent.

FACTUAL DISCUSSION

The following **FACTS** are not in dispute:

Petitioner filed a petition alleging violations of the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13 et seq. (ABR). Said petitioner references alleged conduct of respondent's varsity baseball coaches and retaliation against petitioner's son, A.N.

A.N. was a student in the South Orange-Maplewood School District and attended Columbia High School. R.N. is the father of A.N. A.N. is an adult, having attained the age of eighteen prior to the filing of the petition.

The petitioner herein only names R.N. as petitioner. Petitioner's son, A.N., was never named a party to the within action. The petition seeks relief only on behalf of A.N.

The previous judge in this matter, the Honorable Joan Bedrin-Murray, entered an order dated July 28, 2017, where she denied respondent's motion to dismiss for lack of standing of R.N. Said order found that R.N. had a right to bring a petition in his own right. Said order also required petitioner to file a motion to amend his petition to name only himself as petitioner and to bring the petition on his own behalf, and not on behalf of A.N. That motion was never filed. An amended petition was never filed.

The relief requested in the petition is all requested on behalf of A.N.

LEGAL ANALYSIS AND CONCLUSION

Standard for Summary Decision

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted).

I have limited my review herein to the petition and Judge Bedrin-Murray's order of July 28, 2017. I disagree with Judge Bedrin-Murray's conclusion. R.N. did not, and does not, have standing to bring this matter in his own right.

N.J.S.A. 18A:37-14 defines "harassment, intimidation or bullying" as"

> any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other

> distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

Cleary the Act seeks to protect students. The petition seeks relief on behalf of a student, petitioner's son A.N. A.N. is an adult and not a party to the petition. Further, the petition was filed after the time A.N. reached his majority. R.N. cannot bring a valid claim on behalf of another adult.

N.J.A.C. 6A:3-1.2 provides the following definitions regarding contested matters, Indispensable party and Interested person(s):

> "Contested case" means an adversarial proceeding in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required to be adjudicated by the Commissioner after opportunity for agency hearing pursuant to N.J.S.A. 18AL6-9, N.J.S.A. 52:14B-1 et seq. (Administrative Procedure Act) and N.J.A.C. 1:1 (New Jersey Uniform Administrative Procedure Rules).
>
> "Indispensable party" means a person(s) without whose inclusion a matter cannot proceed or adequate judgment cannot be entered.
>
> "Interested person(s)" means a person(s) who will be substantially, specifically, and directly affected by the outcome of a controversy before the Commissioner.

Clearly A.N. is an indispensable party and is not named in the petition. The petition asserts no claims on behalf of the petitioner, R.N. It only seeks relief for alleged HIB violations against A.N.

Further, the relief requested in the petition is beyond the authority of the undersigned to order. The relief requested includes, inter alia:

> To hold respondent accountable for the travesty of events that have occurred since July 2014. The only relief that can be provided at this time is the truth. It is requested that the respondent, in public session, openly acknowledge their reasons for not following the law and the overall outcome and pain that was caused to my son and the other players and parents. In addition to accepting their responsibility, both a verbal and written apology to my son. It is requested that copies of the "confidential" report given to the Board in December 2015 and the independent investigator's report be provided to the families that were directly impacted. A letter to every family that approached the school about HIB by the coaches be sent from the President and Superintendent apologizing for their actions and acknowledging the HIB that was endured by the student athletes. A letter in the Maplewoodian.com, Village Green and News Record to the community for their role in allowing HIB to exist within the athletic department.

Further, despite the order requiring petitioner to file a motion to amend the petition to set forth a claim on his own behalf, and not on behalf of A.N., no such motion or amended petition was ever submitted.

Based upon the above I **CONCLUDE** there are no genuine issues of material facts as they relate to the petition, and respondent is entitled to prevail as a matter of law.

I further **CONCLUDE** that the respondent's motion for summary decision should be granted and that the order of Judge Joan Bedrin-Murray, dated July 28, 2017, be vacated.

ORDER

It is hereby **ORDERED** that respondent's motion for summary decision is **GRANTED**; and

It is further **ORDERED** that petitioner's petition is **DISMISSED** with prejudice.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 11, 2018
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: May 11, 2018

Date Mailed to Parties: MAY 14 2018

db

APPENDIX

List of Moving Papers

For Petitioner:

Brief in opposition to motion for summary decision

For Respondent:

Motion for summary decision

Brief in support of motion for summary decision

Sur-reply brief

Other Pleadings and Filings:

Petition

Motion to dismiss for lack of standing

Brief in support of motion to dismiss for lack of standing

Brief in opposition to motion to dismiss for lack of standing

Order of Judge Joan Bedrin-Murray dated July 28, 2017

Motion by respondent for interlocutory review by the Commisioner

Brief in support of motion for interlocutory review

Brief in opposition to motion for interlocutory review

SETTLEMENT AGREEMENT, RESIGNATION AND GENERAL RELEASE

This SETTLEMENT AGREEMENT, RESIGNATION AND GENERAL RELEASE ("**Agreement**") is being entered into among and between DR. JOSEPH BELL ("**Dr. Bell**" or "**Releasor**") and HAMILTON TOWNSHIP BOARD OF EDUCATION ("**HAMILTON** shall be referred to as "**Releasees.**" Dr. Bell, HAMILTON shall be collectively referred to herein as the "**Parties.**"

WHEREAS, Dr. Bell is and has been employed by HAMILTON as a tenured teacher; and

WHEREAS, HAMILTON certified tenure charges against Dr. Bell to the Commissioner of Education on or about April 25, 2018 (the "**Action**"); and

WHEREAS, the Commissioner of Education transmitted the matter for hearing and determination by an arbitrator; and

WHEREAS, the Parties wish to resolve the tenure charges in the interest of the public without the need for further litigation, and all of Dr. Bell's claims and potential claims against HAMILTON, and hereby stipulate to settle same subject to the terms and conditions set forth herein; and

WHEREAS, the meaning, effect and terms of this Agreement have been fully explained to Dr. Bell, who understands that this Agreement settles, bars, and waives any and all claims that he could possibly have against Releasees as of the date of this Agreement;

NOW, THEREFORE, in consideration of the mutual promises, covenants, agreements and representations contained herein, the legal sufficiency of which is acknowledged by the Parties, and intending to be legally bound hereby, the Parties agree as follows:

1. Settlement of Tenure Charges. The Board agrees upon execution of the within Settlement Agreement, Resignation and Release by the parties, the subject tenure charges shall be moot and shall be deemed to be withdrawn and abandoned by HAMILTON.

2. Resignation: Dr. Bell, by signing this Agreement, hereby tenders his irrevocable resignation effective June 30, 2018. The resignation shall be irrevocable upon acceptance and approval of this Agreement by HAMILTON.

3. Consideration. In consideration of Dr. Bell's irrevocable resignation,

(a) Dr. Bell shall be retroactively returned to the payroll effective May 16, 2018 and paid his regular salary, based upon his annual salary of $_____ .00, through June 30, 2018.

(b) Said compensation will be less all applicable taxes, TPAF pension contributions, Contributory Insurance, TPAF Loan deductions, NJEA dues, and Garnishment (if any).

(c) HAMILTON shall continue all benefits for Dr. Bell through June 30, 2018 subject to all lawful Ch. 78 contributions and the terms of the HTEA Agreement.

(d) Dr. Bell shall be entitled to no further payments, benefits or emoluments of employment except as explicitly set forth herein.

4. No Admissions. The parties agree that neither the resignation of Dr. Bell, nor the Board's approval of this Agreement, constitute an admission of liability or wrongdoing by either party.

5. Dr. Bell's General Release of Claims. In consideration for Releasees promises and representations made herein, Dr. Bell, individually and on behalf of his heirs, representatives, immediate family members (including but not limited to his spouse and children), agents, successors and assigns, hereby releases Releasees, their parents, board members, subsidiaries, shareholders, directors, officers, employees, agents, attorneys, insurers, affiliates, predecessors, successors, assigns, heirs, and all persons acting by, through, under or in concert with any of them (collectively, 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 Dr. Bell now has, claims to have, owns, holds or which Dr. Bell at any time heretofore had, held, or claimed to have based on events occurring through the date of execution of this Agreement, to the fullest extent allowed by law, except for the claim specifically referenced in Paragraph 5 of this Agreement. This release includes, without limitation, claims arising under 42 U.S.C. § 1981, Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family Medical Leave Act, the National Labor Relations Act, the Employee Retirement Income Security Act (save for claims related to vested benefits, which are exempted from this release), the Equal Pay Act, the New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, the New Jersey Workers' Compensation Act, except for the claim specifically referenced in Paragraph 5 of this Agreement, as well as any other federal, state, local, or municipal statute, ordinance or regulation that prohibits improper discrimination, harassment or retaliation in the workplace or otherwise relates to or regulates employment relationships. In addition, this release extends to and covers claims for tortious conduct or breach of express or implied contract, including wrongful discharge, breach of covenant of good faith and fair dealing, intentional or negligent infliction of emotional distress, breach of contract or implied contract, negligence, misrepresentation, fraud, detrimental reliance, promissory estoppel, defamation, invasion of privacy, breach of laws governing safety in the workplace, loss of consortium, or any claims under federal, state, and local statutory and common law relating in any manner whatsoever to his employment with HAMILTON or the termination of that employment relationship. Dr. Bell represents and warrants that he has not sold, assigned, transferred, conveyed or otherwise disposed of any claim, demand or cause of action, including any claim for attorneys' fees, against Releasees that relate to the matters stated above.

6. Liens. It is further understood that as a condition of this settlement, all claims and/or liens, past, current and/or future arising out of this settlement or asserted against the proceeds of this settlement are to be satisfied by Releasor and/or their Attorneys, including but

not limited to any Child Support Judgment liens, Medicare or Medicaid claims and/or liens, Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician or attorney claims and/or liens, or any of the statutory, equitable, common law or judgment claims and/or liens, including but not limited to claim based on subrogation or any other legal or equitable theory. Releasor(s) therefore agrees, upon prompt presentation of any such claims and/or liens, to defend Releasees against any such claims and/or liens, and to indemnify and hold Releasees harmless against any judgment entered against Releasees based on such claims and/or liens, including the payment of any fines, charges and attorneys fees incurred as a result of any such lien. Failure to satisfy any such lien shall be considered a breach of this Agreement and Releasor(s) and their Attorneys agree to pay all costs, interest and attorneys fees relative to any such lien.

7. Post-Employment Inquiry. HAMILTON agrees, through its Administration, to respond to post-employment inquiries regarding Dr. Bell by providing the information required by N.J.S.A. 47:1A-10, including his name, title, position, last salary, payroll record, length of service in the District, date of separation, that Dr. Bell resigned from his employment, the amount, if any, of any pension received, and any other information required to be provided by law. The Board shall also provide fully and truthfully all such information as it may be legally required to provide to any governmental agencies or pursuant to Court Order.

8. No Rehire. Dr. Bell understands and agrees that his employment relationship with HAMILTON has ended. Dr. Bell understands and agrees that as of June 30, 2018 he will no longer be entitled to any wages, salary, health benefits, emoluments, or any other payments other than those specifically and explicitly set forth in this Agreement. Releasees shall be under no obligation to reinstate, hire, rehire or consider Dr. Bell for future employment with the HAMILTON. Dr. Bell acknowledges that he will not be eligible for rehire with the Released Parties, including but not limited to full-time, part-time, temporary employment, as a non-payroll worker, or any other form of contract work at any time in the future. Accordingly, Dr. Bell agrees that he will not seek or apply for employment with the Released Parties or any successor or assign of the Released Parties. Dr. Bell acknowledges that if he applies for such employment notwithstanding his representations in this paragraph and is rejected, the decision will be based solely on this paragraph and not for some other reason, unlawful or otherwise.

9. Public Interest Served. The within settlement will serve the public interest, eliminating additional litigation costs. The within settlement further avoids the need to require student witnesses from having to testify in the tenure charge hearing.

10. No Other Legal Action by Dr. Bell. Dr. Bell confirms that he does not have any charge, complaint or action pending in any forum or form against any of the Released Parties as of the date of hereof. Further, Dr. Bell 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. This covenant extends to, but is not limited to, proceedings to negate, modify or reform this Agreement, though nothing in this paragraph is intended to limit Dr. Bell from instituting legal action for the sole purpose of enforcing Releasees' obligations to him under this Agreement. Further, nothing in this paragraph is designed to interfere with or limit Dr. Bell's protected rights

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. Nonetheless, Dr. Bell understands that, by signing this Agreement, he waives any rights he may have to recover money or other relief in any lawsuit or proceeding he brings, or that is brought on his behalf, by any agency or third party against any of the Released Parties based on events arising out of or relating to his employment with HAMILTON through the date of this Agreement. Except where otherwise permitted under this paragraph, Dr. Bell agrees that any action he may file against any of the Released Parties based on events that transpired on or before the effective date hereof shall be dismissed with prejudice upon presentation of this Agreement. Dr. Bell further agrees that, to the extent allowed by law, he will not participate in any litigation, complaints, or claims brought by other individuals against Releasees.

11. Assent to Terms. The parties hereby acknowledge that they have entered into this Agreement with a full understanding of their rights and obligations and that they were fully informed of the implications of this Agreement by their respective attorneys, and they do so without duress, of their own free will and volition.

12. Non-Disparagement. Dr. Bell agrees not to make, publicly or privately, through any media or medium (including, without limitation, comments on social networking sites), any disparaging or derogatory remarks or otherwise make statements that could injure the business or reputation of any of the Released Parties. Dr. Bell and Releasees all agree not to defame or disparage the other with respect to any matter arising out of the employment relationship or lawsuit in the past and in the future.

13. Additional Covenants and Acknowledgments Pursuant to N.J.A.C. 6A:3-5.6.

(a) The Tenure Charges in this matter arise out of allegations of unbecoming conduct based upon alleged statements made by Dr. Bell to two students. Dr. Bell denies making the alleged statements. The Tenure Charges and Dr. Bell's Answer are incorporated by reference.

(b) The parties agree that settlement of this case is justified for a final resolution. As a result of Dr. Bell's resignation, the Board will achieve a guaranteed result, in an expeditious manner, at a comparatively low cost and will avoid the uncertainty of litigation before an arbitrator. Additionally, the within matter involves extensive testimony of witnesses, both employees and students, whose interests would be better and permanently served by resolution through this Agreement.

(c) The parties further agree that the proposed settlement will serve the public interest. As a result of Dr. Bell's resignation from employment with HAMITLON, HAMILTON will not have to incur any further expenses associated with arbitration or any subsequent action related to this matter. Further, HAMILTON will avoid the expenditure of substantial future administrative time and effort, and avoid the disruption to the educational day for employee and student witnesses.

(d) Dr. Bell acknowledges has that he has the right to contest the charges against him and seek an adjudication of the charges by the arbitrator;

(e) Dr. Bell acknowledges that he has the right to consult any attorney and has, in fact, consulted an attorney prior to signing this Agreement;

(f) Dr. Bell acknowledges, as a teaching staff member, that the Commissioner of Education has a duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

14. Entire Agreement. This Agreement sets forth the entire agreement between Dr. Bell and Releasees. All other prior agreements between the Parties are hereby terminated and shall have no other force or effect. Dr. Bell acknowledges and agrees that Releasees have not made any promises to him other than those set forth in this Agreement. This Agreement may be modified only upon an express written agreement between the Parties. Because counsel for Dr. Bell had a full opportunity to review this Agreement with him before he signed it, the language 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. Disputes. The validity, performance, construction, and effect of this Agreement shall be governed by the substantive laws of the United States and the New Jersey. The Superior Court of New Jersey shall retain jurisdiction to implement and enforce the Agreement and its terms.

16. Severability. The invalidity or unenforceability of any provision of this Agreement, whether in whole or in part, shall not in any way affect the validity or enforceability of any other provision contained herein.

17. Counterparts; Exchange by Electronic Means. This Agreement may be executed in counterparts, which shall be taken together as the entire agreement of the Parties hereto. This Agreement may also be exchanged by the Parties via electronic mail for the purposes of securing signatures and will be fully enforceable as an original document.

DR. BELL ACKNOWLEDGES THAT HE HAS READ THIS AGREEMENT, UNDERSTANDS IT AND IS ENTERING INTO IT KNOWINGLY AND VOLUNTARILY AND NOT AS A RESULT OF ANY PRESSURE, COERCION OR DURESS.

DR. BELL AGREES THAT HE HAS HAD A REASONABLE AND SUFFICIENT TIME AND OPPORTUNITY TO CONSULT WITH COUNSEL, AND THAT HE HAS FULLY DISCUSSED AND REVIEWED THE TERMS CONTAINED IN THIS AGREEMENT WITH COUNSEL PRIOR TO EXECUTING IT, OR FREELY CHOSEN NOT TO DO SO.

DR. BELL FURTHER UNDERSTANDS, ACKNOWLEDGES AND AGREES THAT THIS AGREEMENT CONTAINS A

GENERAL RELEASE OF CLAIMS AS TO ALL RELEASED PARTIES, AND THAT THIS AGREEMENT SETTLES, BARS, AND WAIVES ANY AND ALL CLAIMS THAT HE HAS OR COULD POSSIBLY HAVE AGAINST THE RELEASED PARTIES THROUGH THE DATE OF THIS AGREEMENT.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties agree to the terms of this Agreement.

DR. JOSEPH BELL

Dated: 22 May 2018

WITNESS - MICHAEL BARRETT, Esq.

Dated: May 28, 2018

HAMILTON TOWNSHIP BOARD OF EDUCATION

Susan Lombardo

NAME:
TITLE:

Dated: 6-21-18

Dear Ladies and Gentlemen of the Hamilton Township Board of Education:

Subject to the terms and conditions of our Settlement Agreement, Resignation, and Release ("Agreement"), and approval of same by the Board of Education, I hereby tender my irrevocable resignation effective June 30, 2018 from all employment with the Hamilton Township Board of Education.

Very truly yours,

Dr. Joseph Bell 28 May 2018

Dr. Joseph Bell

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

SYNOPSIS

Petitioner – a tenured special education teacher who was employed in respondent's school district for approximately 12 years, until she was deemed mentally unfit for service – asserted that the District violated *N.J.S.A.* 18A:16-4 by failing to reemploy her upon receiving proof of her recovery. Petitioner sought an order compelling the District to reemploy her or allow her to provide the District with additional proof of her recovery. This is the second petition filed by petitioner with the Commissioner in which she challenged the District's refusal to accept her proof of recovery submissions after she was placed on administrative leave in December 2013, and required to undergo a psychological examination to determine her fitness to teach. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: *N.J.S.A.* 18A:16-2(a) provides that "The 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;" the Commissioner has recognized that the right to reemployment under *N.J.S.A.* 18A:16-4 is conditioned upon a school board's satisfaction with the proof of recovery offered by the employee; in the instant case, the District reasonably rejected a report by Dr. Michael Ferenschak, Psy.D., because the report neglected to mention any recovery efforts by petitioner, such as therapy or medication, and placed conditions on her return to work, including a recommendation that she work in a "non-high stress environment that is supportive and collaborative"; further, Dr. Ferenschak's report failed to address why a return to work would not trigger a recurrence of petitioner's stress and anxiety, leaving open a reasonable possibility of harm that justifies the District's decision to reject his report as proof of Ms. Hayes' recovery; however, partial summary decision in favor of petitioner is also appropriate because Ms. Hayes should have been given more time to provide the District with further proof of her recovery in accordance with *N.J.S.A.* 18A:16-4, as the District refused to accept further proof of recovery, resulting in less than the full two years to which she was statutorily entitled to prove her mental fitness to return to work; and the District should permit petitioner to submit additional proof of recovery within sixty days. The ALJ granted the District's motion for summary decision in part and denied in part; and granted petitioner's motion for partial summary decision.

Upon comprehensive review, the Commissioner concurred with the ALJ's findings and determinations in this matter, and adopted the Initial Decision of the OAL as the final decision with the modification that petitioner be given 193 days from the date of this decision – representing the number of days she was prohibited from providing evidence of her mental fitness to teach – to submit proof of recovery that is satisfactory to the District, in accordance with *N.J.S.A.* 18A:16-4.

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 6/22/18

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

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

The record of this matter and the March 28, 2018 Order of the Office of Administrative Law (OAL), granting in part and denying in part the District's motion for summary decision, and granting petitioner's motion for partial summary decision – submitted to the Commissioner pursuant to *N.J.A.C.* 1:1-12.5(e) – have been reviewed. The Commissioner has also reviewed the parties' exceptions and replies thereto, filed pursuant to *N.J.A.C.* 1:1-18.4.

By way of background, petitioner was placed on administrative leave, effective December 16, 2013, and required to undergo a psychological examination to determine her fitness to teach. Following an examination, Dr. Jonathan Mack, Psy.D., issued a report on August 11, 2014, in which he found that petitioner was at an "unacceptable risk for future problems with the elementary school behaviorally disordered population" and that if petitioner is able to work with a "less stressful population," she should be required to have weekly psychological counseling and be evaluated for medication. (Mack Report at 44) Accordingly, on March 3, 2015, the District informed petitioner that, pursuant to *N.J.S.A.* 18A:16-4, she was ineligible for further service with the District and would be terminated from payroll in 60 days. Thereafter, on March 31, 2015, petitioner submitted letters from her psychologist and primary

care doctor as proof of recovery, which the District ultimately found did not qualify as satisfactory evidence of proof of recovery.[1]

On August 9, 2016, petitioner submitted as proof of recovery a report by another psychologist, Dr. Michael Ferenschak, which indicated that she is susceptible to flare-ups in highly stressful situations. As such, the report recommended that petitioner work in a "non-high stress environment that is supportive and collaborative," but indicated that she "does not appear to possess any major current psychological barriers that should keep her from returning to full-time employment." (Ferenschak Report at 6-7) On August 12, 2016, the District advised petitioner that the report was not satisfactory proof of recovery. Following an inquiry as to what the District would require to demonstrate her fitness to teach, the District informed petitioner on August 22, 2016 that the two year period for her to apply for reinstatement had expired.

Petitioner filed a petition of appeal and motion for emergent relief on November 21, 2016, seeking an order reinstating her as a teacher in the District or compelling the District to consider new proof of recovery submissions. On December 7, 2016, the Administrative Law Judge (ALJ) issued an Order denying the motion for emergent relief, which the Commissioner adopted.

Following the District's motion for summary decision and petitioner's motion for partial summary decision, the ALJ concluded that the District's motion should be granted in part because it reasonably rejected Dr. Ferenschak's report, but that partial summary decision should also be granted to petitioner because she should have been given more time to provide the

[1] Petitioner filed a petition of appeal on June 1, 2015, requesting to be reinstated to her position and alleging the District had not responded to her proof of recovery submission. Summary decision was granted in favor of the District in an Initial Decision that was adopted by the Commissioner. Petitioner appealed this matter to the Appellate Division, which issued a decision on August 23, 2017, affirming the Commissioner's decision that the District did not act in an arbitrary, capricious or unreasonable manner in rejecting petitioner's proof of recovery letters.

District with further proof of her recovery. Specifically, the ALJ found that Dr. Ferenschak's report failed to mention any recovery efforts that petitioner has taken, such as therapy or medication, and places the condition on her return to work that she work in a non-high stress environment. The ALJ noted that the report did not explain why a return to work would not trigger a recurrence of petitioner's stress and anxiety after having a major depressive episode and panic attack during her leave of absence, stating:

> If she continued to have psychological issues while she was not working, it is difficult to see how, without any documented treatment efforts, such issues would not recur upon her return to work. These concerns represent "a reasonable possibility of harm" that, "given the interest of student safety," justify the District's decision to reject Dr. Ferenschak's report as proof of [petitioner's] recovery and to decline to reinstate her employment. (ALJ's Order at 13)

With respect to future proof of recovery, the ALJ found that "a reasonable reading of [*N.J.S.A.* 18A:16-4] leads to the conclusion that an employee has two years from the time he becomes 'ineligible for further service,' or 'the time his services were discontinued' due to psychological unfitness, to provide satisfactory proof of recovery." (ALJ's Order at 14) Even though Dr. Mack's report was issued on August 11, 2014, the ALJ noted that the District did not inform petitioner that she was ineligible for further service until March 3, 2015, so petitioner should have had until March 3, 2017 at the earliest to submit proof of recovery. However, due to the District's refusal to accept further proof of recovery after receiving Dr. Ferenschak's report in August 2016, and due to the denial of petitioner's application for emergent relief, petitioner's time period to submit proof of recovery was cut short. As such, the ALJ granted an additional 60 days to make up for the time lost, even though 60 days would still not provide petitioner with a cumulative two years.

In her submissions to the Commissioner, petitioner argues that she is entitled to the full amount of time statutorily mandated to submit proof of recovery, rather than the 60 days that the ALJ ordered. Specifically, petitioner contends that she is entitled to either another 193 days to submit proof of recovery – if the two year period began on March 3, 2015, when the District told her she was ineligible for further service – or 254 days if the two year period began when she was terminated on May 3, 2015. Petitioner contends that the ALJ did not rely on any legal precedent in shortening the time period set forth in *N.J.S.A.* 18A:16-4. Petitioner maintains that she should not be punished for the delays caused by the District, such as the 5 months between the time petitioner went out on administrative leave and when she was evaluated by Dr. Mack, or the 7 months after Dr. Mack's report that it took for the District to deem her ineligible for service. Further, petitioner points out that the District "successfully opposed the emergent motion by arguing that any time remaining from the time [the District] refused to accept additional proof of recovery could be provided at the end of the case." (Petitioner's April 25, 2018 Submission at 4)

Petitioner also took exception with being denied a hearing on the proof of recovery that was already submitted. Petitioner argues that the ALJ relied on *Emily Diaz v. Board of Education of the Township of Mahwah, Bergen County,* Commissioner's Decision No. 348-10, August 27, 2010 as a similar case, but the petitioner in *Diaz* had a hearing on the merits rather than being decided on a motion for summary decision. Petitioner argues that she has been unable to question Dr. Mack on whether the District's interpretation of his report is accurate, so she will never be able to determine if the District's requirement that she undergo weekly counseling is arbitrary. As such, petitioner seeks a hearing so that she can prove that the

District's criteria for proof of recovery – *i.e.*, evidence of weekly counseling sessions – is unreasonable, as her treating physicians have determined that such treatment is unnecessary.

In its submissions, the District argues that – contrary to petitioner's arguments – the issue of what is necessary for proof of recovery in this case has already been litigated. The Commissioner and Appellate Division have already "deemed that any proof of recovery submission by Petitioner would have to describe her recovery efforts and/or any treatment regimen in place to address Dr. Mack's concerns, including proof that she followed the recommendation to undergo weekly psychological counseling and be evaluated for psychiatric medication." (Respondent's April 10, 2018 Submission at 5) The District explains that it appropriately rejected Dr. Ferenschak's report because it did not address petitioner's recovery efforts, and also made petitioner's return to work contingent upon placement in a "non-high stress environment that is supportive and collaborative" – which recommendation is similar to that included in Dr. Mack's report, and previously deemed unacceptable by the Commissioner and the Appellate Division. Further, even though there was a hearing in *Diaz*, *supra*, there is no requirement for a hearing in this matter because there are no genuine issues of material fact.

With respect to the ALJ's Order allowing petitioner 60 additional days to submit proof of recovery, the District argues that petitioner should not be afforded any additional time to submit proof of recovery because both the March 3, 2017 and May 3, 2017 dates have passed and this matter is moot. Alternatively, the District contends that petitioner is fundamentally misunderstanding the ALJ's Order in her arguments as to having 193 or 254 days to submit additional proof of recovery. The ALJ gives petitioner 60 days to submit proof of recovery detailing any recovery efforts that occurred during the two year period, which the ALJ found expired on March 3, 2017. The District maintains that the ALJ's Order does not permit

petitioner to seek weekly psychological counseling now in an attempt to obtain the required treatment, but rather that she can only submit evidence of her having completed the treatment during the two year period.

Upon review of the record, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the March 28, 2018 Order – that the District did not act in an arbitrary, capricious or unreasonable manner in rejecting Dr. Ferenschak's report. Petitioner's exceptions on this issue are not persuasive. It was reasonable for the District to find that Dr. Ferenschak's report – which placed limitations and necessary accommodations on petitioner's ability to return to work, and failed to address petitioner's recovery efforts – was not satisfactory. Further, regardless of whether *Diaz, supra*, was decided following a hearing, there are no material facts in dispute here and the matter was ripe for summary decision. Although petitioner argues that she is unable to question Dr. Mack about whether she complied with his recommendations or whether the District's criteria for proof of recovery is unreasonable, the Appellate Division previously found in this matter that "the ultimate resolution of these issues has no bearing on whether [the District's] exercise of its statutory authority was reasonable." *C.H. v. State-Operated School District of the City of Camden, Camden County*, A-3383-15T1, slip op. at 14 (App. Div. Aug. 23, 2017).

The Commissioner also agrees with the ALJ that petitioner should be given additional time to submit proof of recovery. However, the Commissioner disagrees with the ALJ that petitioner's additional time to demonstrate her fitness to teach should be limited to 60 days, and instead agrees with petitioner that she should be given an additional 193 days to submit evidence of her recovery to make up for the time she was prevented from doing so during part of the two year period.

N.J.S.A. 18A:16-4 provides that "[i]f the result of any such examination indicates mental abnormality or communicable disease, the employee shall be ineligible for further service until proof of recovery, satisfactory to the board, is furnished . . . unless his absence shall exceed a period of two years." It is only logical that the two year period would begin when the employee is informed that she is "ineligible for further service" with the District. *See Emily Diaz v. Board of Education of the Township of Mahwah, Bergen County,* EDU 01751-09 (March 2, 2010), adopted by Commissioner's Decision No. 348-10, August 27, 2010 (noting that the two year period within which the petitioner could demonstrate her fitness to teach began on October 13, 2008 – the date, following the results of her psychiatric evaluation, that the Board informed her that she was unable to perform her teaching duties, would need proof of recovery in order to return to work, and would be placed on a medical leave of absence and charged sick days, pursuant to *N.J.S.A.* 18A:16-4). Here, such notice was provided by the District on March 3, 2015. It is unclear from the record why the District waited 7 months between the receipt of Dr. Mack's report in August 2014 and notification to petitioner that she was ineligible for service in March 2015, but it would be inequitable for the District to reap the benefit from its own delay of the process.

Petitioner's two year period was cut short because the District refused to accept further proof of recovery as of August 22, 2016, and petitioner was unsuccessful in her emergent attempt to compel the District to accept evidence of her fitness to teach. It is relevant to note that in the District's opposition to petitioner's motion for emergent relief, the District argued that irreparable harm did not exist because "the Commissioner could also order the District to accept future proof of recovery submission if she ultimately prevails." *Claudine Hayes v. City of Camden State-Operated School District, Camden County*, EDU 18048-16 (December 7, 2016),

adopted by Commissioner's Decision No. 6-17E, decided January 10, 2017 (Slip Op.) As such, petitioner should be permitted an additional 193 days to seek any necessary medical treatment and submit proof of recovery that is satisfactory to the District. This time limit represents the number of days from when the District refused to accept future proof of recovery submissions on August 22, 2016 to March 3, 2017.

Accordingly, the March 28, 2018 Order of the OAL – granting in part and denying in part the District's motion for summary decision, and granting petitioner's motion for partial summary decision – is modified as stated herein. Petitioner has 193 days from the date of this decision to submit proof of recovery that is satisfactory to the District, in accordance with *N.J.S.A.* 18A:16-4. No aspect of this matter remains pending at the OAL.

IT IS SO ORDERED.[2]



COMMISSIONER OF EDUCATION

Date of Decision: 6/22/18

Date of Mailing: 6/22/18

[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

INTERLOCUTORY ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION FOR SUMMARY DECISION, AND GRANTING PETITIONER'S MOTION FOR PARTIAL SUMMARY DECISION
OAL DKT. NO. EDU 18048-16
AGENCY DKT. NO. 301-11/16

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

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

Benjamin Teris, Esq., for respondent (Brown & Connery, LLP, attorneys)

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

STATEMENT OF THE CASE

Petitioner Claudine D. Hayes (Hayes), a tenured special-education teacher who was employed by respondent State-Operated School District of the City of Camden (District) for approximately twelve years until she was deemed mentally unfit for service, asserts that the District violated N.J.S.A. 18A:16-4 by failing to reemploy her upon receiving proof of her recovery, and seeks an order compelling the District to reemploy her or to allow her to provide the District with additional proof of her recovery.

PROCEDURAL HISTORY

This is the second petition Hayes has filed with the Commissioner of Education to challenge the District's refusal to accept her proof of recovery submissions after a psychological examination conducted in 2014 indicated that she suffered from mental abnormalities. The first petition, which was filed in 2015, was dismissed on summary decision upon a finding by an administrative law judge that, in accordance with N.J.S.A. 18A:16-4, the District had reasonably rejected letters from two doctors as proof of Hayes' recovery. That decision was adopted by the Commissioner and affirmed by the Appellate Division.

On November 21, 2016, while the first petition was pending on appeal in the Appellate Division, Hayes filed a separate petition of appeal and motion for emergent relief with the Commissioner, alleging that the District again violated N.J.S.A. 18A:16-4 by rejecting a report from a psychologist, Dr. Michael Ferenschak, as additional proof of her recovery and seeking an order compelling the District to reemploy her or allow her to provide the District with further proof of her recovery.

On November 29, 2016, the Commissioner transmitted the motion for emergent relief and the underlying petition to the Office of Administrative Law (OAL). N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On December 9, 2016, Hayes' motion for emergent relief was denied pending a plenary hearing.

On September 1, 2017, shortly after the Appellate Division affirmed the Commissioner's decision to dismiss the first petition, the District filed a motion for summary decision on the second petition, arguing that the District reasonably rejected the report of Dr. Ferenschak as proof of recovery.

On November 27, 2017, Hayes filed a brief in opposition to the District's motion and in support of a cross-motion for partial summary decision on the issue of whether she is entitled to provide additional proof of recovery. Oral argument was held on February 9, 2018.

FACTUAL DISCUSSION

During her nearly twelve years of employment with the District, Hayes mostly taught high-school students with specials needs. However, for the last several years of her employment, she taught special-education elementary-school students. During the 2011–2012 school year, Hayes was assigned to teach autistic students, but, in March 2012 she was reassigned to a class for behaviorally challenged students at a different school after she requested a transfer for her "own well-being and physical safety." She stayed in that position until February 2013, when she requested a leave of absence for panic attacks, anxiety, and insomnia.

When she returned from her leave of absence in March 2013, she was assigned to a class for behaviorally challenged students at a different elementary school. However, shortly thereafter, she was involved in an incident in which she physically restrained one of her students, and, as a result, she was reassigned to yet another elementary-school class for behaviorally challenged students for the 2013–2014 school year.

On December 11, 2013, Hayes suffered a panic attack in the school and was taken to the hospital by paramedics. On December 13, 2013, the District advised Hayes that, due to her "concerning pattern of behavior this year," she would be placed

on paid administrative leave effective December 16, 2013, and required to undergo a psychological examination to determine her fitness to teach.[1]

On May 28 and May 29, 2014, Hayes was evaluated by a psychologist, Jonathan Mack, Psy.D. During the evaluation, Dr. Mack "conducted a battery of psychological tests" and interviewed Hayes. In an August 11, 2014, report, Dr. Mack concluded that Hayes suffered from a personality disorder and a panic disorder, and that, in his opinion, "Ms. Hayes is at an unacceptable risk for future problems with the elementary school behaviorally disordered population throughout the [District] at this time." He also opined that "[i]f another less stressful population is found for [her] to work with . . . she should be mandated to have weekly psychological counseling with a licensed psychologist and to be evaluated for mood stabilizing medications."

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

On March 31, 2015, Hayes provided the District with a one-page letter from her psychiatrist, Safeer Ansari, D.O., and a one-page letter from her primary-care physician, Chris Colopinto, D.O., as proof of her recovery. According to Dr. Ansari, who reviewed Dr. Mack's report:

> I currently find her to be stable and mentally healthy to return to work. However, due to Ms. Hayes' physical disabilities and limitations . . . I do agree with Dr. Mack's recommendation that Ms. Hayes is not to be placed in a B.D. or Behaviorally Disordered Classroom with students who are

[1] Hayes has not worked for the District since December 13, 2013.

> emotionally disabled and can become physically violent particularly at the elementary level. As stated by Dr. Mack, it appears that [Hayes] had the most success working with students at the High School level who suffer from Multiple/Learning Disabilities, Other Health Impairments, and/or the Autistic population.

And according to Dr. Colopinto, who also reviewed Dr. Mack's report, "[b]ased on my own independent findings I believe Ms. Claudine Hayes is mentally healthy enough to return to work granted that she is provided with the accommodations that have been recommended as appropriate."

Petition I

On June 1, 2015, Hayes filed a petition of appeal with the Commissioner in which she alleged that the District had not responded to her proof-of-recovery submissions, and requested reinstatement to her position ("Petition I"). After Hayes filed Petition I, the District, in a letter dated June 16, 2015, informed Hayes that it had reviewed the letters from Dr. Ansari and Dr. Colopinto, but stated that the letters "confirm that she continues to be ineligible for service since neither letter provides proof of Ms. Hayes' recovery satisfactory to the District so that she can return to work."

On June 23, 2015, the Commissioner transmitted Petition I to the OAL as a contested case. The District subsequently moved for summary decision, arguing that Petition I should be dismissed because Hayes had failed to provide adequate proof of recovery in accordance with N.J.S.A. 18A:16-4. On January 4, 2016, the administrative law judge (ALJ) granted the District's motion and, in an initial decision, dismissed Petition I, finding that the District had reasonably rejected the letters from Dr. Ansari and Dr. Colopinto as unsatisfactory proof of recovery.

On February 19, 2016, the Commissioner adopted the initial decision as the final decision. According to the Commissioner:

> Here, the record supports a finding that the District's rejection of petitioner's proof of recovery—which consisted of

> one-page letters from two practitioners—was reasonable. Indeed, neither letter references the multiple diagnoses made by Dr. Mack, nor do the letters describe petitioner's recovery efforts and/or any treatment regimen in place to address Dr. Mack's concerns. Both letters merely provide conditional recommendations that petitioner be permitted to return to work—with certain parameters in place, e.g., that she only be permitted to teach certain grade levels and student populations. Under the law, student safety must be the District's paramount concern.
>
> [Footnotes omitted.]

And in a footnote regarding Dr. Mack's recommendations, the Commissioner explained that, "[s]ignificantly, petitioner fails to address Dr. Mack's recommendation that she be mandated to undergo weekly psychological counseling and be evaluated for medication by a psychiatrist—and provides no proof that same has occurred."

Hayes subsequently filed an appeal with the Appellate Division and, on August 23, 2017, the court affirmed the Commissioner's final decision on Petition I:

> we discern no basis to disturb respondent's decision. Dr. Mack's extensive report diagnosed petitioner with several mental conditions, which placed her at risk for inappropriate behavior with students. The report left no question that petitioner's mental health issues affected her teaching and disciplinary abilities. Moreover, Dr. Mack only noted a different position "may" be better for petitioner, and only upon certain specified conditions. Although the report raised the possibility that petitioner could return to a "less stressful population," given the totality of Dr. Mack's findings, respondent acted reasonably by deeming her ineligible for service absent proof of recovery.
>
> We further agree with the Commissioner that respondent acted reasonably by rejecting petitioner's proof of recovery letters. Both letters stated petitioner was able to "return to work," while agreeing with Dr. Mack's suggested conditions and accommodations. As a "reasonable possibility" of harm will justify a board decision, the Commissioner appropriately noted that given the interest of student safety, petitioner's letters were insufficient proof of recovery. Therefore, under our deferential scope of review,

> we find the Commissioner's decision to uphold respondent's actions was not arbitrary, capricious, or unreasonable.
>
> Petitioner further argues the Commissioner and ALJ erred because they granted summary decision for respondent based on disputed facts. According to petitioner, these disputed issues included whether she actually threatened student safety; whether she failed to comply with Dr. Mack's recommendations; the basis for Dr. Mack's conclusions; and the sufficiency of her doctors' conclusions. We decline to discuss this argument at length, as the ultimate resolution of these issues has no bearing on whether respondent's exercise of its statutory authority was reasonable. In other words, this case turned on whether respondent reasonably deemed petitioner ineligible for service based on Dr. Mack's report and reasonably rejected petitioner's proof of recovery letters. Here, because a "reasonable possibility" of harm warrants board action, we find the Commissioner's grant of summary decision was appropriate in this matter.
>
> [C.H. v. State-Operated Sch. Dist. of Camden, No. A-3383-15 (App. Div. August 23, 2017) (citations omitted), https://njlaw.rutgers.edu/collections/courts/.]

Petition II

While her appeal of Petition I was pending in the Appellate Division, Hayes visited another psychologist, Michael Ferenschak, Psy.D., for a fitness-for-duty evaluation on July 26 and July 27, 2016. Dr. Ferenschak administered several psychological tests, conducted a clinical interview and, in an August 4, 2016, report, concluded that Hayes was fit to teach. While Dr. Ferenschak diagnosed her with a depressive disorder and an anxiety disorder, he remarked that "Ms. Hayes' current symptoms are more transient and much less severe than they were when she was out of work for mental health reasons" and that "[s]he has not had a Major Depressive Episode in over a year, and she has not experienced a panic attack in six months."

According to Dr. Ferenschak,

> Ms. Hayes appears to be susceptible to flare-ups of her mental health issues when in highly stressful situations.

> Thus, if or when she returns to work, it is recommended that she work in a non-high stress environment that is supportive and collaborative. While teaching in a school can be considered a stressful job, Ms. Hayes showed she was able to psychologically handle such a job without incident for the first decade of her employment, when the perceived stressors were much lower. If Ms. Hayes does return to work, it is recommended that she seek psychotherapy to help her manage her work-related stress and guard against extreme emotional responses.
>
> Ms. Hayes is not currently experiencing an acute psychological issue that should prevent her from working, nor is she a danger to herself or others. It needs to be stated that these conclusions are not guarantees of her future work performance or mental response to a return to work, as psychological assessment cannot predict the future. However, from this evaluation, Ms. Hayes does not appear to possess any major current psychological barriers that should keep her from returning to full-time employment.

On August 12, 2016, after having received Dr. Ferenschak's report on August 9, 2016, the District's attorney informed Hayes' attorney that the report was "*not* satisfactory proof of recovery." The District rejected the report because Hayes failed to provide the District with Dr. Ferenschak's qualifications; the report did not indicate that Dr. Ferenschak was provided with or considered certain information, including a job description and Dr. Mack's report; the report indicated that Hayes stopped attending counseling sessions a year prior; and, Dr. Ferenschak's "statement that Ms. Hayes cannot work in a highly stressful environment shows she is unable to work as a teacher of the handicapped in the District." The District's attorney stated that "[t]he District takes the safety of its students and staff seriously and is willing to act reasonably concerning this difficult situation," and, "[i]f you would like to discuss, I am available to speak at your convenience."

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

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

On November 21, 2016, Hayes filed a petition of appeal and motion for emergent relief with the Commissioner alleging that the District violated N.J.S.A. 18A:16-4 by failing to reemploy her upon receiving proof of her recovery from Dr. Ferenschak and seeking an order compelling the District to reemploy her or allow her to provide the District with additional proof of her recovery ("Petition II"). On November 29, 2016, the Commissioner transmitted the motion for emergent relief and the underlying petition to the OAL. On December 9, 2016, Hayes' motion for emergent relief was denied pending a plenary hearing.

Cross-Motions for Summary Decision

On September 1, 2017, after the Appellate Division issued its opinion on Petition I, the District filed a motion for summary decision on Petition II, arguing that the District reasonably rejected Dr. Ferenschak's report as proof of recovery and that, pursuant to N.J.S.A. 18A:16-4's two-year time limit for submitting proof of recovery, the District was under no obligation to accept additional proof of recovery after August 11, 2016, or two years after Dr. Mack found Hayes unfit for duty.

According to the District,

> [t]he instant action must fail for the same reason as Petitioner's prior action. Her most recent purported proof of recovery submission, although longer than the previous one, fails to outline Petitioner's recovery efforts and also places qualifications on any return—i.e., must be in a "non-high stress environment that is supportive and collaborative." It also deficiently fails to outline the steps she has taken to recover from the conditions diagnosed in the initial report—

> which should have been the very purpose of the submission. Moreover, Petitioner admits she has not been attending counseling sessions and has not been evaluated for psychiatric medication, which the Commissioner already deemed necessary.
>
> . . . As to the time remaining for Petitioner to submit proof of recovery, it indisputably expired on August 11, 2016—two years following the issuance of [Dr. Mack's] report . . . .

On November 27, 2017, Hayes filed a brief in opposition to the District's motion and in support of a cross-motion for partial summary decision on the issue of whether she is entitled to provide additional proof of recovery. In opposition to the District's motion, Hayes argues that a hearing is necessary to determine genuine issues of material fact regarding the adequacy of Hayes' proof of recovery. In particular, Hayes submits that "[t]he issue of whether it is possible to recover from a sleep disorder, panic disorder and a personality disorder without weekly counseling remains an issue of fact," and that whether Hayes can work for the District "if she cannot work in a highly stressful environment is obviously a factual inquiry that requires testimony to determine what the teaching environment requires and whether that environment falls in the category of environments Dr. Ferenschak is warning against."

In support of her cross-motion for partial summary decision, Hayes maintains that the two-year period in which to submit proof of recovery under N.J.S.A. 18A:16-4 began to run "from the date Respondent told [her] she would be removed from payroll as a result of her services being discontinued," or May 3, 2015, and not the date on which Dr. Mack concluded Hayes was unfit for duty, August 11, 2014. Thus, according to Hayes, she should have had until May 3, 2017, to submit further proof of recovery.

Hayes essentially argues that she did not receive the benefit of the full two-year period under N.J.S.A. 18A:16-4 for two reasons. First, on August 22, 2016, the District informed Hayes that it "would [not] be willing to accept future proof of recovery submissions pursuant to N.J.S.A. 18A:16-4" because "the time has now expired for Ms. Hayes to apply for reinstatement pursuant to N.J.S.A. 18A:16-4, as her absence from the District has exceeded a period of two years."

Second, Hayes' motion for emergent relief seeking in part an order compelling the District to allow her to submit additional proof of recovery beyond Dr. Ferenschak's report was denied. The requested relief was denied in part upon a finding that she would not suffer irreparable harm if the District was not compelled to accept further proof of recovery pending a plenary hearing because the Commissioner could order the District to accept further proof of recovery if Hayes prevailed at a plenary hearing, and in part on a finding that Hayes had failed to show a likelihood of success on the merits because "it appears from the language of N.J.S.A. 18A:16-4 that Hayes had two years to provide satisfactory proof of recovery either from the date she was placed on paid leave by the District (December 16, 2013), or from the date of Dr. Mack's fitness-for-duty determination (August 11, 2014), and that, at the latest, the time for proof of recovery expired on August 11, 2016."

As a result, Hayes argues that partial summary decision in her favor is appropriate and that she should be given more time to submit further proof of recovery if Dr. Ferenschak's report is not sufficient.

LEGAL ANALYSIS

Under N.J.S.A. 18A:16-2(a), a school board "may require individual psychiatric . . . examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal . . . mental health." And under N.J.S.A. 18A:16-4,

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

The Commissioner has recognized that the right to reemployment under N.J.S.A. 18A:16-4 is conditioned upon a school board's satisfaction with the proof of recovery

offered by the employee, such that "N.J.S.A. 18A:16-4 instructs that if it has been determined that an employee manifests a mental abnormality, he or she 'shall be ineligible for further service until proof of recovery, satisfactory to the board[,] is furnished.'" Diaz v. Bd. of Educ. of the Twp. of Mahwah, EDU 1751-09, Final Decision (August 27, 2010), <njlaw.rutgers.edu/collections/oal>. A school board's "obligation to determine the fitness of teachers is a reflection of their duties to protect the students from a significant danger of harm, whether it be physical or otherwise. And they need not wait until the harm occurs; a reasonable possibility of its occurrence warrants such action." Gish v. Bd. of Educ. of Paramus, 145 N.J. Super. 96, 104–05 (App. Div. 1976) (citations omitted). Importantly, an "action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives." Kopera v. Bd. of Educ. of W. Orange, 60 N.J. Super. 288, 294 (App. Div. 1960) (citations omitted).

In Petition I, the Commissioner concluded, and the Appellate Division agreed, that, in the interest of student safety, the District had reasonably rejected the one-page letters from Dr. Ansari and Dr. Colopinto as proof of Hayes' recovery because neither letter adequately addressed the concerns raised by Dr. Mack in the report in which he concluded Hayes was psychologically unfit to teach. The Commissioner took issue with the fact that "neither letter references the multiple diagnoses made by Dr. Mack, nor do the letters describe petitioner's recovery efforts and/or any treatment regimen in place to address Dr. Mack's concerns," but "merely provide conditional recommendations that petitioner be permitted to return to work—with certain parameters in place, e.g., that she only be permitted to teach certain grade levels and student populations." The Appellate Division echoed those sentiments, and added that, "[a]s a 'reasonable possibility' of harm will justify a board decision, the Commissioner appropriately noted that given the interest of student safety, petitioner's letters were insufficient proof of recovery."

In Diaz, the Commissioner determined that a school board did not abuse its discretion in rejecting as proof of recovery two doctors' reports submitted by a teacher who had been declared psychologically unfit due to job-related anxiety and stress issues. In that decision, the Commissioner noted that the rejected reports: failed to address why "a return to work would not trigger a recurrence of petitioner's stress and

anxiety"; "found petitioner fit for work without identifying the means by which she had allegedly recuperated" or why "petitioner was prepared to handle the same stressors in the same work environment"; and "recommended the transfer [from high school to middle school] requested by petitioner, undermining somewhat [the doctors'] contentions that she was unconditionally fit for duty." The Commissioner also noted that petitioner "had not availed herself of therapeutic interventions" despite the fact that each doctor she saw in connection with the matter thought that "she could benefit from same."

Here, as in Petition I and Diaz, the District reasonably rejected Dr. Ferenschak's report as proof of Hayes' recovery. Like the rejected reports in Petition I and Diaz, Dr. Ferenschak's report neglects to mention any recovery efforts by Hayes, such as therapy or medication, and places conditions on her return to work, such that "if or when she returns to work, it is recommended that she work in a non-high stress environment that is supportive and collaborative."

And as in Diaz, Dr. Ferenschak's report fails to address why a return to work would not trigger a recurrence of Hayes' stress and anxiety. Importantly, Dr. Ferenschak noted that Hayes had had a "Major Depressive Episode" and a "panic attack" during her leave of absence, but nonetheless concluded that "Ms. Hayes does not appear to possess any major current psychological barriers that should keep her from returning to full-time employment." If she continued to have psychological issues while she was not working, it is difficult to see how, without any documented treatment efforts, such issues would not recur upon her return to work. These concerns represent "a 'reasonable possibility' of harm" that, "given the interest of student safety," justify the District's decision to reject Dr. Ferenschak's report as proof of Hayes' recovery and to decline to reinstate her employment.

While Hayes argues that a hearing is necessary to determine genuine issues of material fact regarding Dr. Mack's recommendations and the sufficiency of Dr. Ferenschak's conclusions, the Appellate Division rejected a similar argument in Petition I, stating that "the ultimate resolution of these issues has no bearing on whether respondent's exercise of its statutory authority was reasonable," and that "because a

'reasonable possibility' of harm warrants board action, we find the Commissioner's grant of summary decision was appropriate in this matter." Here, too, partial summary decision in favor of the District is appropriate despite Hayes' argument to the contrary, because a review of Dr. Ferenschak's report shows there remained a "reasonable possibility of harm" if Hayes returned to work and that, as such, the District reasonably rejected the report as proof of recovery.

However, partial summary decision in favor of Hayes is also appropriate because, even though the District reasonably rejected Dr. Ferenschak's report, Hayes should have been given more time to provide the District with further proof of her recovery in accordance with N.J.S.A. 18A:16-4. Under N.J.S.A. 18A:16-4, if a psychiatric examination shows that a teacher is unfit to work,

> the employee shall be ineligible for further service until proof of recovery, satisfactory to the board, is furnished, but if the employee . . . has tenure, he may be granted sick leave with compensation as provided by law and shall, upon satisfactory recovery, . . . be reemployed with the same tenure as he possessed at the time his services were discontinued, if he has tenure, unless his absence shall exceed a period of two years.

A reasonable reading of this provision leads to the conclusion that an employee has two years from the time he becomes "ineligible for further service," or "the time his services were discontinued" due to psychological unfitness, to provide satisfactory proof of recovery. Here, although Dr. Mack issued his report on August 11, 2014, the District, for whatever reason, did not notify Hayes that she was ineligible for further service until March 3, 2015. On that date, the District informed Hayes that, "pursuant to N.J.S.A. 18A:16-4, the State District Superintendent has determined that you are ineligible for further services with the District and shall be terminated from payroll effective sixty (60) days from receipt of this correspondence." The District also informed Hayes, "[y]ou will remain ineligible for service absent the submission of proof of recovery, satisfactory to the District," and that "[i]f you fail to submit such proof within (2) years from the beginning of your leave of absence, you will be permanently ineligible for service with the District."

Since the District did not notify Hayes that she was "ineligible for further services" until March 3, 2015, under N.J.S.A. 18A:16-4, Hayes should have had—at the earliest—until March 3, 2017, to prove to the District that she had recovered from her psychological issues.[2] That is also when the District notified her that she had two years to submit proof of recovery before her eligibility for reemployment would be foreclosed. Thus, it follows that Hayes should have had more time than she was given to submit satisfactory proof of recovery to the District.

However, due to the District's refusal to consider any further proof of recovery after receiving Dr. Ferenschak's report in August 2016, and because Hayes' request for emergent relief in the form of an order compelling the District to accept further proof of recovery was denied on December 9, 2016, Hayes did not get the full two years to which she was statutorily entitled to prove her mental fitness to the District. Upon reconsideration, Hayes' request for emergent relief was denied in part based on a misinterpretation of the two-year period for proof of recovery under N.J.S.A. 18A:16-4, and Hayes should now be given the opportunity to make up for the time that was lost.

Accordingly, Hayes' motion for partial summary decision should be granted and the District should permit Hayes to submit additional proof of recovery within a reasonable period of time. Sixty days should be sufficient to accomplish this.

While Hayes has not worked for the District in four years, and N.J.S.A. 18A:16-4 appears to limit the right to reinstatement to those employees who have been absent from work for two years or less, the clock should not start to run until the employee is notified in writing that she is ineligible for further service due to the results of a psychological or psychiatric exam. And although an order compelling the District to accept further proof of recovery for up to sixty days would still not provide Hayes with a

[2] Hayes argues that she should have had until May 3, 2017, or two years from the date she was terminated, to submit satisfactory proof of recovery. It would seem that under N.J.S.A. 18A:16-4, the two-year period should start to run from the date Hayes was notified that she was ineligible for further service, which would have been on or about March 3, 2015. Regardless, whether March 3 or May 3, it appears that Hayes did not get a full two years to submit proof of recovery in accordance with N.J.S.A. 18A:16-4.

cumulative two years, it would also not be fair at this point to compel the District to wait much longer for satisfactory proof of Hayes' recovery.[3]

Accordingly, the District's motion for summary decision should be granted in part and denied in part, and Hayes' motion for partial summary decision shall be granted.

ORDER

I hereby **ORDER** that the District's motion for summary decision is **GRANTED** in **PART** and **DENIED IN PART WITHOUT PREJUDICE**. Hayes' motion for partial summary decision is **GRANTED**. Within sixty days, Hayes shall submit medical records and evidence of her purported recovery to the District. The District shall have sixty days thereafter to decide whether Hayes has recovered the ability to hold a teaching position in the District. The parties shall advise the OAL at the conclusion of the 120-day period of the status of the matter, and, if necessary, the matter shall then be listed for further motions or hearing.

This order granting in part and denying in part respondent's motion for summary decision and granting petitioner's motion for partial summary decision is being submitted under N.J.A.C. 1:1-12.5(e) for immediate review. This recommended order may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION**, who by law is authorized to make the final decision in this matter. If the Commissioner of Education does not adopt, modify or reject this order within forty-five days and unless such time limit is otherwise extended, this recommended order shall become a final decision in accordance with N.J.S.A. 52:14B-10.

[3] At oral argument, Hayes' counsel indicated that, to his knowledge, Hayes had no current medical information to provide. Unless Hayes can demonstrate to the Board's satisfaction that she has recovered from her psychological issues, the previous determination of incapacity would not change. Dr. Mack provided specific recommendations, and no proof has been submitted to date to demonstrate that Hayes has complied with them to support her contention that she has recovered sufficiently to teach in the District. The passage of time is not sufficient to presume recovery.

Within thirteen days from the date on which this order was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF 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.

Susan Scarola

March 28, 2018
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency:

Date Mailed to Parties:

/lam

188-18

OAL DKT. NO. EDU 00313-17
AGENCY DKT. NO. 315-12/16

Y.S. AND D.S., ON BEHALF OF MINOR CHILDREN, D.S. AND K.S.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed consent order, 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: 6/27/18

Date of Mailing: 6/27/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 00313-17

AGENCY DKT. NO. 315-12/16

Y.S. AND D.S ON BEHALF OF D.S. AND K.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF HAMONTON, ATLANTIC COUNTY,

Respondent.

Howard S. Mendelson, Esq., for petitioner (Davis & Mendelson, L.L.C., attorneys)

Kelli A. Prinz, Esq., for respondent (Cooper Levenson, P.A., attorneys)

Record Closed: May 16, 2018 Decided: May 16, 2018

BEFORE **JEFFREY R. WILSON**, ALJ:

This matter was transmitted to and filed with the Office of Administrative Law ("OAL") on January 10, 2017, 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 Consent Order indicating the terms of settlement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached document and the attached Board Resolution.

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

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

5-16-18
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency: 5/21/18

Date Mailed to Parties: 5/21/18

JRW/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Consent Order and Hammonton Board of Education Board Resolution received by the Office of Administrative Law on May 15, 2018

RECEIVED

2018 MAY 15 P 2:54

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Kelli A. Prinz, Esquire (ATTY ID: 015422010)
COOPER LEVENSON, P.A.
1125 Atlantic Avenue - 3rd Floor
Atlantic City, NJ 08401
Telephone (609) 572-7456
Facsimile (609) 572-7457
File No.: 50696.787
Attorney for Respondent, Hammonton Board of Education

Y.S. and D.S. o/b/o D.S. and K.S., PETITIONER(s), vs. HAMMONTON TOWNSHIP BOARD OF EDUCATION. RESPONDENT (s).	NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU-315-12/16 **CONSENT ORDER**

THIS AGREEMENT is made and entered into as of this 12th day of April, 2018, between The Board of Education of the Township of Hammonton ("District" or "Respondent") and Y.S. and D.S. o/b/o D.S. and K.S. ("Petitioners") collectively referred to as the "Parties."

WHEREAS, the Petitioners' children are students attending the District's high school; and

WHEREAS, a dispute regarding the Petitioners' domicile arose in November 2016; and

WHEREAS, the Parties hereto agree that it is in their mutual interest to resolve the pending November 2016 dispute related to the Petitioners' residency; and

WHEREAS, the Parties were scheduled to meet before Judge Jeffrey Wilson, ALJ, on January 5, 2018, for the purposes of a residency hearing with respect to a dispute regarding the Petitioners' domicile during the period of September 1, 2015 to November 4, 2016; and

WHEREAS, the Parties negotiated in good faith prior to the hearing, and, as a result of these good faith negotiations the Parties formed an Agreement; and

NOW, THEREFORE, in consideration of the mutual promises of the Parties to this Agreement, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. **SETTLEMENT TERMS.**

A. The Petitioners agree to pay the District $750.00 to settle the dispute which will represent the full and complete amount for any alleged tuition owed for the time period of September 1, 2015 through the date of this Consent Order, without admitting any obligation to pay that tuition. This payment is due in full within two weeks after entry of this Order.

B. The Petitioners represent that their children, D.S. and K.S., are domiciled at 7 U Rose Rita Terrance, Hammonton, located within the District.

C. Petitioners agree they will abide by all the residency law and regulations, and further agree that they are subject to continuing residency investigation(s) to confirm that the information submitted to the District regarding their children's residency is true and accurate.

D. Subsequent to the execution of this Agreement, if the District has a reasonable belief the Petitioners' children are not domiciled in the District, it expressly reserves the right to take all action in accordance with the law including seeking tuition for any applicable time period not including September 1, 2015 to the date of this Consent Order. Petitioners understand and acknowledge the District's right to investigate and pursue future claims.

E. Each party shall be responsible for its own Attorney's fees in conjunction with this matter.

2. **ATTORNEY REVIEW.**

The Parties acknowledge that they had the opportunity to review the terms of this Agreement with counsel. The Parties enter into this Agreement knowingly, without coercion or other improper influence.

3. **NO ADMISSION OF LIABILITY.**

This Agreement is not meant to be construed as an admission of liability as to any party, as liability is disputed and denied. Petitioner acknowledges and understands that the District does not make any admissions of any liability by the promises, consideration or terms agreed hereto.

4. **WHO IS BOUND.**

Y.S. and D.S. o/b/o D.S., and K.S. and the District are bound by this Agreement. Anyone who succeeds to the rights and responsibilities of Y.S. and D.S. or the District, such as heirs, assigns, executors, administrators and successors are also bound.

5. **REPRESENTATION OF COMPREHENSION OF DOCUMENT.**

In entering into this Agreement and Release, Petitioners and District represent that they each have relied upon the legal advice of their respective counsel, who is the attorney of their choice and that the terms of this Agreement have been completely read and explained to each party. Petitioners and District fully understand and voluntarily accept the terms of this Agreement. Petitioners represent and certify that no pressure or duress has been exerted upon Petitioners to accept the terms of this Agreement.

6. **MISCELLANEOUS OPERATIVE TERMS.**

A. This Agreement contains the entire agreement between Petitioners and District with respect to the subject matter and supersedes all prior agreements or understandings

dealing with the same subject matter. There is no agreement on the part of the District to do anything other than as is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey, without regard to its choice of law or conflict of law provisions.

B. No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by both Parties.

C. 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.

D. The Parties expressly agree that they shall act in good faith to ensure implementation of this Agreement.

E. This Agreement may be executed in two (or more) counterparts of each of which, when executed and delivered shall be deemed to be an original, and of which counterparts, taken together, shall constitute one and the same agreement. An original signature transmitted by facsimile shall be deemed to be an original for purposes of this Agreement and for the accompanying letter of resignation.

F. The Board of Education President has been duly authorized by the District to sign this Agreement and bind the District to its terms. Upon approval of this Agreement at a duly convened public meeting, the District authorizes its President to execute the same on its behalf.

IN WITNESS WHEREOF, the parties have set their hands and seals as of the day and year as written.

PETITIONERS:

Yvette Samuel _____ Date

David Samuel _____ Date

RESPONDENT:

_____ 4-12-18

Sam Mento III Date
Board of Education President

Kelli A. Prinz, Esquire (ATTY ID: 015422010)
COOPER LEVENSON, P.A.
1125 Atlantic Avenue - 3rd Floor
Atlantic City, NJ 08401
Telephone (609) 572-7456
Facsimile (609) 572-7457
File No.: 50696.787
Attorney for Respondent, Hammonton Board of Education

Y.S. and D.S. o/b/o D.S. and K.S.,	NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
PETITIONER(s),	OAL DOCKET NO.: EDU-315-12/16
vs.	**CONSENT ORDER**
HAMMONTON TOWNSHIP BOARD OF EDUCATION.	
RESPONDENT (s).	

THIS AGREEMENT is made and entered into as of this _____ day of _____, 2018, between The Board of Education of the Township of Hammonton ("District" or "Respondent") and Y.S. and D.S. o/b/o D.S. and K.S. ("Petitioners") collectively referred to as the "Parties."

WHEREAS, the Petitioners' children are students attending the District's high school; and

WHEREAS, a dispute regarding the Petitioners' domicile arose in November 2016; and

WHEREAS, the Parties hereto agree that it is in their mutual interest to resolve the pending November 2016 dispute related to the Petitioners' residency; and

5/1/18
5/1/18

WHEREAS, the Parties were scheduled to meet before Judge Jeffrey Wilson, ALJ, on January 5, 2018, for the purposes of a residency hearing with respect to a dispute regarding the Petitioners' domicile during the period of September 1, 2015 to November 4, 2016; and

WHEREAS, the Parties negotiated in good faith prior to the hearing, and, as a result of these good faith negotiations the Parties formed an Agreement; and

NOW, THEREFORE, in consideration of the mutual promises of the Parties to this Agreement, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. SETTLEMENT TERMS.

A. The Petitioners agree to pay the District $750.00 to settle the dispute which will represent the full and complete amount for any alleged tuition owed for the time period of September 1, 2015 through the date of this Consent Order, without admitting any obligation to pay that tuition. This payment is due in full within two weeks after entry of this Order.

B. The Petitioners represent that their children, D.S. and K.S., are domiciled at 7 U Rose Rita Terrance, Hammonton, located within the District.

C. Petitioners agree they will abide by all the residency law and regulations, and further agree that they are subject to continuing residency investigation(s) to confirm that the information submitted to the District regarding their children's residency is true and accurate.

D. Subsequent to the execution of this Agreement, if the District has a reasonable belief the Petitioners' children are not domiciled in the District, it expressly reserves the right to take all action in accordance with the law including seeking tuition for any applicable

time period not including September 1, 2015 to the date of this Consent Order. Petitioners understand and acknowledge the District's right to investigate and pursue future claims.

E. Each party shall be responsible for its own Attorney's fees in conjunction with this matter.

2. ATTORNEY REVIEW.

The Parties acknowledge that they had the opportunity to review the terms of this Agreement with counsel. The Parties enter into this Agreement knowingly, without coercion or other improper influence.

3. NO ADMISSION OF LIABILITY.

This Agreement is not meant to be construed as an admission of liability as to any party, as liability is disputed and denied. Petitioner acknowledges and understands that the District does not make any admissions of any liability by the promises, consideration or terms agreed hereto.

4. WHO IS BOUND.

Y.S. and D.S. o/b/o D.S., and K.S. and the District are bound by this Agreement. Anyone who succeeds to the rights and responsibilities of Y.S. and D.S. or the District, such as heirs, assigns, executors, administrators and successors are also bound.

5. REPRESENTATION OF COMPREHENSION OF DOCUMENT.

In entering into this Agreement and Release, Petitioners and District represent that they each have relied upon the legal advice of their respective counsel, who is the attorney of their choice and that the terms of this Agreement have been completely read and explained to each party. Petitioners and District fully understand and voluntarily accept the terms of this

YS 5/1/18
DS 5/1/18

Agreement. Petitioners represent and certify that no pressure or duress has been exerted upon Petitioners to accept the terms of this Agreement.

6. MISCELLANEOUS OPERATIVE TERMS.

A. This Agreement contains the entire agreement between Petitioners and District with respect to the subject matter and supersedes all prior agreements or understandings dealing with the same subject matter. There is no agreement on the part of the District to do anything other than as is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey, without regard to its choice of law or conflict of law provisions.

B. No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by both Parties.

C. 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.

D. The Parties expressly agree that they shall act in good faith to ensure implementation of this Agreement.

E. This Agreement may be executed in two (or more) counterparts of each of which, when executed and delivered shall be deemed to be an original, and of which counterparts, taken together, shall constitute one and the same agreement. An original signature transmitted by facsimile shall be deemed to be an original for purposes of this Agreement and for the accompanying letter of resignation.

F. The Board of Education President has been duly authorized by the District to sign this Agreement and bind the District to its terms. Upon approval of this Agreement at a

5/1/18

5/1/18

duly convened public meeting, the District authorizes its President to execute the same on its behalf.

IN WITNESS WHEREOF, the parties have set their hands and seals as of the day and year as written.

PETITIONERS:

Yvette Samuel — Date: 5/1/18

David Samuel — Date: 5/1/18

RESPONDENT:

Sam Mento III — Date
Board of Education President

YS 5/1/18
DS 5-1-18

Hammonton Board of Education

566 Old Forks Road
Hammonton, NJ 08037
Phone 609-567-7000 + Fax 609-561-4420
Website: www.hammontonps.org

Robin Chieco
Superintendent of Schools

Barbara S. Prettyman
Business Administrator

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2018 MAY 15 P 2:55
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

May 15, 2018

Resolution No. 18 04 14 R:

Upon a motion made by Mrs. Berenato, seconded by Mrs. Byrnes resolved that the Hammonton Board of Education approve agreement with Y.S. and D.S. regarding residency dispute. Motion carried by all members' present voting "aye" in roll call.

I hereby certify the above to be a true and exact copy of the Minutes of the Regular Meeting of the Hammonton Board of Education held April 12, 2018.

Board Secretary

189-18

OAL DKT. NO. EDU 7388-15
AGENCY DKT. NO. 91-4/15

BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX, MIDDLESEX COUNTY,	:	
PETITIONER ,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET 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. According to the Agreement the settlement shall become effective immediately following the final execution by the parties. The Agreement also states that the first settlement payment is due within 30 days after the final execution of the Agreement. These dates have preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms, or have agreed upon 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: 6/27/18
Date of Mailing: 6/27/18



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION APPROVING SETTLEMENT

OAL DKT. NO. EDU 07388-15

AGENCY DKT. NO. 94-4/15

BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX, MIDDLESEX COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY,

Respondent.

Anthony P. Sciarillo, Esq., for petitioner (Sciarrillo, Cornell, Merlino, McKeever and Osborne, LLC, attorneys)

Robert J. Merryman, Esq., for respondent (Apruzzese, McDermott, Mastro and Murphy, attorneys)

Record Closed: May 24, 2018 Decided: May 24, 2018

BEFORE **PATRICIA M. KERINS**, ALJ:

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.

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** 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 (title of agency head) 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.

5/24/18
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: 5/25/18

Date Mailed to Parties: 5/25/18

Attachment

SCIARRILLO CORNELL
MERLINO, MCKEEVER & OSBORNE, LLC
ATTORNEYS AT LAW

Email: edlawgroup@sciarrillolaw.com

May 23, 2018

Via Facsimile 609-689-4100 and Regular Mail
Hon. Patricia Kerins, ALJ
State of New Jersey
Office of Administrative Law
P.O. Box 049
Trenton, NJ 08625-0049

Re: Middlesex Borough Board of Education v. Bound Brook Borough Board of Education
OAL Docket No. EDU-07388-2015

Dear Judge Kerins:

As attorneys for the Middlesex Borough Board of Education, we enclose a fully-executed Settlement Agreement and General Release relative to the above captioned matter, which is submitted for Your Honor's approval. We also enclose resolutions from both Boards.

If Your Honor needs anything further, please do not hesitate to contact us.

Very truly yours,
SCIARRILLO, CORNELL, MERLINO, McKEEVER & OSBORNE, LLC

Anthony P. Sciarrillo
APS:sjc

Enclosures

Cc: Robert J. Merryman, Esq. (w/ enclosures) via electronic mail

RECEIVED
2018 MAY 24 A 8:51
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

RECEIVED
2018 MAY 24 A 8:53
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Agreement is entered into by and between the BOUND BROOK BOARD OF EDUCATION ("Bound Brook") and the MIDDLESEX BOROUGH BOARD OF EDUCATION ("Middlesex"). In consideration of the mutual covenants and undertakings set forth herein, Bound Brook and Middlesex (collectively "the parties") hereby agree as follows:

1. In consideration of the terms of this agreement, Middlesex agrees to pay to Bound Brook the total sum of Forty Seven thousand and 00/100 Dollars ($47,000) on account of disputed claims.

2. The settlement proceeds shall be paid as follows: Within thirty (30) days of the final execution of this agreement, Middlesex will pay Bound Brook the sum of Twenty-three Thousand and Five Hundred 00/100 Dollars ($23,500.00). Between July 1, 2018 and July 31, 2018, Middlesex will pay Bound Brook the sum of Twenty-three Thousand and Five Hundred 00/100 Dollars ($23,500.00).

3. Bound Brook agrees to waive any claim for any additional monies, other than the sum described in Paragraph 2 above, whether by way of statute, regulation, contract, Board policy or otherwise, with regard to tuition and/or other costs as arising out of, or which could have been pursued in, the matter entitled Middlesex Borough Board of Education v. Bound Brook Board of Education, Docket No. EDU-07388-15, Agency Ref. No. 91-4/15

4. Middlesex agrees to waive any claim for any monies from Bound Brook, whether by way of statute, regulation, contract, Board policy or otherwise, with regard to tuition and/or other costs as arising out of, or which could have been pursued in, the matter entitled Middlesex Borough Board of Education v. Bound Brook Board of Education, Docket No. EDU-07388-15, Agency Ref. No. 91-4/15.

5. Upon execution of this agreement, Middlesex shall dismiss with prejudice the pending Administrative appeal in the matter entitled Middlesex Borough Board of Education v. Bound Brook Board of Education, Docket No. EDU-07388-15, Agency Ref. No. 91-4/15, in its entirety and with prejudice.

6. Both parties acknowledge that they have consulted with their respective attorneys before agreeing to these terms and signing this Agreement; that they have carefully read and fully understand all of the provisions of this Agreement; that they have had adequate time to review the Release and the provisions contained herein; and that they fully understand and voluntarily agree to the terms of this Agreement and the Release.

7. The parties agree that this Agreement shall be construed in accordance with the laws of the State of New Jersey, and that the laws of the State of New Jersey will apply to any dispute concerning it. The parties choose the Superior Court of New Jersey as their forum for resolving any dispute concerning this Agreement.

8. Both parties acknowledge that the provisions of this Agreement include valuable and sufficient consideration for the obligations undertaken herein.

9. This agreement is a compromise of disputed claims and is not an admission of liability or wrongdoing by any party. It is entered into as a business judgment, bearing in mind the cost and uncertainty of litigation. Both parties expressly deny that it, or any of its members, officers, agents servants or employees have violated any law, statute, ordinance, contract, duty or obligation whatsoever, or that they have engaged in any improper conduct.

10. This settlement involves unique facts and circumstances and therefore shall not be considered as precedent in any other matter or with respect to any other party.

11. The parties acknowledge and agree that each party is responsible for its own attorneys' fees and costs and that neither party is a "prevailing party" with respect to any fee-shifting laws or provisions.

12. The signatories below hereby certify that they have the authority to bind the respective parties to the terms of this Agreement.

13. This Settlement Agreement and General Release contains the full agreement between the parties and may not be abandoned, supplemented, amended, changed, or modified in any manner, orally or otherwise, except in writing of concurrent date or subsequent date, signed by a duly authorized representative of each of the parties hereto. Each party agrees to be responsible for their own attorney's fees.

14. If any term, provision or condition of this Settlement Agreement and General Release is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other sentence, paragraph, section, provision, term and/or condition of this Settlement Agreement and General Release, provided that the essential consideration received by each party is not eliminated or reduced as a result of such a declaration of invalidity.

15. This Settlement Agreement and General Release shall become effective immediately following final execution by the parties.

16. This Settlement Agreement and General Release contains the full agreement between Middlesex and Bound Brook with regard to matters set forth herein and shall be binding upon and inure to the benefit of the parties, their officials (elected and/or appointed), officers, members, directors, attorneys, representatives, employees, associates, partners, agents, servants, executors, administrators, personal representatives, heirs, successors and assigns of each and all

other persons, firms, corporations, associations or partnerships or any other entity or persons connected therewith (past, present and future), except as set forth herein or as may be agreed to in a further writing between the parties and further execution by the parties.

Bound Brook Board of Education

By: _____
Michele DeFazio, Board President

Witnesseth

_____
Thomas Venanzi, Board Secretary

Middlesex Borough Board of Education

By: _____
David Oliver, Board President

Witnesseth

_____
Michelle Loree, Board Secretary

Middlesex Public Schools
www.middlesex.k12.nj.us

RECEIVED
2018 MAY 24 A 9:00
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

300 John F. Kennedy Drive
Middlesex, NJ 08846-1498
732-317-6000
Ext. 20201
Fax 732-317-6005
loreem@middlesex.k12.nj.us

Michele A. Loree
Business Administrator/
Board Secretary

The Middlesex Board of Education met on May 14, 2018, in the Middlesex High School Library Media Center in the Middlesex High School, 300 John F. Kennedy Drive, Middlesex, New Jersey.

The following Board Members were present:

Mr. Coyle	Present	Mrs. San Phillips	Present
Mrs. DiNizio, Vice President	Present	Mrs. Schueler	Present
Mr. Giovanni	Present	Ms. Townsend	Present
Mrs. Harrity	Present	Mr. Oliver, President	Present
Dr. Hrevnack	Present		

Motion by Mrs. Schueler seconded by Mr. Coyle to approve the resolution listed below as recommended by the Superintendent of Schools:

Resolution Authorizing Settlement Agreement
RESOLVED, the Middlesex Borough Board of Education approves the Settlement Agreement and General Release concluding the litigation matter entitled Middlesex Borough Board of Education v. Bound Brook Board of Education, OAL Docket No. EDU-07388-15, Agency Ref. No. 91-4/15, and authorizes the Board President to execute the same, and hereby agrees to be bound by the terms set forth therein.

Motion carried by roll call vote:

Mr. Coyle	Yes	Mrs. San Phillips	Yes
Mrs. DINizio, Vice President	Yes	Mrs. Schueler	Yes
Mr. Giovanni	Yes	Ms. Townsend	YES
Mrs. Harrity	Yes	Mr. Oliver, President	Yes
Dr. Hrevnack	Yes		

I, Michele Loree, Business Administrator/Board Secretary of the Board of Education of the Borough of Middlesex in the County of Middlesex, State of New Jersey, hereby certify that the above extract from the minutes of the May 14, 2018, regular public meeting of the Middlesex Board of Education to be a true and accurate copy of the official minutes of the meeting.

Michele Loree
Business Administrator/Board Secretary

5/21/18
Date

Bound Brook School District

130 West Maple Avenue
Bound Brook, NJ 08805

Tel: 732-652-7928
Fax: 732-271-9097

Thomas M. Venanzi
Interim Business Administrator/Board Secretary

5/7/18-2 Settlement Agreement with the Middlesex Board of Education

RESOLVED, the Bound Brook Board of Education accepts the Settlement Agreement between the Middlesex Board of Education and the Bound Brook Board of Education.

I certify that the above is a true and correct copy of a resolution approved by the Bound Brook Board of Education on May 7, 2018.

Date: 5-16-18

Attest: Theresa Zacharewich
Theresa Zacharewich, Assistant to the Business Administrator

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2018 MAY 24 A 8:51
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

OAL DKT. NO. EDU 11084-17
AGENCY DKT. NO. 164-7/17

BOARD OF EDUCATION OF THE GLOUCESTER COUNTY VOCATIONAL-TECHNICAL SCHOOL, GLOUCESTER COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF WOODBURY, GLOUCESTER COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 6/28/18

Date of Mailing: 6/28/18

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION APPROVING SETTLEMENT

OAL DKT. NO. EDU 11084-17

AGENCY DKT. NO. 164-7/17

BOARD OF EDUCATION OF THE GLOUCESTER COUNTY VOCATIONAL-TECHNICAL SCHOOL, GLOUCESTER COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF WOODBURY, GLOUCESTER COUNTY,

Respondent.

Kim C. Belin, Esq., for petitioner (Florio, Perrucci, Steinhardt and Fader, LLC, attorneys)

Victoria S. Beck, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: May 24, 2018 Decided: May 24, 2018

BEFORE **PATRICIA M. KERINS**, ALJ:

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.

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** 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 (title of agency head) 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.

5/24/18
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: 5/25/18

Date Mailed to Parties: 5/25/18

Attachment

RECEIVED
2018 FEB 21 A 8:09
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

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, Woodbury City Public School District

Gloucester County Vocational-Technical School District, Petitioner, v. Woodbury City Public School District, Respondents.	OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO.: 164-7/17 CIVIL ACTION **STIPULATION OF SETTLEMENT AND GENERAL RELEASE**

This Settlement Agreement and General Release (hereinafter "the Agreement") is entered into by and between Gloucester County Vocational-Technical School District and Woodbury City Public School District (hereinafter, collectively, "the Parties"). The Parties in good faith have negotiated concerning this matter and agree to settle for the following terms:

1. The Gloucester County Vocational-Technical School District shall withdraw its Petition in the above-captioned matter.

2. The Woodbury City Public School District shall pay the Gloucester County Vocational-Technical School District the amount of THREE THOUSAND DOLLARS ($3,000.00) to be used for one year of tutoring services for I.H., a student that attends the Gloucester County Vocational-Technical School.

3. The Gloucester County Vocational-Technical School District agrees to waive any and all potential claims against the Woodbury City Public School District relating to I.H. through the date of the within Agreement.

4. Each party shall be responsible for their own costs and fees, and no party shall be a prevailing party as a result of the within Agreement.

IN WITNESS HEREOF, the Parties have set their hands this____ day of _____, 2017.

Petitioner:

BY: _____ DATED: 12-21-17

BY: _____ DATED: _____

Respondent:

BY: _____ DATED: 2-2-18
Board President

BY: _____ DATED: 2-5-18
Board Secretary

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

WOODBURY CITY PUBLIC SCHOOLS

A Leader in Personalizing Education

8.5 Grant Authorization

The Woodbury City Board of Education hereby approved granting authorization to the Superintendent to approve a settlement to GCIT for no more than $3,000 regarding a matter involving student #2086890599.

CERTIFICATE

I, Kara L. Huber, Board Secretary of the Board of Education of the City of Woodbury in the County of Gloucester, New Jersey, hereby certify that the foregoing extract from minutes of a meeting of the Board of Education duly called and held on November 15, 2017, 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.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of the Board of Education on this 18 day of January, 2018.

Kara L. Huber, Board Secretary

Motion: Mr. Abbott Second: Mrs. McIlvaine

Roll Call Vote: Yes 9 No: 0

Items #8.1-8.6

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

OAL DKT. NO. EDU 06747-18
AGENCY DKT. NO. 112-5/18

J.M., ON BEHALF OF MINOR CHILD, K.L.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY, AND MACKEY PENDERGAST, SUPERINTENDENT,	:	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. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/28/18

Date of Mailing: 6/29/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 06747-18
AGENCY DKT. NO. 112-5/18

J.M. ON BEHALF OF MINOR CHILD K.L.,
Petitioner,
v.
MORRIS SCHOOL DISTRICT BOARD OF EDUCATION AND MACKEY PENDERGAST, SUPERINTENDENT,[1]
Respondents.

Laura A. Siclari, Esq., for petitioner (McCusker, Anselmi, Rosen & Carvelli, attorneys)

Marie-Laurence Fabian, Esq., for respondents (Porzio, Bromberg & Newman, attorneys)

Record Closed: June 8, 2018 Decided: June 12, 2018

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

---

[1] Although the transmittal lists the student as K.M. and the Board of Education of the Township of Morris, the parties agree that the student's initials are K.L. and the Board is the Morris School District Board of Education.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about May 9, 2018, petitioner, J.M., on behalf of her son, K.L., filed a Petition with the Commissioner of Education contesting the District's determination that K.L. must be evaluated by one of the Board's psychiatrists before he is permitted to return to school. Petitioner also filed a motion for emergent relief seeking an order providing for K.L.'s immediate return to his regular school program at the middle school. The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on May 10, 2018, and scheduled for oral argument on May 15, 2018. Respondents submitted a brief, along with a certification of the principal of the middle school, Joseph Uglialoro (Uglialoro Cert.), in opposition to the motion.[2] Petitioner and counsel for respondents appeared at the OAL on May 15, 2018 and oral argument was ultimately adjourned at petitioner's request to May 23, 2018. Subsequently, petitioner retained counsel and oral argument was rescheduled, at the request of petitioner's counsel, to June 4, 2018. Prior to the scheduled proceeding, petitioner filed a brief, along with a certification of petitioner (J.M. Cert.), a supplemental certification of petitioner (J.M. Supp. Cert.) and a certification of Laura A. Siclari, Esq. (Siclari Cert.) in further support of petitioner's request for emergent relief. Respondents filed a certification by the District's Director of Pupil Services, Jessica Neu (Neu Cert.), and a supplemental certification of Mr. Uglialoro (Uglialoro Supp. Cert.) in opposition to the motion. Oral argument was entertained on June 4, 2018, after which the parties furnished additional submissions in support of their respective positions. The submissions included a second supplemental certification of Mr. Uglialoro (Uglialoro Second Supp. Cert.) and supplemental briefs on behalf of respondents, and a supplemental brief and supplemental certification of Laura A. Siclari, Esq. (Siclari Supp. Cert.) on behalf of petitioner.

[2] Although respondents characterized their submission as a "cross-motion" for emergent relief seeking to have K.L. evaluated by a psychiatrist, respondents did not file a separate Petition of Appeal seeking such relief. See N.J.A.C. 6A:3-1.6(a). Accordingly, respondents' motion will not be considered and their submission will be considered as opposition to petitioner's motion.

FACTUAL DISCUSSION

A summary of the pertinent facts as gleaned from the documentation submitted follows.

K.L. is a fourteen-year-old student, who is currently enrolled in the eighth grade at one of the District's middle schools. (Uglialoro Cert. at ¶ 2; J.M. Cert. at ¶ 1.)

On or about April 3, 2018, when the District was closed for spring break, K.L. posted photographs of himself on social media. (Uglialoro Cert. at ¶ 6; J.M. Cert. at ¶ 2.) K.L. posted a black and white photograph on Instagram, which depicts K.L. taking a selfie while holding what looks like an assault rifle and wearing what appears to be sunglasses. (Uglialoro Cert. at Exhibit C.) The photograph was accompanied by the comment, "Chopper wit a scope and this shit ain't got no kickback." (Ibid.) The same photograph was posted in color on the social media sound platform SoundCloud. (Uglialoro Cert. at ¶ 6 and Exhibit D; Exhibit C attached to Petition.) An orange circle can be seen at the top of the gun in the color photograph. According to petitioner, K.L. was holding a toy airsoft rifle (a type of BB gun). (J.M. Cert. at ¶ 2.)

Principal Uglialoro's certification details the events that then transpired. Principal Uglialoro spoke with petitioner the day after learning of the photograph, during which he explained the District's concern about the photograph and K.L.'s comment on Instagram and recommended that she direct K.L. to remove the pictures. (Uglialoro Cert. at ¶ 7.) Principal Uglialoro, who was then in another state, also informed petitioner that he would contact her to discuss the next steps when he returned to New Jersey. (Ibid.) According to Principal Uglialoro, petitioner appeared to understand the nature of the District's concern and agreed that the pictures should be removed. (Ibid.) Principal Uglialoro returned to New Jersey on April 4, 2018, and learned that, although the image and comment had been removed from Instagram, the image remained on SoundCloud. (Id. at ¶ 8.) Principal Uglialoro described that he then reached out to petitioner several times; he left two messages asking petitioner to call him; and, after not hearing back from petitioner, he eventually left a message informing her that she should not send K.L. to

school on Thursday, April 5, 2018, after spring break, and requested that she call him to arrange a meeting with him that day. (Id. at ¶ 9; Uglialoro Second Supp. Cert. ¶ 2.)

K.L. appeared for school on April 5, 2018, and was directed to report to Principal Uglialoro's office. (Uglialoro Cert. at ¶ 10; Uglialoro Second Supp. Cert. ¶ 2.) Principal Uglialoro and K.L.'s Teen Pride counselor (Blake Sloven) spoke with K.L. about the situation. (Uglialoro Cert. at ¶ 10.) According to Principal Uglialoro's certification, K.L. insisted that it was not a big deal because the gun in the photo was simply an airsoft gun and, despite a discussion of recent tragedies involving gun violence and a reminder of how, during an assembly held after the Parkland shooting, Principal Uglialoro had warned all students to think before they said or posted anything, K.L. did not acknowledge or appear to understand that, in this age of gun violence and school shootings, his posting was a cause for concern. (Ibid.) Principal Uglialoro and Mr. Sloven then met with the Assistant Superintendent for Pupil Services, Suzanne Olimpio. (Uglialoro Cert. at ¶ 11.) After further discussion of the situation, they agreed that K.L. should be suspended for three days. (Ibid.)

Ms. Olimpio and Principal Uglialoro met with petitioner that same day, during which they informed petitioner of the decision to impose a three-day suspension and reiterated that K.L. should remove the images and comment. (Uglialoro Cert. at ¶ 13; Uglialoro Second Supp. Cert. at ¶ 3.) According to petitioner's certification, she asked for the policy behind the suspension and Principal Uglialoro referred her to a code of conduct policy relating to the use of electronics and causing harm to others. (J.M. Cert. at ¶ 2.)

After that meeting, K.L. removed the remaining image from SoundCloud. (Uglialoro Cert at ¶ 14.) However, K.L. posted a new image of himself on Instagram holding a toy gun, which petitioner characterizes as a Nerf gun. (Uglialoro Cert. at ¶ 14 and Exhibit E; J.M. Cert. at ¶3.) Principal Uglialoro states in his certification that, although the gun is identifiable as a toy in the photo, the District was nonetheless very concerned about K.L.'s decision to post the photograph under the circumstances. (Uglialoro Cert. at ¶ 14.) Principal Uglialoro met again with Mr. Sloven and Ms. Olimpio after this second posting and, after consultation with the superintendent, it was agreed that K.L.'s actions,

taken as a whole, indicated that he might be a danger to himself or others. (Id. at ¶ 15.) Principal Uglialoro described that, in order to ensure K.L.'s safety and the safety of the school community, they determined that K.L. should be evaluated by a psychiatrist prior to returning to school. (Ibid.) The District's articulated goal is to have K.L. evaluated by a psychiatrist so that it can assure his safety and that of the school community and make informed decisions going forward. (Uglialoro Cert. at ¶ 20; Neu Cert. at ¶ 9.)

Principal Uglialoro informed petitioner of this decision and sent a letter to petitioner, dated April 9, 2018, advising that K.L. was "being placed on home instruction pending medical clearance resulting from a psychiatric evaluation." (See Uglialoro Cert. at ¶ 16 and Exhibit F; J.M. Cert. at ¶ 3 and Exhibit A.) The letter further stated that "[t]his decision is based on [K.L.'s] recent behavior involving an inappropriate image posted on social media, and our desire as a school district to ensure that he is not a threat to himself or to the health, safety, or welfare of others in our school community." The letter advised that the psychiatric evaluation must be conducted by one of the two Board-approved psychiatrists and that petitioner must sign a consent form authorizing the psychiatrist "who conducts [K.L.'s] psychiatric evaluation to communicate and share records with personnel from the Morris School District." The letter enclosed a list of the two Board-approved psychiatrists from which petitioner could choose to perform the evaluation at the Board's expense, and a consent form for petitioner to sign.

The District began providing home instruction to K.L. on April 11, 2018. (Uglialoro Cert. at ¶ 17.) To date, petitioner has not taken K.L. for an evaluation by one of the Board-approved psychiatrists and K.L. remains on home instruction. (Id. at ¶¶ 18, 19.) The Board has since approved two additional psychiatrists who could perform the evaluation and an additional psychiatrist was on the agenda for approval by the Board at its June 4, 2018 meeting. (Neu Cert. at ¶ 5.)

The submissions include various correspondence by and between petitioner and District representatives in April 2018. (See J.M. Cert. at Exhibit B and correspondence attached to Petition). In petitioner's letters she, among other things, consented to a "medical clearance"; stated her "right" "to see a psychiatrist of [her] choice" at the District's

expense; requested authorization to go Saint Clare's Hospital (Saint Clare's) for the assessment; provided a narrower consent form; and requested a copy of the District's policy that authorizes a psychiatric evaluation for medical clearance. In other correspondence, the District addressed the basis for the requirement that K.L. must be evaluated by a Board-approved psychiatrist. In a letter dated April 10, 2018, the Board attorney informed petitioner that the District "has developed various policies, procedures and practices aimed at protecting the health, safety and welfare of the students in their schools [and] [o]ne such practice is to require a student who has engaged in behavior that raises a concern that he may be a danger to himself or others to be evaluated by a psychiatrist prior to coming back to school after the incident that raises the concern." (Petition at Exhibit H.) The letter further advised that, "[c]onsidering that this is the second time that the Board is requiring a psychiatric examination of your son, it will require him to be seen by a Board-approved doctor." In a later letter dated April 13, 2018, the attorney informed petitioner that, "although St. Clare's is approved by the Board, it is not approved for a full psychiatric evaluation, which is what the Board is seeking for your son." (Ibid.)

The certification of the District's Director of Pupil Services explains that, although the Board has a contract with Saint Clare's, the Board has not approved any psychiatrists at Saint Clare's and it does not utilize the services at Saint Clare's for medical evaluations like the one at issue, where the District is concerned that the student might be a danger to him/herself or others. (Neu Cert. at ¶ 6.) Rather, the District utilizes Saint Clare's when a student expresses suicidal ideation in which case the student would go to Saint Clare's for a screening, which is typically performed by a mental health screener, not a psychiatrist. (Ibid.) As K.L. had not expressed suicidal ideation, the District did not provide petitioner with the option of St. Clare's for the psychiatric evaluation being sought. (Id. at ¶ 7.)

On May 18, 2018, petitioner took K.L. to St. Clare's, where he was assessed by a Licensed Clinical Social Worker (LCSW), who signed a form stating that K.L. had been seen for a "Behavioral Health Assessment" and a letter indicating that "[a]t this time the patient does not present as a danger to self or others and can return to his/her regular school program." (J.M. Cert. at ¶¶ 6, 7 and Exhibit D.) The LCSW also recommended

that K.L. "continue counseling through Teen Pride." On the day of oral argument, petitioner provided a copy of a report from Saint Clare's that accompanied the assessment. (J.M. Supp. Cert. at ¶¶ 2-5 and Exhibit A.)[3] After receiving the Saint Clare's assessment, Principal Uglialoro articulated his continuing belief that K.L. should be evaluated by a psychiatrist with whom the District can communicate its concerns prior to the evaluation and who will provide sufficient information to assure the District of his safety and that of the school community. (Uglialoro Supp. Cert. at ¶ 4.)

According to Principal Uglialoro's certification, during discussions with petitioner in April about why the District determined that K.L. should be evaluated by a psychiatrist, he and Ms. Olimpio emphasized that they were not considering K.L.'s recent gun-related postings on Instagram and SoundCloud and his lack of insight into the implications of those actions in a vacuum. (Id. at ¶ 2.) Principal Uglialoro described that they explained that they had a broad scope of concern, arising from these recent postings in light of K.L.'s history of discipline at the school, reports of his behavior in the community and the incident that occurred in 2016, when K.L. was in 7th Grade, which involved the posting of a threatening message on Snap Chat. (Uglialoro Supp. Cert. at ¶ 2; Uglialoro Cert. at ¶ 3 and Exhibit A.) With regard to the 2016 incident, as the District was concerned about the safety of its students and staff, it determined that K.L. should be evaluated by a psychiatrist prior to returning to school; K.L. was eventually evaluated by a psychiatrist selected by petitioner, who cleared him to return to school; K.L. returned to school and was referred to the District's Teen Pride program for counseling; and K.L. has received counseling through that program since November 2016. (Id. at ¶¶ 4, 5 and Exhibit B.)[4]

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:

[3]Although the report lists an attending doctor in psychiatry, the role of that doctor, if any, cannot be ascertained. It is further unclear whether the entire report was provided since the report appears to depict that it consists of six pages and only three pages were attached to petitioner's certification.

[4] As to this incident, petitioner submitted a letter from an attorney, which petitioner states had been previously provided to the District, in which the attorney indicates that his client, and not K.L., was responsible for the Snap Chat message. (J.M. Cert. at ¶ 9 and Exhibit E.)

> 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 must satisfy all four prongs in order to establish entitlement to emergent relief.

Turning to the first criteria, emergent relief should not be granted except "when necessary to prevent irreparable harm." Crowe, 90 N.J. at 132. Petitioner bears the burden of proving irreparable harm. Harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. The moving party must demonstrate a "'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). The "[i]nadequacy of damages as a compensation may be due to the nature of the injury itself or the nature of the right or property injured." Scherman v. Stern, 93 N.J. Eq. 626, 631 (E. & A. 1922). 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. (citations omitted.)

I **CONCLUDE** that petitioner has failed to establish a clear showing that K.L. will suffer immediate irreparable injury unless the requested relief is granted. It is undisputed that the District has been providing K.L. with home instruction pending the results of the psychiatric evaluation. Although the educational option of home instruction is intended to be used for a "limited time period," M.G. and S.K. o/b/o B.K. v. Princeton Regional Bd. of Educ., EDS 4813-13 (April 15, 2013) <http://njlaw.rutgers.edu/collections/oal/>, the documentation supports that the District envisioned that this educational alternative would last for only a short period of time and K.L. remains on home instruction due to petitioner's failure to have him evaluated by one of the Board-approved doctors. P.H. and P.H. o/b/o M.C. v. Bergenfield Bd. of Educ., EDU 07381-00, State Bd. Decision, (September 5, 2001), <http://njlaw.rutgers.edu/collections/oal/>, aff'd on recons., State Bd. (October 3, 2001), < http://www.nj.gov/education/legal/>, cited in petitioner's supplemental brief, is markedly distinguishable. Although the State Board found "it obvious that a child such as M.C. suffers irreparable harm when he is deprived of an education for even a brief period of time," the student in that case had been permanently expelled without the provision of an alternative education program or home instruction due to circumstances beyond the control of his parents. In contrast, K.L. has received home instruction since April 11, 2018, shortly after the District informed petitioner of the need for the evaluation and, had the evaluation occurred at that time, a determination regarding his return to school would, in all likelihood, already have been made. In other words, any potential harm that might accrue to K.L. by still being on home instruction, coupled with K.L.'s ability to return to school, are matters "within the control reposing in his parent [ ]." T.L. o/b/o T.L. v. Middletown Bd. of Educ., EDU 06671-01, Initial Decision, (April 29, 2002), adopted, Comm'r (June 13, 2002), <http://njlaw.rutgers.edu/collections/oal/>.

Further, even if it can be said that K.L. will suffer irreparable harm, petitioner must make a preliminary showing of a reasonable probability of ultimate success on the merits of her claim, and demonstrate that the legal right underlying her claim is settled, to prevail on an application for an emergent relief. Crowe, 90 N.J. at 133. I **CONCLUDE** that petitioner has failed to shoulder her burden of proving both standards.

It is well settled 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. Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966). Stated differently, the exercise of a school board's discretionary powers may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). The scope of the Commissioner's review is limited. The Commissioner's role is not to substitute his or her judgement for that of the Board, but to assess whether the Board had a reasonable basis for its conclusions. Id. at 295-96. And, "[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).

The Legislature has recognized that "the safety and welfare" of public school students "is a matter of prime concern to the citizens of this state." N.J.S.A. 18A:17-42. Toward that end, the documentation at this juncture supports that the District had a practice to require a student who has engaged in behavior that raises a concern that he may be a danger to himself or others to be evaluated by a psychiatrist prior to returning to school after the incident that raises the concern.[5] Indeed, the District's actions in 2016 after the Snap Chat incident evidence this practice.

The ability of a school board to exclude a student from school pending the results of a psychological or psychiatric evaluation under circumstances similar to the within matter was addressed in T.L. o/b/o T.L. v. Middletown Bd. of Educ., EDU 06671-01, Initial Decision, (April 29, 2002), adopted, Comm'r (June 13, 2002) <http://njlaw.rutgers.edu/collections/oal/>. In that case, T.L., a sixth-grade student, was not permitted to return to school until he underwent an examination by a psychiatrist or

[5] The parties do not dispute that the District had no written policy at the time the action was taken. Rather, the Board approved a "School Clearance Following Crisis Situation" policy on May 7, 2018. (See J.M. Cert. at Exhibit C; policy attached to the Board's June 8, 2018 brief.)

psychologist at the school's expense after he composed a "hit list" that included the names of students and teachers with whom T.L. was angry. In rejecting the parent's challenge to the Board's action, the Administrative Law Judge (ALJ) held:

> The establishment of safety in the public schools is a legitimate statutory imperative, carried out here under lawfully enacted policies. N.J.S.A. 18A:17-42 through -48. In a nationwide climate of concern for student and teacher safety which can be officially noticed, a compelled psychological or psychiatric evaluation in the factual circumstances here is a rational requirement. There is no evidence that this component of the above policies has been unlawfully applied. The parents may choose either a psychologist or psychiatrist, and the expense will be borne by respondent Board. The record is devoid of proofs demonstrating prejudice to be incurred by this arrangement.
>
> ...
>
> Neither the Board policy requiring psychological or psychiatric clearance within the context of assuring safe conditions in school, nor implementation of the policy under the circumstances of record have been shown to be arbitrary or capricious. T.L.'s return to classes is therefore within the control reposing in his parents, to be accomplished at Board expense.

The Commissioner concurred with the ALJ's assessment that the "petitioner failed to prove that the Board's policy requiring an examination of T.L. by a psychiatrist or psychologist prior to his return to school is improper," and petitioner failed to demonstrate that the Board applied its policy in a manner that was arbitrary, capricious and unreasonable under the circumstances. See also M.F. o/b/o S.L.T. v. Neptune Bd. of Educ., 97 N.J.A.R. 2d (EDU) 578 (upholding the Board's decision to require an immediate psychiatric evaluation for a student who threatened to commit suicide and tightened a belt around her neck).

The same rationale would appear to apply with equal force to this case and undermines petitioner's likelihood of prevailing on her claim and demonstration that the law is settled in her favor. Similar to T.L., "within the context of assuring safe conditions

in school," petitioner has failed to show that, based upon the totality of the circumstances, the District's requirement that K.L. be evaluated by a Board-approved psychiatrist toward ensuring K.L.'s safety, as well as the safety and welfare of its students, was arbitrary, capricious, unreasonable or not a rational requirement. Indeed, the concern for student and teacher safety has been heightened since T.L. was decided given the more recent school shootings in our society. Further, similar to T.L., the record is devoid of proofs demonstrating any prejudice that will incur to K.L. or petitioner by the proposed arrangement, which permits petitioner to choose the Board-approved psychiatrist who will to conduct the evaluation at the Board's expense. Although, unlike T.L., the District did not have a written policy in place when the action was taken, petitioner has failed to offer any legal support demonstrating that a school board lacks the authority to take such action without a written policy or to negate the reasonableness and rationality of the action taken. Clearly, a school board has broad discretion to take the actions needed to effectively operate its public schools and to protect the health, safety and welfare of students in its care.

I place no weight on the Complaint Investigation Report by the Office of Special Education Programs (OSEP) offered by petitioner. (Siclari Cert. at Exhibit A.) Succinctly stated, the scope of OSEP's investigation authority involves complaints "regarding the provision of special education and related services," N.J.A.C. 6A:14-9.2(a), and the within matter does not involve a special education student or special education services. Similarly, the safety clearance policies from other New Jersey school districts attached to petitioner's most recent submission (Siclari Supp. Cert. at Exhibit C to F), fall short of establishing petitioner's likelihood of success on her claim and that the law is settled in her favor. Although the submitted policies permit the evaluation to be completed by a licensed or certified mental health professional, including a psychologist, a psychiatrist, a social worker or a psychiatric nurse, the policies, without more, fail to demonstrate that the District's determination as to the type of mental health professional appropriate under the circumstances was arbitrary or capricious. Indeed, the policy of one school district "reserves the right to obtain its own assessment by an evaluator of its choosing." (Siclari Supp. Cert. at Exhibit C.) The policies also do not support that the District acted in an arbitrary, capricious or unreasonable manner by not accepting the assessment by the

social worker at Saint Clare's. Rather, the policies make clear that the evaluator must "have access to all relevant information regarding the student and the incident giving rise to the exclusion"; the parent must provide consent for a district staff member "to provide necessary background information" to the evaluator; and the evaluator must provide a clearance letter confirming that the assessment was conducted pursuant to the assessment parameters set forth in the policies. And, as was done in this case, the policies also instruct that the student will be provided with appropriate home or out-of-school instruction during any period of exclusion.

In sum, petitioner's proofs fail to establish that she has a likelihood of prevailing on her claim that the District's determination requiring a psychiatric evaluation of K.L. by one of its approved psychiatrists to determine whether he posed a potential risk of harm to himself, other students or staff was without a rational basis, induced by improper motives and/or was arbitrary, capricious or unreasonable under the circumstances. Petitioner has also failed to offer any case or other law which demonstrates that the legal right underlying her claim is settled.

Finally, in balancing the equities and interests of the parties, the scales tip in favor of the District and militate against granting the relief sought. Petitioner has failed to articulate any harm that will result if K.L. is evaluated by a Board-approved psychiatrist at the Board's expense and no hardship is apparent. On the other hand, the District plainly has a substantial and valid interest in protecting the safety and welfare of its students and staff and taking measures in situations that present a potential risk of harm. Suffice it to say, the public interest in protecting the welfare of school children and providing a safe instructional environment outweighs any potential hardship to petitioner.

Based upon the foregoing, I **CONCLUDE** that petitioner has failed to meet the requirements set forth in N.J.A.C. 6A:3-1.6(b) warranting emergent relief.

ORDER

I **ORDER** that petitioner's application for emergent relief be and hereby 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.

June 12, 2018
DATE

Margaret M Monaco
MARGARET M. MONACO, ALJ

jb

R.H., ON BEHALF OF MINOR CHILD, G.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE – MAPLEWOOD SCHOOL DISTRICT, ELIZABETH AARON, KATHERINE GILFILLAN, SIDNEY SAYOVITZ, AND MATTHEW ENDLICH.	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Pro se petitioner contended that the respondent Board's harassment, intimidation or bullying (HIB) appeal decision in this matter, which was rendered in petitioner's favor, contained inaccuracies and failed to mention that her daughter, G.H., was attacked or bullied by a "mob." The Board's HIB Appeal Decision concluded that the January 2017 incident at issue herein constituted HIB, and the female who physically assaulted G.H. was disciplined as a result. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this matter, and the case is ripe for summary decision; to initiate a contested case under New Jersey's school laws, a petitioner must file a petition of appeal with the Commissioner that states the allegations and facts giving rise to the appeal, and the specific relief sought, *N.J.A.C.* 6A:3-1.4(a); in the instant case, petitioner failed to assert a cognizable cause of action against the respondents; R.H. stated in her appeal that she is in full agreement with the Board's HIB decision regarding the January 2017 incident wherein her daughter was victimized, but was dissatisfied with certain wording within the decision and claimed that there were certain inaccuracies and omissions in the report. The ALJ concluded that, while it is understandable that petitioner is rightly troubled by the attack on her daughter, the claims raised in the petition are not actionable; further, petitioner failed to present any facts showing that the Board acted in an arbitrary, capricious or unreasonable manner with respect to the wording of the Board's HIB Appeal Decision. Accordingly, the ALJ granted the Board's motion for summary decision.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision as the final decision in this matter, for the reasons expressed therein. The petition was dismissed.

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

Issued 6/28/18

OAL DKT. NO. EDU 17492-17
AGENCY DKT. NO. 253-11/17

R.H., ON BEHALF OF MINOR CHILD, G.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE – MAPLEWOOD SCHOOL DISTRICT, ELIZABETH AARON, KATHERINE GILFILLAN, SIDNEY SAYOVITZ, AND MATTHEW ENDLICH.	:	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.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner fails to state a cause of action as the Board's Harassment, Intimidation and Bullying (HIB) determination was rendered in petitioner's favor, and petitioner does not have a legal right to compel the Board to alter the wording of the report. Additionally, the Commissioner agrees with the ALJ that the Board acted on the HIB complaint in a timely manner, in accordance with *N.J.S.A.* 18A:37-15(b)(5).

Accordingly, the Initial Decision of the OAL is adopted – for the reasons thoroughly expressed therein – as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/28/18

Date of Mailing: 6/29/18

* 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 17492-17
AGENCY DKT. NO. 253-11/17

R.H., ON BEHALF OF G.H.,
Petitioner,
v.
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ELIZABETH AARON, KATHERINE A. GILFILLAN, SIDNEY A. SAYOVITZ, MATTHEW ENDLICH,
Respondents.

R.H., petitioner, pro se

Alyssa K. Weinstein, Esq., for respondents (Purcell Mulcahy Flanagan, attorneys)

Record Closed: April 4, 2018 Decided: May 24, 2018

BEFORE **SUSANA E. GUERRERO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On October 23, 2017, G.H.'s mother, R.H., filed a Petition of Appeal with the Commissioner of Education. Petitioner's mother represents her daughter's interests pro

se. The Petition asserts that the Respondents' HIB[1] Appeal Decision contains inaccuracies and fails to mention that G.H. was attacked or bullied by a "mob." The HIB Appeal Decision concluded that the incident of January 18, 2017 where G.H. was physically assaulted constituted HIB and that the female who assaulted G.H. was disciplined as a result. The Bureau of Controversies and Disputes transmitted the matter to the Office of Administrative Law as a contested case on November 27, 2017.

Respondents, the Board of Education of the South Orange-Maplewood School District ("Board"), Elizabeth Aaron, Katherine A. Gilfillan, Sidney A. Sayovitz and Matthew Endlich (collectively "respondents") filed a motion seeking summary decision. Petitioner opposes the motion.

FACTUAL DISCUSSION

Based on the submissions presented, I rely on the following **FINDINGS of FACT** in deciding this motion:

G.H. is a student at Columbia High School (CHS), a school operated by the Board. On January 18, 2017, G.H. was injured by another student outside CHS, and a HIB investigation was conducted. It is undisputed that the school district's investigation included interviews of students and a review of video footage of the January 18, 2017 incident. Petitioner was in communication with respondent Aarons, and other school officials, immediately following the incident. An initial determination was made that the incident did not constitute HIB, but constituted a violation of the school's code of conduct, and petitioner appealed this determination to the Board.

The Board overturned the initial determination and issued a HIB Appeal Decision concluding that the January 18, 2017 incident did in fact constitute HIB. The Board found, in part, that G.H. was physically assaulted on January 18, 2017 on the sidewalk in front of CHS after school hours; a female aggressor struck G.H.; G.H. was an active participant in the fight; the aggressor was appropriately disciplined; the assault interfered with G.H.'s education and the school provided her with appropriate supports;

[1] Harassment, Intimidation and Bullying, as codified in N.J.S.A. 18A:37-13 et seq.

and G.H. later returned to school and successfully completed the school year without further incident. The Board concluded that the fight was motivated, at least in part, by the victim's race or gender, and that the incident caused a substantial disruption to school operations and interfered with G.H.'s educative progress (for which she received home instruction and additional supports when she returned to school, including oversight, point person contact and accommodations and modifications to her assignments and coursework). The Board concluded that the matter constituted HIB.

Petitioner filed this appeal because she seeks to modify the language contained in the HIB Appeal Decision. The six-page Petition asserts in relevant part that: "The incident report filed by the school attorney, Katherine Gilfillan, the school Board and the school principal are [sic] not accurate....They omitted the fact that a MOB participated in this attack...They omitted they [sic] fact that 2 of the children that assaulted [G.H.]...had charges pressed against them by Maplewood Police department. ...They omitted the fact that these children are repeat offenders of harassment intimidation bullying and assault. ...They omitted the fact that I had to email Ms. Elizabeth Aaron to make sure [G.H.] was safe when she returned to school....They omitted the fact that [G.H.] was out of school with PTSD caused by [the] attack. They omitted that we have had to pay for all her medical care...They omitted the fact that we had to beg the school to provide proper tutor and teachers to assist her. Petitioner also asserts that "the Incident occurred on January 18, 2017, [and] the report should have been file[d] within 48 hours of [the] incident, and Ms. Aaron agreed to do this on January 23, 2017. (5 days after incident)."

Petitioner continues: "My problem with the HIB [A]ppeal Decision is the incident report is not factual. We are in full agreement with the HIB decision incident of January 18, 2017. Our problem with [the] decision is the incident report as completed by the School Attorney Katherine Gilfillan is not factual based on evidence and information provided. It omits the evidence we provided during our appeal hearing, such us [sic] police reports, emails to [the] school principal and supper intendent [sic], and the actual Video of [the] attack. The Attorney, school principal, HIB coordinator and board name one participant in [the] attack, [but] video clearly shows a MOB. Video also clearly show[s] at least two people punching [G.H.]"

The Petition specifically addresses each alleged inconsistency in the HIB Appeal Decision and concludes by indicating that: "We want the school to acknowledge and confirm that the attack against [G.H] was HIB initiated by a MOB...We want all [of] the children involved in [the] attack identified and punished according to the LAW. They must pay the consequences for their bad behavior. We want Columbia High [S]chool to accept they have a problem and fix it."

Respondent Elizabeth Aaron (Respondent Aaron) is the CHS Principal. Respondent Matthew Endlich (Respondent Endlich) is a CHS teacher who serves as the school's HIB Specialist. Respondents Sidney A. Sayovitz and Katherine A. Gilfillan are attorneys for the Board.

Respondents' Motion for Summary Decision

Respondents filed a motion for summary decision on February 27, 2018 on the basis that petitioner is not entitled, under any governing statute or regulation, to seek or obtain administrative relief for her dissatisfaction with the wording or contents of the Board's HIB Appeal Decision. Respondents argue that they are entitled to summary decision because petitioner has no cognizable cause of action; petitioner failed to set forth any facts indicating that respondents acted in an unlawful, arbitrary, capricious, or unreasonable manner with respect to the wording used in the Board's HIB Appeal Decision; and that respondents Aaron, Endlich, Sayovitz and Gilfillan may not be held responsible for petitioner's dissatisfaction with the wording of the Board's HIB Appeal Decision as they lack the authority to even alter the wording of the Board's HIB Appeal Decision.

Petitioner's Response to the Motion for Summary Decision

Petitioner opposed respondents' motion for summary decision arguing that the HIB Appeal Decision should have named J.M., M.F. "and the other boys that are still attending" CHS, not only T.A., a female student. Petitioner alleges that M.F. punched G.H in the face. She later mentions that three of the children who attacked G.H., including T.A., J.M., and M.F. are no longer students at CHS, however at least three

other students who were involved G.H.'s attack still attend CHS. Petitioner does not identify these students.

Petitioner also appears to argue that a HIB report should have been filed within 48 hours of the January 18, 2017 incident, yet it was filed on Monday, January 23, 2017 by Elizabeth Aaron.

Petitioner asserts that the HIB report submitted by Respondents Gilfillan, Aaron, Endlich and Sayovitz is not accurate and that the school refused to indicate in the report that "a large group of children [came] together to attack one child." Petitioner also raises an issue with the fact that G.H. was referred to as an active participant in the altercation. She also recounts her experience meeting with the Maplewood Police Department, as well as her communications with District employees after the January 18 incident. Petitioner also raised new complaints in her opposition papers concerning supports provided, or not provided to her daughter by the District, however these will not be considered here as the new claims go beyond the scope of her petition.

Respondents' Reply

Respondents filed a reply to petitioner's opposition, stressing that petitioner has presented no genuine issue of material fact to dispute that: "(1) respondents provided her with the HIB-related information required by N.J.S.A. 18A:37-15(b)(6)(d); (2) upon appeal by petitioner, the Board reversed the initial no-HIB determination; and (3) petitioner is in 'full agreement with the HIB decision' but has a gripe with certain wording used in the decision." The governing statute here does not entitle petitioner to her preferred choice of wording in the HIB Appeal Decision, and the statute does not permit a cause of action allowing one to challenge such wording.

In response to petitioner's assertion that the HIB report form should have been filled out within 48 hours of the assault, respondents respond that the assault undeniably occurred after school hours on a Wednesday, January 18, 2017. The school then closed for the week less than 48 hours later on Friday, and the HIB reporting form was filled out first thing in the morning when school re-convened on

Monday. Respondents also deny petitioner's allegations that Ms. Aaron and Superintendent Ramos did not respond to her emails, and they referenced copies of emails and provided responses to petitioner dated January 19 and 20 that dispute petitioner's assertions.

Respondent's reply also addresses various allegations asserted in petitioner's response to the motion, and concludes that petitioner's failure to set forth essential facts giving rise to a dispute under the school law, per N.J.A.C. 6:24-1.3, was not cured by the opposition submissions.

ANALYSIS

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." N.J.A.C. 1:1-12.5(b). To survive a 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/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 the hearing, the evidence submitted by the parties on the motion, together with all legitimate inferences favoring the non-moving party, would require submission of the issue to the trier of fact. N.J.A.C. 1:1-12.5(b).

The Commissioner of Education has jurisdiction to hear and determine all controversies arising under the school laws. N.J.S.A. 18A:6-9. N.J.A.C. 6A:3-1.1 to -1.17 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. N.J.A.C. 6A:3-1.1. To initiate a contested case pursuant to these rules, petitioner must prepare a petition of appeal and serve such petition upon each respondent. N.J.A.C. 6A:3-1.3(a). The petition must state the allegations and facts giving rise to the appeal, and the specific relief sought. N.J.A.C. 6A:3-1.4(a).

Here, petitioner fails to assert a cognizable cause of action against respondents. N.J.S.A. 18A:37-15(b)(6)(e) permits the appeal of a school board's decision affirming, rejecting or modifying the superintendent's HIB decision, and here, the Board's decision itself is not contested. R.H. states in her appeal that she is "in full agreement with the HIB decision incident of January 18, 2017." She does not look to reverse the Board's decision, which was decided in G.H.'s favor and specifically found that the acts of January 18 constituted a HIB violation. The nature of this appeal is petitioner's dissatisfaction with certain wording in the five-page HIB Appeal Decision. More specifically, petitioner claims that there are certain inaccuracies in the report, and that certain information should not have been omitted. While one may appeal the Board's final decision, or determination, R.H. does not seek to disturb the Board's final decision here and no legal cause of action exists to compel the Board to alter the wording in its report.

Petitioner's greatest grievance is the HIB Appeal Report's references to only one female student as being the aggressor, rather than describing the incident as having been initiated by a "mob." R.H. demands that the respondents identify and punish all those who formed part of this "mob." However, petitioner acknowledges that, despite having a videotaped recording of the incident, neither she nor G.H. could identify any current CHS male students who took part in this "mob." The District reviewed the video and conducted several interviews as part of its investigation, and petitioner has not provided any indication that the District's investigation itself was conducted improperly. In her opposition, R.H. identifies two male students, J.M. and M.F., who she claims were aggressors in the January 18 incident against her daughter and who should have been named in the HIB Incident Report. These two individuals no longer attend CHS according to petitioner, and therefore, any HIB-related claims against these individuals are also moot. 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://lawlibrary.rutgers.edu/oal/search.html; 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://lawlibrary.rutgers.edu/oal/search.html. Here, since J.M. and M.F. no longer attend CHS, the respondent Board is precluded from asserting any disciplinary action against them and any HIB-related claims that may be raised against them are, therefore, moot.

Finally, petitioners claim that there was failure to file an HIB report within 48 hours from the July 18, 2017 incident. N.J.S.A. 18A:37-15(b)(5) requires that all acts of HIB be reported verbally to the school principal on the day the incident occurs and that it be reported in writing within two school days. Since G.H.'s HIB incident occurred and was reported to the principal after schools hours on Wednesday, and weekends are not counted toward the 48 hours, the HIB report was properly made on Monday morning once school resumed.

While petitioner is clearly, and understandably, troubled by the attack her daughter sustained and the effects she has had to endure, the claims raised by R.H. as part of this appeal are simply not actionable and petitioner has failed to present any facts indicating that respondent acted in an unlawful, arbitrary, capricious or unreasonable manner with respect to the wording used in the Board's HIB Appeal Decision. As there is no genuine issue as to any material facts challenged, summary decision must be granted.

CONCLUSION AND ORDER

As the moving party, respondents carry the burden of proof to demonstrate, by a preponderance of the credible evidence, that summary decision should be entered in favor of respondents, and specifically that summary decision is appropriate because petitioner has no cognizable cause of action, and petitioner failed to raise any genuine issue of material fact that respondents acted in an unlawful, arbitrary, capricious or unreasonable manner with respect to the wording used in the HIB Appeal Decision. After considering all proofs submitted relative to the motion, I **CONCLUDE** that respondents have met their burden.

Based on the foregoing, I **CONCLUDE** that the respondents' motion for summary decision should be **GRANTED**.

It is, therefore, **ORDERED** that the motion for summary decision filed by respondents is **GRANTED** for the reasons stated herein.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 24, 2018
DATE

SUSANA E. GUERERO, ALJ

Date Received at Agency: May 24, 2018

Date Mailed to Parties: MAY 29 2018

mm

LIST OF EXHIBITS

For petitioner:

P-1 Petitioner's Petition and supporting documents

P-2 Petitioner's Opposition to Motion for Summary Decision

For respondents:

R-1 Respondents' Answer

R-2 Respondent's Motion for Summary Decision

R-3 Respondent's Reply to petitioner's response

AGENCY DKT. NO. 132-5/18

IN THE MATTER OF LORENA PORTILLO,	:	
BOARD OF EDUCATION OF THE TOWN	:	COMMISSIONER OF EDUCATION
OF WEST NEW YORK, HUDSON COUNTY.	:	DECISION

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC) – finding that respondent violated the School Ethics Act (SEA) for failure to timely complete the mandatory Governance 3 training, in accordance with *N.J.S.A.* 18A:12-33. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty, pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent ultimately completed her training following the SEC's issuance of an Order to Show Cause on April 24, 2018. Respondent has not filed exceptions to the recommended penalty, nor has she instituted an appeal before the Commissioner – pursuant to *N.J.A.C.* 6A:4-1 *et seq.* – of the SEC's underlying finding of violation.

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

Accordingly, respondent is hereby reprimanded as a school official found to have violated the SEA for failure to complete required training in a timely manner.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 6/28/18

Date of Mailing: 7/02/18

[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)

IN THE MATTER OF LORENA PORTILLO	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***WEST NEW YORK SCHOOL DISTRICT BOARD OF EDUCATION,* HUDSON COUNTY**	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	**DOCKET NO.: T28-17**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on April 24, 2018, and mailed on April 25, 2018, via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1.

In the OTSC mailed on April 25, 2018, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, and N.J.A.C. 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of a board of education located in the City of West New York, Hudson County. As a result of her position as a board of education member, and in accordance with the statute and regulation cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 3 training program by December 31, 2017.

On March 5, 2018, NJSBA provided the Commission with the names of those board members who failed to complete mandated training by December 31, 2017, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA. More specifically, an e-mail was sent to all board members, including Respondent, on March 30, 2017, and August 10, 2017, and to all business administrators on October 4, 2017, and January 10, 2018, reminding them of the annual training requirement and

the December 31, 2017, deadline. On February 9, 2018, a notice was sent to the West New York School District's Business Administrator advising that, as of that date, Respondent had not completed training. In addition to these communications, multiple communications about mandated training were sent to NJSBA's members through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, on March 23, 2018, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by December 31, 2017. As a result, the County sent correspondence to Respondent, with a copy to the Business Administrator, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated April 6, 2018, via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions for completing the training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on April 25, 2018.

To date, there is no dispute that Respondent did not complete her required training by December 31, 2017, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement on April 25, 2018, and also filed a response to the Commission's OTSC on May 21, 2018. In her response, Respondent stated, "Since December of last year, I do not have the reliable structure at home to access the internet from my computer or laptop." Importantly, Respondent did not deny that she did not complete training by December 31, 2017.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on May 22, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, 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 Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a

violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

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

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: May 23, 2018

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on May 22, 2018.

Kathryn A. Whalen

Kathryn A. Whalen, Director

194-18SEC

AGENCY DKT. NO. 133-5/18

IN THE MATTER OF ADELINA FELICIANO,	:	
BOARD OF EDUCATION OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF WOODBINE, CAPE MAY COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission) – finding that respondent violated the School Ethics Act for failure to timely complete school board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed the training after the issuance of its April 24, 2018 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

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

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

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 6/28/18

Date of Mailing: 7/03/18

* 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 ADELINA FELICIANO	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***WOODBINE SCHOOL DISTRICT BOARD OF EDUCATION,* CAPE MAY COUNTY**	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	**DOCKET NO.: T25-17**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on April 24, 2018, and mailed on April 25, 2018, via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1.

In the OTSC mailed on April 25, 2018, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, and N.J.A.C. 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of a board of education located in the City of Woodbine, Cape May County. As a result of her position as a board of education member, and in accordance with the statute and regulation cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 4 training program by December 31, 2017.

On March 5, 2018, NJSBA provided the Commission with the names of those board members who failed to complete mandated training by December 31, 2017, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA. More specifically, an e-mail was sent to all board members, including Respondent, on March 30, 2017, and August 10, 2017, and to all business administrators on October 4, 2017, and January 10, 2018, reminding them of the annual training requirement and

the December 31, 2017, deadline. On February 9, 2018, a notice was sent to the Woodbine School District's Business Administrator advising that, as of that date, Respondent had not completed training. In addition to these communications, multiple communications about mandated training were sent to NJSBA's members through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, on March 23, 2018, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by December 31, 2017. As a result, the County sent correspondence to Respondent, with a copy to the Business Administrator, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated April 6, 2018, via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions for completing the training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on April 25, 2018.

To date, there is no dispute that Respondent did not complete her required training by December 31, 2017, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement on April 30, 2018, and also filed a response to the Commission's OTSC on May 1, 2018. In her response, Respondent stated she was unable to complete her training due to login and electronic devices issues. Importantly, Respondent did not deny that she did not complete training by December 31, 2017.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on May 22, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, 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 Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a

violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

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

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: May 23, 2018

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on May 22, 2018.

Kathryn A. Whalen, Director

IN THE MATTER OF ADELINA FELICIANO	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***WOODBINE SCHOOL DISTRICT BOARD OF EDUCATION,* CAPE MAY COUNTY**	:	
	:	**DOCKET NO.: T25-17**

WHEREAS, Adelina Feliciano, Respondent, is a board member on the Woodbine School District Board of Education; and

WHEREAS, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 4 training program by December 31, 2017; and

WHEREAS, at its meeting on April 24, 2018, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by December 31, 2017 as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1; and

WHEREAS, after having been served with the OTSC, Respondent completed her training requirement, and also filed a response to the Commission's OTSC indicating she did not complete training in a timely fashion because of login and electronic devices issues; and

WHEREAS, at its meeting on May 22, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1 by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on May 22, 2018, the Commission recommended that the Commissioner of Education impose a penalty of **reprimand**; and

WHEREAS, at its meeting on May 22, 2018, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on May 22, 2018.

Kathryn A. Whalen, Director

AGENCY DKT. NO. 131-5/18

IN THE MATTER OF MELISSA MCGRAW,	:	
BOARD OF EDUCATION OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF WOODBINE, CAPE MAY COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC) – finding that respondent violated the School Ethics Act (SEA) for failure to complete her Governance 1 training program, in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that as of the date of its decision respondent had not completed the training as directed. Respondent has not filed exceptions to the recommended penalty; nor has she instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

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

Accordingly, respondent is hereby removed as a school official found to have violated the SEA – effective from the date of this decision – for failure to complete required training.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 6/28/18

Date of Mailing: 7/03/18

[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).

IN THE MATTER OF	:	**BEFORE THE SCHOOL**
MELISSA MCGRAW	:	**ETHICS COMMISSION**
	:	
	:	**DECISION FOR FAILURE TO**
WOODBINE SCHOOL DISTRICT	:	**COMPLETE MANDATORY**
BOARD OF EDUCATION,	:	**TRAINING REQUIREMENT IN A**
CAPE MAY COUNTY	:	**TIMELY MANNER**
	:	
	:	**DOCKET NO.: T26-17**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on April 24, 2018, and mailed on April 25, 2018, via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1.

In the OTSC mailed on April 25, 2018, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, and N.J.A.C. 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of a board of education located in the City of Woodbine, Cape May County. As a result of her position as a board of education member, and in accordance with the statute and regulation cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by December 31, 2017.

On March 5, 2018, NJSBA provided the Commission with the names of those board members who failed to complete mandated training by December 31, 2017, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA. More specifically, an e-mail was sent to all board members, including Respondent, on March 30, 2017, and August 10, 2017, and to all business administrators on October 4, 2017, and January 10, 2018, reminding them of the annual training requirement and

the December 31, 2017, deadline. On February 9, 2018, a notice was sent to the Woodbine School District's Business Administrator advising that, as of that date, Respondent had not completed training. In addition to these communications, multiple communications about mandated training were sent to NJSBA's members through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, on March 23, 2018, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by December 31, 2017. As a result, the County sent correspondence to Respondent, with a copy to the Business Administrator, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated April 6, 2018, via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions for completing the training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on April 25, 2018.

To date, there is no dispute that Respondent did not complete her required training by December 31, 2017, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent still failed to complete training as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1. However, Respondent did file a response to the Commission's OTSC, stating that she failed to complete training due to difficulties in her home life.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on May 22, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12.

For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon issuance of a final decision by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such

suspension to become effective immediately upon issuance of a final decision by the Commissioner of Education.

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

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

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: May 23, 2018

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on May 22, 2018.

Kathryn A. Whalen

Kathryn A. Whalen, Director

196-18SEC

AGENCY DKT. NO. 134-5/18

IN THE MATTER OF KIMBERLY SCHIELA,	:	
BOARD OF EDUCATION OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF AVALON, CAPE MAY COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission) – finding that respondent violated the School Ethics Act for failure to timely complete school board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty, pursuant to *N.J.S.A.* 18A:12-29(c). The Commission recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completes the required training before the Commissioner issues his final decision, the Commission recommends that the respondent be suspended for 30 days. Respondent did not file exceptions, nor has she submitted proof that she completed the training program. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4 *et seq.*

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

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/28/18
Date of Mailing: 7/03/18

* 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 KIMBERLY SCHIELA	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***AVALON SCHOOL DISTRICT BOARD OF EDUCATION,* CAPE MAY COUNTY**	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	**DOCKET NO.: T27-17**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on April 24, 2018, and mailed on April 25, 2018, via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1.

In the OTSC mailed on April 25, 2018, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, and N.J.A.C. 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of a board of education located in the City of Avalon, Cape May County. As a result of her position as a board of education member, and in accordance with the statute and regulation cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 4 training program by December 31, 2017.

On March 5, 2018, NJSBA provided the Commission with the names of those board members who failed to complete mandated training by December 31, 2017, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA. More specifically, an e-mail was sent to all board members, including Respondent, on March 30, 2017, and August 10, 2017, and to all business administrators on October 4, 2017, and January 10, 2018, reminding them of the annual training requirement and

the December 31, 2017, deadline. On February 9, 2018, a notice was sent to the Avalon School District's Business Administrator advising that, as of that date, Respondent had not completed training. In addition to these communications, multiple communications about mandated training were sent to NJSBA's members through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, on March 23, 2018, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by December 31, 2017. As a result, the County sent correspondence to Respondent, with a copy to the Business Administrator, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated April 6, 2018, via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions for completing the training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on April 25, 2018.

To date, there is no dispute that Respondent did not complete her required training by December 31, 2017, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by December 31, 2017, and also failed to complete training as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on May 22, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12.

For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon issuance of a final decision by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon issuance of a final decision by the Commissioner of Education.

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

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

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: May 23, 2018

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on May 22, 2018.

Kathryn A. Whalen, Director

IN THE MATTER OF KIMBERLY SCHIELA	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***AVALON SCHOOL DISTRICT BOARD OF EDUCATION,* CAPE MAY COUNTY**	:	
	:	**DOCKET NO.: T27-17**

WHEREAS, Kimberly Schiela, Respondent, is a board member on the Avalon School District Board of Education; and

WHEREAS, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 4 training program by December 31, 2017; and

WHEREAS, at its meeting on April 24, 2018, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by December 31, 2017 as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1; and

WHEREAS, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by December 31, 2017, and also failed to complete training as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1; and

WHEREAS, at its meeting on May 22, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1 by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on May 22, 2018, the Commission recommended that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon issuance of a final decision by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon issuance of a final decision by the Commissioner of Education; and

WHEREAS, at its meeting on May 22, 2018, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on May 22, 2018.

Kathryn A. Whalen, Director

AGENCY DKT. NO. 130-5/18

IN THE MATTER OF MARY WOLBERT,	:	
BEVERLY CITY SCHOOL DISTRICT,	:	COMMISSIONER OF EDUCATION
BURLINGTON COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission) – finding that respondent violated the School Ethics Act for failure to timely complete training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed the training after the issuance of the Commission's April 24, 2018 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

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

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

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/28/18

Date of Mailing: 7/03/18

[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)

199-18L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

June 28, 2018

Daniel J. Gallagher, Esq.
The Carroll Law Firm
1 N. New York Road, Suite 39
Galloway, New Jersey 08205

Cynthia Verderber
55 Leeds Point Road
Galloway, New Jersey 08205

Re: *In the Matter of the Tenure Hearing of Cynthia Verderber, School District of the City of Pleasantville, Atlantic County, Agency Dkt. No. 142-6/18.*

Dear Parties:

I have reviewed the record in the contested case entitled *In the Matter of the Tenure Hearing of Cynthia Verderber, School District of the City of Pleasantville, Atlantic County, Agency Dkt. No. 142-6/18.* The record includes the District's request to withdraw the tenure charges filed in this matter due to Respondent's formal resignation from her teaching position, filed with the District on June 20, 2018. In light of this information, I find that no purpose would be served by further proceedings in this matter.

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

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner

c: County Superintendent
State Law Library

LOR/SLP

NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing of Ron Murphy:

THE EDGEWATER TOWNSHIP BOARD OF EDUCATION

"Petitioner,"

- and -

RON MURPHY

"Respondent."

Agency Docket No. 49-3/18

DECISION APPROVING SETTLEMENT AGREEMENT

Before
Joyce M. Klein
Arbitrator

Appearances:

For the Petitioner:
Amy L. Gillette, Esq.
Zeller & Wieliczko, LLP

For the Respondent:
Amy R. Guerin, Esq.
Parker McCay, P.A.

On February 28, 2018, the Edgewater Township Board of Education [the "Petitioner"] filed tenure charges with the State of New Jersey Department of Education against Ron Murphy [the "Respondent"], a teacher employed by the Petitioner, alleging that Respondent used inappropriate and demeaning language with students and violated the Board's dress code on repeated occasions after being directed not to do so.

On June 14, 2018, I held a hearing at which representatives of the Edgewater Township Board of Education and Ron Murphy met with the arbitrator. At that time, the parties entered into a Settlement Agreement resolving the charges brought against Mr. Murphy. The terms of settlement were approved by both Respondent and Petitioner by June 28, 2018.

The terms of settlement provide that Respondent acknowledges the need to improve his performance. Further, Respondent agreed to serve an unpaid suspension from February 28, 2018 through June 30, 2018. The Settlement Agreement also provides that the Board has agreed to allow Respondent to return to his teaching position with all the same rights and benefits to which he has been entitled to this point, subject to additional terms and conditions contained in the Agreement. Those terms and conditions include the withholding of Respondent's increment for the 2018-2019 school year, Respondent's agreement to take affirmative steps to improve his conduct and performance, including to complete professional development. The Settlement Agreement returns Respondent to work on a last chance basis. To that end, Respondent has agreed to treat all students respectfully, to follow the District's dress code requirements and all other requirements and directives.

Under N.J.A.C. 6A:3-5.6, the arbitrator is required to issue a brief decision approving the settlement of tenure charges and explaining why the arbitrator is approving the terms of settlement. I have approved these terms for the following reasons.

I am persuaded that the issues that were raised in the Statement of Tenure Charges and Specifications filed by the Petitioner and the Answer to Tenure Charges filed by the Respondent have been fully reviewed and discussed by all parties and that the issues raised therein have been satisfactorily addressed by the terms of settlement. The terms of settlement reflect an appropriate resolution of the charges leveled against the Respondent. The terms of settlement will permit Respondent to return to the classroom with additional training and counseling that will enhance his efforts to be a successful teacher. The settlement provides the Petitioner with adequate protection should Respondent engage in similar misconduct in the

future, as well as assurance that Respondent will take appropriate steps to insure his success as a teacher. I find that the settlement terms properly balance the interests of both parties. Given Respondent's agreement to take all steps necessary to insure his success as a teacher, together with his agreement to return to work on a last chase basis, I find this settlement allows Petitioner to return Respondent to the classroom in a manner that best serves the public interest. In sum, this settlement provides a satisfactory basis for the resolution of any concerns that were raised by the Statement of, and the Answer to, the Tenure Charges that were set forth in the record of this proceeding.

Accordingly, and based upon all of the above, this will serve as the arbitrator's approval of the parties' settlement agreement.

Dated: July 2, 2018
Ocean Grove, New Jersey

Joyce M. Klein

State of New Jersey }
County of Monmouth } ss:

On this 2nd day of July, 2018, before me personally came and appeared Joyce M. Klein to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

Gretchen L Boone
Notary Public
New Jersey
My Commission Expires 8-24-2022
No. 50066778

SETTLEMENT AGREEMENT

This Settlement Agreement (hereinafter "Agreement") is entered into by and between the Edgewater Park Township Board of Education (hereinafter "the Board") and Ron Murphy (hereinafter "Murphy"). The Board and Murphy shall collectively be referred to as "the Parties."

RECITALS

WHEREAS, Murphy is currently a tenured teacher employed by the Board; and

WHEREAS, the Board certified tenure charges against Murphy on February 27, 2018, for conduct unbecoming and insubordination and suspended Murphy without pay effective February 28, 2018; and

WHEREAS, the tenure charges are attached to this Agreement as Exhibit A and an incorporated herein by reference; and

WHEREAS, Murphy acknowledges the substance of the tenure charges and the genuine need for his performance to improve; and

WHEREAS, Murphy has expressed a sincere desire to improve and would like to remain in the employ of the Board; and

WHEREAS, the Board has agreed to allow Murphy to return to his teaching position with all the same rights and benefits to which he has been entitled to this point, subject to the terms and conditions contained in this Agreement and with the understanding that future infractions similar to those outlined in the tenure charges will result in the District refiling tenure charges against Murphy seeking his termination;

AND NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound, the Board and Murphy agree as follows:

AGREEMENT

1. The foregoing Recitals are incorporated herein and made part of this Agreement.

2. The Board agrees to withdraw the tenure charges against Murphy without prejudice, subject to the following terms and conditions:

    a. **Unpaid Suspension.** Murphy shall serve a suspension without pay beginning on February 28, 2018, and continuing through June 30, 2018. Murphy acknowledges and agrees that he waived his right to continue his health care coverage during this

unpaid suspension. The Board will take the appropriate steps to confirm the reinstatement of Murphy's health insurance coverage at the outset of the 2018-2019 school year.

b. **Increment Withholding**. Murphy's adjustment increment shall be withheld for the 2018-2019 school year, and Murphy hereby waives any right to challenge said increment withholding for the 2018-2019 school year. The parties acknowledge that following the increment withholding during the 2018-2019 school year, Murphy will receive an employment and adjustment increase in accordance with the collectively negotiated agreement, however, Murphy acknowledges that the 2018-2019 increment withholding will result in him lagging behind the salaries of colleagues with equivalent levels of experience and education. Murphy may request that the Board restore his withheld increment no earlier than the 2019-2020 school year. However, it is within the Board's statutory discretion whether to restore the withheld increment in a future year. The Board shall have complete and absolute discretion as to whether or not to grant any such request. The Board is in no way obligated to reinstate Murphy's increment at any time.

c. **Counseling**. Murphy shall immediately seek counseling and at his own expense. Murphy further agrees:

    i. To provide the name, telephone number and mailing address of the psychologist and/or psychiatrist, or clinician in this field, to the Board so that the Board may provide the him/her with information about Mr. Murphy's performance prior to Murphy commencing treatment; and

    ii. To regularly treat with the psychologist and/or psychiatrist, or clinician in this field, during the entirety of the 2018-2019 school year.

    iii. To authorize and require the psychologist and/or psychiatrist, or clinician in this field, to provide the Board with written updates approximately every thirty (30) days during the 2018-2019 school year confirming whether Murphy is regularly seeking treatment and confirming whether Murphy is complying with all recommendations. Appropriate documentation verifying treatment will be provided to school administration upon the referral for treatment. The first update shall be provided to the Board on or about September 1, 2018.

d. **Training/Professional Development**. Murphy shall promptly complete training/professional development identified by the Board at his own expense, not to exceed $500.00. Any amounts in excess of $500.00 will be paid by the Board. Murphy's return to work at the beginning of the 2018-2019 school year shall not be contingent upon the completion of the training/professional development.

e. **"Last Chance" Agreement**. Murphy acknowledges and agrees that the Board has provided him with one last chance for improving his performance. If Murphy engages in any conduct that is the same and/or similar to any of the conduct outlined in the tenure charges, attached hereto as Exhibit A, or if Murphy breaches any part of this Agreement in any way, then Murphy understands that the Board will file tenure charges against Murphy seeking his termination and an arbitrator assigned under the purview of the Commissioner of Education will make a determination as to whether Murphy is found to have engaged in said conduct and/or to have breached this Agreement. The Parties agree that the only issue before the arbitrator shall be whether Murphy engaged in said conduct and/or breached the Agreement. While the statutory process for tenure termination cannot be circumvented by contractual agreement, Murphy acknowledges that this agreement signifies his last chance to improve his performance, shall be admissible in the resultant tenure proceedings, and that if he is found to have engaged in said conduct and/or have breached this Agreement, then termination will be the appropriate penalty. Murphy hereby waives any and all rights he may have to challenge the penalty of termination.

3. **Return to Work.** The Board agrees to return Murphy to a teaching position at the beginning of the 2018-2019 school year. The Board agrees to initially assign Murphy to the Mildred Magowan Elementary School. Murphy acknowledges that all transfers and reassignments are within the Board's managerial prerogative.

4. **Performance Expectations**. Murphy acknowledges and agrees that he is responsible for performing all of the duties and responsibilities of a public school employee, as determined by New Jersey statutes, state administrative regulations, Board policy and regulations, and the directives of his supervising staff and School District administrators. These performance expectations include but are not limited to the following:

   a. Murphy will not engage in the alleged conduct outlined in the tenure charges attached hereto as Exhibit A.

   b. Murphy shall treat all students respectfully and shall refrain from calling students any derogatory and/or demeaning names.

   c. Murphy shall be sensitive to the needs of special education students.

   d. Murphy shall comply with all dress code requirements and directives from administration while on School District property and/or while attending School District related events. These requirements and directives include but are not limited to: (i) refraining from wearing any hat and/or hood on his head; (ii) refraining from wearing his pants in such a manner that his underwear is visible; and (iii) refrain from wearing the waistband of his pants lower than his hips.

5. Murphy acknowledges and agrees that he had ample time to review this Agreement with competent legal counsel of his choosing. Murphy further acknowledges and agrees that he freely and knowingly entered into this Agreement, with full knowledge of the consequences of this Agreement, and that his assent to this Agreement is not the result of any fraud, force, coercion or duress.

6. Nothing in this Agreement shall be construed as a limitation on the Board's ability to file tenure charges against Murphy in the future, nor shall it in any way limit the scope of such tenure charges, nor shall it limit Murphy's right to assert defenses to any such tenure charges in the future. This Agreement shall be admissible in tenure proceedings, but shall not limit the evidence that the Board is otherwise permitted by law to adduce in such proceedings, nor shall it limit Murphy's right to assert defenses and rely on evidence. This Agreement acknowledges Murphy's alleged serious employment problems to date and provides Murphy with one last chance to correct those problems; however, it does not in any respect restrict the Board's rights or prerogatives and it does not in any respect restrict Murphy from opposing and defending future tenure charges.

7. All agreements and covenants contained herein are severable. In the event that any provision of this Agreement should be held to be unenforceable, the validity and enforceability of the remaining provisions hereof shall not be affected thereby.

8. By signing this Agreement, each signatory represents that he or she is a party or has been duly authorized to sign on that party's behalf.

9. The Parties agree that this Agreement may be signed in counterparts and that the facsimiles and/or electronic scans of signatures shall have the same force and effect as original signatures.

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound hereby, have set their hands and seals on the dates indicated:

EDGEWATER PARK TOWNSHIP
BOARD OF EDUCATION

By: _____
President

Print Name: ROBERT SHAFFER

RON MURPHY

By: _____
Ron Murphy

By: _____
Witness

Date: 6/27/18

By: _____
Secretary

Print Name: _____

Date: 6-27-18

Print Name: Amy L. Gillette

Date: 5.14.18

AGENCY DKT. NO. 365-12/15

S.J., ON BEHALF OF MINOR CHILD, S.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	ORDER
RESPONDENT.	:	

On March 23, 2018, a final agency decision was rendered in this matter, wherein the Commissioner found S.J. liable for tuition in the amount of Thirteen Thousand Forty One Dollars and Zero Cents ($13,041.00), representing tuition for a period of ineligible attendance by her child, S.W., in the Board's school district during the 2015-2016 school year. The Board subsequently notified the Commissioner that S.J. had failed to comply with the decision, and requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. S.J. 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, Shaunte Johnson is now subject to entry of a judgment by the court in the amount of $13,041.00, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 7/06/18

Date of Mailing: 7/06/18

204-18

AGENCY DKT NO. 117-5/18

IN THE MATTER OF THE TENURE HEARING	:	
OF DEMARIS HERNANDEZ, SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY	:	DECISION

For the Petitioner, Benjamin B. Brenner, Esq.
No appearance by or on behalf of Respondent, Demaris Hernandez

This matter was opened before the Commissioner of Education on June 1, 2018, through tenure charges of abandonment, chronic and excessive absenteeism, conduct unbecoming, and incapacity, certified by Dr. Clarence Alston, Superintendent of the School District of the City of Pleasantville, together with a statement of supporting evidence against respondent, Demaris Hernandez, a tenured Secretary in petitioner's employ. Petitioner provided respondent with written notice of such certification at her last known address – via certified mail – on May 25, 2018.

On June 1, 2018, the Commissioner directed respondent – via both certified and regular mail – to file an answer to the charges. This communication 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 date 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 petitioner in this matter indicates that respondent has engaged in conduct that is unbecoming of a support staff member, including excessive absenteeism, failing to follow basic District procedures and protocols, causing disruption in the work environment, and abandonment of her position. Respondent was out of the office for

28.5 days during the 2013-2014 school year, 40.0 days during the 2014-2015 school year, 72.0 days during the 2015-2016 school year, 41.5 days during the 2016-2017 school year, and 47.5 days during the 2017-2018 school year. The respondent has failed to report to work since December 18, 2017, and – although respondent sent in letters from various medical professionals since that date, requesting her absences be excused – respondent has not attempted to contact the District in any other way to discuss her absence, despite the District's repeated attempts to contact her. On February 21, 2018, the District informed respondent that she does not qualify for family medical leave due to the work hour requirement, and that failure to return to work or contact the District by March 1, 2018 may result in action taken against her by the District. Respondent has not responded to the District's correspondence and has also failed to provide the District with any indication as to when she would be able to return to work – and whether she would have any restrictions or require any accommodations once she did – despite several attempts by the District to obtain this information. The evidence reflects that respondent's conduct resulted in disruption in the work environment.

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 conduct unbecoming have been proven, and warrant the respondent's dismissal from employment.

Accordingly, summary decision is hereby granted to the petitioner, and the respondent is dismissed from her tenured position with the District.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 7/06/18

Date of Mailing: 7/06/18

* 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)

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

SYNOPSIS

Pro se petitioner challenged the Board's decision to rescind J.M.'s admission into the respondent school district's Interdistrict Public School Choice Program (the "choice program"), and requested placement in the choice program for the 2018-2019 school year on an emergent basis. On December 27, 2017, petitioner – a resident of Hopatcong – was informed that as a result of a random lottery for admission, J.M. was "conditionally accepted" into the choice program for the 2018-2019 school year. The respondent Board subsequently rescinded its conditional acceptance of J.M., claiming he should not have been included in the lottery as a Tier 1 student. Petitioner contended that since the preschool program offered in Hopatcong is not a "public preschool" – as it is only available to students with disabilities, and is not a "state-funded" preschool program – J.M. was properly considered a Tier 1 student when the lottery was conducted, and that J.M. should be admitted into respondent's choice program for the upcoming school year. Petitioner also alleged that J.M.'s acceptance into the choice program may have been rescinded due to his status as a classified student. The Board maintained that J.M. is a Tier 2 student who was erroneously included in the lottery with Tier 1 students during the application process.

At the OAL, the ALJ addressed only petitioner's application for emergent relief, which requested that J.M. be placed in respondent's choice program for the 2018-2019 school year. The ALJ determined that petitioner failed to demonstrate entitlement to emergent relief pursuant to *N.J.A.C.* 6A:3-1.6 and *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), as petitioner did not sufficiently show that J.M. would suffer irreparable harm if emergent relief was not granted. Accordingly, emergent relief was denied, and the matter was returned to the Commissioner for review of the ALJ's decision.

Upon review of the record, the Commissioner determined that there are no material facts in dispute, and that the underlying petition can be decided herein as a matter of law. The Commissioner found, *inter alia*, that: J.M. was improperly categorized as a Tier 2 student when his "conditional acceptance" was rescinded by the Board; J.M. was appropriately a Tier 1 student pursuant to the criteria set forth in the subject regulations and the respective tiers; and the crux of the issue here is that Hopatcong does not offer a state-funded preschool program for its students, and therefore – regardless of where he attends preschool – J.M. meets the eligibility requirement for Tier 1. Accordingly, the Commissioner granted the relief requested in the petition, and J.M. shall be placed in the respondent Board's choice program for the 2018-2019 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.

Issued 7/06/18

alleges that J.M.'s acceptance into the choice program may have been rescinded due to his status as a classified student.

Respondent asserts that J.M. is not eligible to be placed in the lottery for the choice program as a Tier 1 student because he did not attend the public preschool program available in Hopatcong during the 2017-2018 school year and, therefore, he should have been deemed a Tier 2 student. Respondent maintains that J.M. is a Tier 2 student who was erroneously placed in the lottery with Tier 1 students during the application process.

The hearing at the OAL only addressed petitioner's application for emergent relief requesting placement of J.M. in respondent's choice program for the 2018-2019 school year. This application was denied because the ALJ determined that petitioner failed to demonstrate entitlement to emergent relief pursuant to *N.J.A.C.* 6A:3-1.6 and *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), as petitioner did not sufficiently show that J.M. would suffer irreparable harm if emergent relief was not granted.

Although no determination concerning the ultimate issue in this matter was made as part of the emergent hearing, the Commissioner's review of the record in this matter indicated that there are no material facts in dispute. As such, the Commissioner invited the parties to comment as to whether this matter could be disposed of on a summary basis. Based on the parties' responses, and consistent with the Commissioner's authority and discretion to hear contested cases pursuant to *N.J.A.C.* 6A:3-1.11, the Commissioner has determined to reach a decision that will dispose of both the emergent application and the underlying petition of appeal, as there are no material facts in dispute and the issue can be decided as a matter of law.

The Commissioner finds that J.M. was improperly categorized as a Tier 2 student when his "conditional acceptance" was rescinded by the Board. The Commissioner finds that J.M. is a Tier 1 student pursuant to the criteria set forth in the subject regulations and the respective tiers.

meets the eligibility requirement for Tier 1. To suggest otherwise – that J.M., a classified student who resides in a district that does not offer a public preschool program, is a Tier 2 student because he attended a (for profit) private preschool – is improper.[1]

Accordingly, the Commissioner grants the relief requested in the petition of appeal, finding that J.M. is a Tier 1 student and his "conditional acceptance" was improperly rescinded based on respondent's erroneous categorization of J.M. as a Tier 2 student.

IT IS SO ORDERED.[2]



COMMISSIONER OF EDUCATION

Date of Decision: 7/06/18

Date of Mailing: 7/06/18

[1] Had petitioner never sought Hopatcong's services and J.M. was unilaterally placed in a non-public school despite Hopatcong having a state-funded pre-school program, respondent's contention could have been merited. However, it is foreseeable that a classified student – entitled to special education and related services tailored to meet their needs in the least restrictive environment – could be placed in an appropriate program in another public school district or in a non-public school if the resident district cannot provide the necessary programming and services to the student. Such placement could be with a private agency such as NORWESCAP, or a non-public school approved for the education of students with disabilities, or a private placement pursuant to *N.J.A.C.* 6A:14-6.5. None of these options should prevent a classified student from being categorized as Tier 1 if the resident district does not offer a state-funded pre-school program, or if the parties agree to an out-of-district placement even where a state-funded pre-school program exists.

[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

ORDER
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 07159-18
AGENCY DKT. NO. 118-5/18

J.M., ON BEHALF OF MINOR CHILD, J.M.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BYRAM, SUSSEX COUNTY,
Respondent.

J.M., petitioner, pro se

Robin Ballard, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: May 25, 2018 Decided: May 29, 2018

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE

Petitioner, J.M., filed a petition on behalf of her son, J.M., a minor, challenging the decision of the Board of Education of the Township of Byram (Board or respondent) not to admit her son into the choice school program. Petitioner seeks an order on emergent relief requiring respondent to admit and enroll minor child J.M. into the respondent's Interdistrict

Public School Choice Program. Respondent opposes petitioner's application for emergent relief.

PROCEDURAL HISTORY

Petitioner filed a petition seeking emergent relief with the New Jersey Department of Education, Office of Controversies and Disputes on May 14, 2018. On May 17, 2018, the matter was filed with the Office of Administrative Law (OAL). Oral argument was held on May 25, 2018, at which time the record was closed.

FACTUAL DISCUSSION

Many of the facts do not appear to be disputed. J.M. is a five-year-old boy who resides in Hopatcong, New Jersey. In May 2016 and May 2017, the Hopatcong Board of Education determined J.M. eligible for special education and related services. J.M. has never attended a school in Hopatcong. In or around July 2017, petitioner entered into a Settlement Agreement with the Hopatcong Board of Education. The Settlement Agreement states in part "J.M. will be privately placed by his Parents at the Goddard School for the 2017–2018 school year and 2018 Extended School Year (ESY) . . . . [T]he parents disagree with the District's previously proposed placement for 2017–2018, despite the fact that such placement was designed to provide an appropriate education according to the requirements of the IDEA." The Settlement Agreement also indicates that "to avoid the cost of litigation," the Hopatcong Board of Education agrees to reimburse petitioner a certain amount towards J.M.'s tuition at the Goddard School, and any related or additional services provided to J.M. during the 2017–2018 school year and 2018 ESY program. According to the Settlement Agreement, J.M.'s parents agree to provide J.M. with transportation to Goddard School and the Hopatcong Board of Education will provide them with "aide in lieu of transportation." All other costs attributable to J.M.'s placement would be the parents' responsibility, and the Hopatcong School District would have no responsibility to oversee J.M.'s program at the Goddard School. J.M. has attended the Goddard School's pre-school program, which is a private school, since April 2016.

Byram Township Board of Education participates in the Interdistrict Public School Choice Program. In November 2017, petitioner completed an application to have J.M. considered for a Choice seat in the incoming kindergarten class. According to respondent, nineteen applications were received for four open spots, and one of the four spots was offered to the sibling of an existing Byram District student. J.M.'s application, as one of the remaining eighteen applications, was included in a lottery. On December 27, 2017, petitioner was informed that, through the lottery, J.M. had been "conditionally accepted" as a Choice student for kindergarten beginning September 2018. Nearly four months later, petitioner was notified by respondent that the conditional application for J.M. to be admitted as a Choice student had been denied "according to the requirements of the law" as set forth in the letter, and that as a Tier 2 student, J.M. should not have been included in the random lottery as there were several Tier 1 students on the Choice wait list.

Respondent admits that it made an error in conducting its lottery for the Choice program by failing to separate the Tier 1 and Tier 2 applicants before conducting the lottery, rather than conducting the lottery with only Tier 1 applicants first.[1] Respondent maintains that J.M. is a Tier 2 student because he attends a private school, does not have a sibling attending a Hopatcong school, he did not attend public school provided in Hopatcong; and he does not reside in a district that does not have public pre-school. Respondent also asserts that a public pre-school program is operated in the resident district of Hopatcong through NORWESCAP, "a private, non-profit corporation established under the Economic Opportunity Act which provides services, such as Early Head Start and Head Start

[1] Respondent refers to "Tier 1" and "Tier 2" applicants. While these terms do not appear in the applicable codes, the New Jersey Department of Education (NJDOE) defines these designations on its website. See http://www.state.nj.us/education/choice/parents/faq.htm#g1l1 Tier 1 students "must be enrolled in a NJ public school in his or her resident school district for the entire year immediately preceding enrollment in a Choice district . . . . **If applying for kindergarten, a Tier 1 student must attend his or her resident district's public and free pre-school (this is limited to districts that are considered 'former Abbott' districts [NJDOE includes a link to these districts, and Hopatcong does not appear on the list], a student who resides in a district that does not offer public and free pre-school, and a student who has a sibling currently attending the Choice district.** Choice districts must first fill their available seats with Tier 1 students. If the number of Tier 1 applicants exceeds the number of Choice seats available, the Choice district must hold a lottery to randomly select students for enrollment and for the waitlist." (emphasis added.)

According to the NJDOE website, Tier 2 student include "NJ residents who have not attended their resident public school for the entire year immediately prior to enrollment in the desired Choice district and do not otherwise meet the requirements for Tier 1. Choice districts are not obligated to accept Tier 2 students. If a choice district accepts Tier 2 applicants, they may do so only after all the qualified Tier 1 applicants have been accepted . . . ."

programs, primarily to low-income families within Hunterdon, Sussex and Warren Counties." Respondent maintains that J.M. does not attend an out-of-district placement. Rather, petitioner had the option to send J.M. to the NORWESCAP program in Hopatcong but opted to send him to a private pre-school, and private school students are considered Tier 2.

Petitioner asserts in her petition that J.M. "is being denied his tier 1 seated [sic] based on a comment made by Tammy Miller in our resident school district of Hopatcong, NJ which stated that we (his parents) refused to send him to the Hopatcong pre-school program in which we have a legal agreement for out of district placement due to the fact that Hopatcong does not offer an inclusion program with typically functioning peers." Petitioner argues that Hopatcong's program is not a public pre-school because it is only available to children with disabilities, and Hopatcong does not offer an "inclusion" pre-school program. At oral argument, petitioner asserted that Hopatcong does not have a State-funded pre-school program, and is not a former Abbott district offering free public pre-school (which would make J.M. a Tier 1 student according to the NJDOE website). Petitioner conceded that J.M. had the option to attend the pre-school program in Hopatcong offered through NORWESCAP, but the parents opted to place J.M. in the Goddard school because they believed that program was not appropriate for J.M. Petitioners also maintain that NORWESCAP is federally-funded, and not a State-funded pre-school program, as Hopatcong was not included in the NJDOE's list of State-funded pre-schools (i.e., former Abbott districts).

Petitioner also suggested that J.M.'s application may have been rescinded four months after being selected by Byram because he has a diagnosis of autism and requires special services. Petitioner requested this emergent hearing because it is near the end of the school year and placement for J.M. for the 2018–2019 school year "must be handled prior to the current school year ending." Petitioner's application asserts that if the emergent relief is not granted, the Choice seat that was originally offered to J.M. will be given to another candidate. It would be a significant financial burden to pay for an out-of-district placement for J.M., yet the Byram school district would provide J.M. with "the necessary services he requires in a district where he will not be a target for discrimination."

Respondent opposes petitioner's application, asserting that petitioner is unable to satisfy the requirements for emergent relief. First, petitioner is unable to demonstrate that J.M. will suffer irreparable harm if he is not placed in Byram's Choice Program. If not placed, J.M. will not be deprived of an education as he can enroll in the Hopatcong kindergarten program. The Hopatcong school district has already held an IEP meeting for J.M., and has prepared an IEP for the 2018–2019 school year containing the services his IEP team have determined to be appropriate for him. There is no concern about J.M.'s educational services being interrupted or terminated if he is not immediately placed in Byram. Any problems petitioner may have had with J.M.'s home district is not sufficient reason to grant the relief requested. Moreover, J.M.'s spot in the choice program was only extended to him conditionally and was revoked when it was determined that an error was made in offering him the spot when a Tier 1 applicant had not been prioritized as required by law.

Second, respondent asserts that petitioner has no legal right to force respondent to admit J.M. as a Choice student on an immediate basis, no likelihood of success on the merits, and that petitioner does not have a well-settled legal right to the requested relief. Respondent cites to the relevant statutes and regulations concerning the requirements to apply to a Choice district, classification of Tier 1 and Tier 2 students, and the legal standards for accepting applicants into the program, and concludes that J.M. is a Tier 2 applicant as he does not have a sibling currently enrolled in Byram; he did not attend pre-school in his resident district for at least one full year; and instead petitioner chose to have J.M. attend a private school. Respondent was legally required to conduct a lottery with all Tier 1 applicants before any Tier 2 application could be considered. Here, Byram mistakenly included Tier 2 applicants in the lottery and Byram is now attempting to correct this error by conducting a new lottery with the Tier 1 applicants only.

Finally, respondent asserts that the interests of Byram strongly outweigh those of petitioner. As indicated above, petitioner has not demonstrated that any type of harm will come to J.M. if Byram does not immediately offer him a Choice seat. On the other hand, granting emergent relief here—by compelling respondent to give a Choice seat to a Tier 2

applicant before offering it to Tier 1 applicants--would require respondent to violate the statutory provisions of the Interdistrict Public School Choice program, N.J.S.A. 18A:36B-14 et seq. To award petitioner immediate placement for J.M. on an emergent basis on the facts of this matter would set a dangerous precedent that would disrupt well-established practices for school districts to accept Choice students in accordance with the parameters set forth in the applicable statute and codes, and this could lead to increased litigation for all Choice districts and unnecessarily burden the taxpayers of these and other school districts.

LEGAL DISCUSSION

The standards which must be met by the moving party in an application for emergent relief 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.

Petitioners must satisfy all four prongs of the Crowe test.

New Jersey's Interdistrict Public School Choice Program, N.J.S.A. 18A:36B-14 et seq., and its applicable regulations provide a process for selecting students to enroll in a Choice program. N.J.S.A. 18A:36B-20(a) provides in part:

> To be eligible to participate in the [choice] program, a student shall be enrolled at the time of application in grades pre-school through 12 in the school of the sending district and have attended school in the sending district for at least one full year immediately preceding enrollment in the choice district, provided that a "sending district" includes any school district that a student in a particular district of residence is required by law to attend. The one year enrollment shall not apply to a student enrolling in pre-school or kindergarten in the choice

> district. Openings in a designated school of a choice district shall be on a space-available basis, and if more applications are received for a designated school than there are spaces available, a lottery shall be held to determine the selection of students. Preference for enrollment may be given to siblings of students who are enrolled in a designated school . . . . If there is an opening in a designated school of a choice district and there is no student who is enrolled in a sending district who meets the attendance requirements of this subsection, including a student who has been placed on a waiting list based on a lottery held in the choice district, then the choice district may fill that opening with a public school student who does not meet the attendance requirements of this subsection or a nonpublic school student.

N.J.A.C. 6A:12-2.2 addresses the eligibility criteria, including attendance requirement, for students to participate in a choice program. It states in relevant part:

> (a) To be eligible to participate in the program a student shall be enrolled at the time of application in grades pre-school through 12 in a public school of the sending district and have attended school in the sending district for at least one full year immediately preceding enrollment in a choice district including time spent at any school that a student in a particular district of residence is required by law to attend . . . . The one-year requirement shall not apply to a student applying to enroll in kindergarten in a choice district if that student already has a sibling enrolled in and attending the choice district and if the district of residence of that student does not offer a public pre-school program. (b) A public school student who does not meet the eligibility requirements found in (a) above or a non-public school student may nonetheless apply to enroll pursuant to N.J.S.A. 18A:36B-20a . . . .

The Choice district is prohibited from discriminating in its admission policies or practices on the basis of an applicant's status as a person with a disability, or any basis prohibited by State or federal law. N.J.S.A. 18A:36B-20(b)

With regard to the first required prong in resolving an emergent relief request, "irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-33. In addition, the irreparable harm standard contemplates that the harm be both substantial and immediate. Subcarrier Communications v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). However, pecuniary

damages may sometimes be inadequate because of the nature of the injury or the right affected. Crowe, 90 N.J. at 133. For example, in Crowe the Court determined neither an unwarranted eviction nor reduction to poverty could be compensated adequately by monetary damages awarded after a distant hearing. Ibid.

In the present matter, petitioner has failed to establish irreparable harm if J.M. is not admitted into the Byram Choice program at this time. J.M. is currently enrolled in the Goddard school and expects to participate in its ESY program this summer. If he does not attend the Byram program in the fall, he is not left with no other educational options for the 2018–2019 school year. For one, he has the option to attend kindergarten in the Hopatcong school district, his home district. While petitioner clearly believes that Byram would be the better choice for J.M., and that it would provide him with the services he requires, petitioners offered no evidence to suggest that Hopatcong could not, or would not, provide J.M. with those needed services and supports. In fact, Hopatcong's child study team has evaluated J.M. and determined him eligible for special education and related services. IEPs were prepared in 2017 and more recently for the 2018–2019 school year, which petitioner initially agreed to but has recently rescinded. Accordingly, I **CONCLUDE** that petitioner has not sufficiently demonstrated that J.M. will suffer irreparable harm if emergent relief is not granted.

As petitioner is unable to satisfy the first prong of the Crowe test, further analysis of the other criteria for emergent relief is not required. It is noted, however, that petitioner does make a compeling argument that the sending district does not provide a State-funded pre-school program, which may therefore qualify J.M. as a Tier 1 applicant.

Based upon the arguments made and record before me, I **CONCLUDE** that petitioner has not not satisfied all four criteria required for emergent relief. As petitioner has failed to satisfy all four prongs of the Crowe test for emergent relief, and for the foregoing reasons, petitioner's request for emergent relief is **DENIED**.

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.

May 29, 2018

DATE

SUSANA E. GUERRERO, ALJ

jb

AGENCY DKT. NO. 73-3/16

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	ORDER
J.B., ON BEHALF OF MINOR CHILD, M.G.,	:	
RESPONDENT.	:	

On May 19, 2016, a final agency decision was rendered in this matter, wherein the Commissioner found J.B. liable for tuition in the amount of Three Thousand Four Hundred Twenty Two Dollars and Forty Cents ($3,422.40), representing tuition for a period of ineligible attendance by her child, M.G., in the Board's school district from April 17, 2015 through June 19, 2015. The Board subsequently notified the Commissioner that J.B. had failed to comply with the decision, and requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. J.B. 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, Janet Bell is now subject to entry of a judgment by the court in the amount of $3,422.40, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 7/06/18

Date of Mailing: 7/06/18

OAL DKT. NO. EDU 08307-18
(EDU 00866-18 ON REMAND)
AGENCY DKT. NO. 281-12/17

J.C., on behalf of minor child, R.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record, proposed settlement agreement (Agreement), and Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1 – mindful of the Commissioner's May 22, 2018 determination that the prior Agreement submitted did not comply with *N.J.A.C.* 6A:3-1.13, as it was not signed by the Board Attorney, nor did it contain a copy of the Board's resolution approving the Agreement. Since there is now a Board resolution approving the terms of the settlement, the Commissioner can approve the within Agreement in its present form.

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

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 7/09/18
Date of Mailing: 7/09/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 08307-18N
AGENCY DOCKET NO. 281-12/17

J.C. ON BEHALF OF R.M.,

Petitioners,

v.

TOWNSHIP OF RANDOLPH BOARD OF EDUCATION, MORRIS COUNTY,

Respondent.

Judith Connelly, petitioner, pro se

Matthew J. Donohue, Esq., on behalf of respondent (Schenck, Price, Smith & King, LLP)

Ronald Conti, Board President, on behalf of respondent

Record Closed: June 14, 2018 Decided: June 14, 2018

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

This matter was initially transmitted to the Office of Administrative Law (OAL) on January 17, 2018, under OAL Docket Number EDU 00866-18, 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

hearing was scheduled for April 11, 2018. On March 9, 2018 respondent's counsel submitted a Motion for Summary Judgment requesting the matter be dismissed. The undersigned denied said motion by Order dated March 29, 2018. Prior to the hearing date respondent's counsel advised that the parties reached a tentative settlement agreement and requested the hearing be cancelled. The hearing was rescheduled to June 5, 2018. Respondent's counsel submitted a fully executed Stipulation of Settlement prior to the hearing date and the undersigned issued an Initial Decision Approving the Settlement on April 13, 2018. The matter was remanded to OAL on June 7, 2018, by Order dated May 22, 2018, in which the Commissioner stated:

> ....The file does not contain a copy of the Board's resolution approving the settlement terms and designating the Board President to sign the Agreement on its behalf; nor is the resolution attached to the Agreement itself. Alternatively, the Agreement is not signed by the Board Attorney, who is the Board's duly authorized representative in litigation. Without either Board Attorney's signature or the appropriate Board resolution approving the Agreement and designating the Board President to sign the Agreement on its behalf – as required under N.J.A.C. 6A:3-1.13- The Commissioner cannot approve the within Agreement.
>
> ....

Upon receipt of the Commissioner's Order, respondent's counsel promptly forwarded a copy of the Resolution Approving Settlement, which authorizes the Board's President to execute the agreement on respondent's behalf. Said Resolution is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement and General Release, I **FIND**:

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

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

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

ORDER that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

June 14, 2018
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: _____

Date Mailed to Parties: _____

ljb

SCHENCK, PRICE, SMITH & KING, LLP
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Attorneys for the Randolph Township
Board of Education

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

J.C. o/b/o R.M., Petitioner, v. RANDOLPH TOWNSHIP BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OAL Dkt. No. EDU 00866-2018 N Agency Ref. No. 281-12/17 **STIPULATION OF SETTLEMENT AND RELEASE**

This Agreement is made by and between Petitioner, Judy Connelly ("J.C."), minor child R.M.'s biological mother, Tracy McConkey ("T.M."), and the Respondent, Randolph Township Board of Education Board of Education ("Board").

RECITALS

WHEREAS, on or about November 7, 2017, Petitioner J.C. requested that her granddaughter R.M. be enrolled in the Randolph Public School District ("District") as an affidavit pupil pursuant to N.J.S.A. 18A:38-1(b)(1); and

WHEREAS, J.C. indicated within the affidavit that minor child R.M.'s biological mother, T.M., would be moving to Randolph, New Jersey after the conclusion of litigation in the State of Washington, but no proof of T.M. moving to Randolph was ever submitted; and

WHEREAS, on or about November 22, 2017, the Board denied Petitioner's request due to R.M. not meeting the criteria established in N.J.S.A. 18A:38-1(b)(1); and

WHEREAS, Petitioner thereafter filed a Petition of Appeal to challenge the Board's determination with regard to R.M.; and

WHEREAS, this administrative action is captioned J.C. o/b/o minor child R.M. v. Township of Randolph Board of Education, and is currently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 00866-2018 N, Agency Dkt. No. 281-12/17 ("the Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, on or about March 29, 2018, T.M. has moved to Randolph, New Jersey; and

WHEREAS, in order to avoid the expense, inconvenience, distractions and inherent uncertainties associated with continuation of this dispute, and the fees and expenses that inevitably would result therefrom, the Parties, by this Agreement, herein agree to adopt a full and final settlement for the duration of the 2017-2018 school year of any and all claims, lawsuits, complaints, and/or disputes between Petitioner and Respondent in connection with any and all damages and losses arising from the Litigation; and

WHEREAS, by this Agreement, the Board shall not contest R.M.'s eligibility to attend the District for the remainder of the 2017-2018 school year; and

WHEREAS, by this Agreement, Petitioner will voluntarily withdraw the Petition of Appeal without prejudice, and without costs to any party as against the other;

NOW, THEREFORE, in consideration of good and valuable consideration, the sufficiency and adequacy of which is acknowledged, the parties to this Agreement agree as follows:

1. The Parties mutually agree that for the remainder of the 2017-2018 school year, R.M. shall be enrolled in the District on a tuition-free basis, subject to T.M. signing an affidavit declaring her intent to remain domiciled within Randolph Township for the foreseeable future.
2. Petitioner understands and agrees that this Settlement shall apply only for the 2017-2018 school year and this Settlement shall in no way entitle R.M. to enroll in the District in any subsequent school years if T.M. is no longer domiciled in Randolph Township, New Jersey.
3. Petitioner, in consideration of this Stipulation of Settlement and Release, and in full, final, and complete settlement of the matter, hereby agree to a withdrawal and dismissal, without prejudice, of the Petition of Appeal in this matter.
4. The terms of this Agreement shall in no way constitute acceptance or assent by the Board that R.M. is automatically entitled to a free public education in the District at any point in the future, and the Parties understand and agree that Respondent reserves the right to investigate R.M.'s and/or Petitioner's residency status in the District at any time in order to determine whether or not Petitioner and/or T.M. and R.M. are domiciled in the District.
5. This Agreement is subject to approval by the Board. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.
6. Petitioner and T.M. voluntarily agree that they shall not file any claims against the Board, collectively or individually, its members, employees and agents, arising from R.M.'s education in the District, unless there is a complete failure by the same, either directly or indirectly, to the educate the child as per New Jersey State standards.

7. 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.

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

9. Petitioner and T.M. hereby represent that they are freely entering into this Agreement, that they were advised of their right to obtain counsel of their choosing and have chosen not to be represented, and that they have read and fully understand the contents and effects of this Agreement.

10. This Settlement is subject to the approval of the Administrative Law Judge assigned to this matter and the Commissioner of Education. The terms of this Agreement shall not be binding until said approvals are received.

11. This Agreement shall be binding upon all Parties hereto, and shall inure to the benefit of each of them, as well as their respective estates, heirs, legal representatives, successors, predecessors, parent companies, subsidiaries, affiliates, owners, directors, officers, shareholders, members, employees, agents and assigns.

12. This Agreement constitutes the entire understanding and agreement by the parties with respect to the subject matter of this Agreement, and there are no agreements, undertakings, restrictions, representations or warranties as between the parties other than those set forth herein. This Agreement supersedes all previous arrangements or understandings, whether written or oral, and contains the entire agreement of the parties with respect to its subject matter. This Agreement may be modified or amended only by written agreement jointly executed by the Petitioner and Respondent.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, consisting of six (6) pages, on the dates set forth below.

PETITIONER

Date: 4/9/18

Judy Connelly, Petitioner

Date: 4/9/2018

Tracy McConkey

FOR RESPONDENT,
RANDOLPH BOARD OF EDUCATION

Date: 4/10/18

Ronald Conti, Board President

STATE OF NEW JERSEY)
ss:
COUNTY OF MORRIS)

I CERTIFY that on April 9, 2018, Judy Connelly and Tracy McConkey, Individually and o/b/o R.M., personally came before me and acknowledged under oath, to my satisfaction, that they:

(a) are named in and personally signed this document; and

(b) signed, sealed and delivered this document as their act and deed.

Susan E. Chillemi
~~Attorney or~~ Notary Public

SUSAN E. CHILLEMI
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES FEB 13, 2022

3. RESOLUTION APPROVING SETTLEMENT

BE IT RESOLVED, that the Board approves the settlement agreement in the matter captioned J.C. o/b/o minor child R.M. v. Township of Randolph Board of Education, currently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 00866-2018 N, Agency Dkt. No. 281-12/17 in accordance with the terms and conditions therein; and

BE IT FURTHER RESOLVED, that the Board President is authorized to execute the agreement on behalf of the Board.

Finance, Facilities and Transportation Motions 1 – 3

1st: Mr. Faranetta

2nd: Ms. Standridge

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Ms. DeVito	Mr. Epstein	Mr. Faranetta	Ms. MacKay	Mr. Matos	Ms. Standridge	Mr. Treston	Ms. White
Y	Not Present	Y	Y	Not Present	Y	Y	Y

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for the Randolph Township
Board of Education

J.C. o/b/o R.M., Petitioner, v. RANDOLPH TOWNSHIP BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OAL Dkt. No. EDU 00866-2018 N Agency Ref. No. 281-12/17 **AFFIDAVIT**

STATE OF NEW JERSEY :
ss:
COUNTY OF MORRIS :

Tracy McConkey, of full age, being duly sworn according to law, deposes and says that:

1. I am a currently domiciled in Randolph Township, and reside in 121 South Road, Mendham, New Jersey with my minor child R.M. as of this date.

2. I fully intend to remain domiciled within Randolph Township at 121 South Road, Mendham, New Jersey with my minor child R.M. for the foreseeable future. I consider this address my permanent residence, i.e. my true, fixed permanent home.

3. I fully understand that I must provide proof of residency that I am domiciled at 121 South Road, Mendham, New Jersey to the Randolph Board of Education Business Administrator no later than April 30, 2018.

4. I fully understand that failure to provide the aforementioned proof of residency by April 27, 2018 will render minor child R.M. as a non-resident student, and I will be assessed tuition if I fail to provide the proof of residency.

TRACY MCCONKEY

Dated: 4/9/2018

BE IT REMEMBERED, that on Apr. 19, 2018, before me the subscriber, personally appeared TRACY MCCONKEY, who, I am satisfied, is the person named in and who executed the within Instrument, and thereupon did acknowledge that she signed, sealed and delivered the same as her act and deed, for the uses and purposes therein expressed.

Notary

SUSAN E. CHILLEMI
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES FEB 13, 2022

Pursuant to Referral by the Commissioner of Education
State of New Jersey
Before Timothy J. Brown, Esquire

In the matter of:		
The Tenure Hearing of	:	
Irene Sincaglia	:	
	:	**Agency Docket No. 44-2/18**
Board of Education of the	:	
Andover Regional School District,	:	
Sussex County	:	

Decision and Award

Appearances:

On behalf of the Board of Education of the Andover Regional School District, Sussex County:
John G. Geppert, Jr., Esquire
Searinci & Hollenbeck, LLC
1100 Valley Brook Ave.
P.O. Box 790
Lyndhurst, NJ 07071

On behalf of Irene Sincaglia:
Sheldon H. Pincus, Esquire
Bucceri & Pincus, Esqs.
300 Broadacres Drive, Suite 210
Bloomfield, NJ 07003-3153

Introduction

This matter arises from tenure charges dated February 2, 2018 and received by the New Jersey Department of Education, Bureau of Controversies and Disputes on February 23, 2018; charges submitted by **the Board of Education of the Andover Regional School District, Sussex**

County (the School District or the District) based upon Conduct Unbecoming and Other Just Cause pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A6-11, N.J.S.A. 18A6-16; N.J.S.A. 18A6-17.1 and N.J.S.C. 6A:3- 5.1 against Irene Sincaglia (Respondent), a tenured school nurse, a March 19, 2018 determination by the Department of Education that the tenure charges are deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the arbitrator of Respondent's defenses and any motions filed with the arbitrator and a March 19, 2018 referral of the tenure charges to the undersigned by the Department of Education, pursuant *to P.L. 2012, c. 26, as amended by P.L. 2015, c. 109,* to hear and decide the tenure matter.

On March 28, 2018, the Undersigned executed a **SEALING ORDER** in the matter requiring, among other things, that all documents admitted into evidence shall have personal identifiers of any student redacted; all references to any student in any stenographic notes or the Arbitrator's Decision shall be by initials only and that:

> The evidentiary record in the arbitration shall be impounded and sealed and forwarded to the Commissioner of Education in sealed form at the conclusion of the arbitration proceeding.

The hearing in the matter was conducted on April 25, May 1, 11 and 21, 2018, in Newton, New Jersey. At the hearing, all parties were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. A transcript was taken of the hearing. Respondent was present for the entire hearing and testified on her own behalf. At the close of the hearing on May 21, 2018 the parties elected to submit written closing argument, upon the receipt of which by the arbitrator on June 12, 2018, the matter was deemed submitted.

This Award is made following my careful consideration of the entire record in the matter, including my observation of the demeanor of all witnesses.

Issues

The issues presented in this matter may be accurately stated as follows:

Has the District met its burden of establishing by a preponderance of the evidence the truth of its tenure charges against Respondent, and if not, what is the appropriate remedy?

The Tenure Charge

The tenure charges in this matter are based upon Conduct Unbecoming and Other Just Cause pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A6-11, N.J.S.A. 18A6-16; N.J.S.A. 18A6-17.1 and N.J.S.C. 6A:3- 5.1 and state:

CHARGE ONE: CONDUCT UNBECOMING

1. During the period from September 2017 to present, Respondent has demonstrated unbecoming conduct in the following manner:

    a. The Respondent has failed to maintain a standard of care for the protection of a student commensurate with her assigned duties and responsibilities.
    b. The Respondent has failed to confer and advise Administration when she received a completed individualized health plan from the student's physician which detailed the necessary accommodations and or nursing services to be provided.
    c. The Respondent has misrepresented to Principal that an individualized health plan may not be required for a student when physician approved plan was in her possession.
    d. The Respondent has misrepresented to Administration that she did not have in her possession an emergency individualized health plan specifying the delivery of accommodations and services needed by a student in the event of an emergency.
    e. The Respondent failed to finalize the written healthcare provisions required under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sec.794(a), for a student.

f. The Respondent failed to review, summarize, and transmit available health and medical information regarding a student to the Child Study Team.
g. The Respondent failed to inform the principal of receipt of medical information from the student's medical home providing accommodation's information used to develop an individualized health plan and emergency health plan.
h. The Respondent has falsely stated to Principal that an IHP could not be finalized due to a lack of parental consent when the school nurse was the parent.
i. The Respondent has failed to render a prompt report as required by district policy.
j. The Respondent has placed a student at risk for anaphylactic shock by not developing an individualized health plan and individualized emergency health plan.
k. The Respondent has placed a student at risk for failing to have a form on file permitting the school district to contact and communicate with a student's physician regarding an individualized health plan and individualized emergency health plan.
l. The Respondent has placed the district at risk when in her capacity as the school nurse, she contacted student's physician without having a signed authorization form on file and commingled her role as school nurse and parent.
m. The Respondent has failed to follow Board policies and procedures including but not limited to Board Policy No. 5310 "Health Services"; Board Policy No. 5308 "Student Health Records"; Board Policy No. 5330 "Administration of Medication", Board Policy No. 3214"Conflict of Interest", Board Policy No. 3280 "Liability For Student Welfare".

CHARGE TWO: CONDUCT UNBECOMING

2. The Board restates the allegations contained in Charge One and re-alleges and incorporates them by reference as if fully set forth at length herein.
3. During the period from September 2017 to present, Respondent has additionally demonstrated unbecoming conduct in the following manner:
    a. The Respondent has failed to adhere to school policies and procedures.
    b. The Respondent has been insubordinate.
    c. The Respondent has failed to comply with administrative directives.
    d. The Respondent has failed to proceed with the verification process for the free and reduced lunch applications and has

caused the district to miss its deadline and has required the district to request an extension for which the district may be at risk of having its funds held.

e. The Respondent has failed to comply with Board Policy No. 3270 "Professional Responsibility" and Board Policy No. 8540 "School Nutrition Programs".
f. Respondent has approached teachers and related service providers in the hallway and in their classrooms to discuss her own child's progress while school was in session and in contravention to the Principal's directive.
g. The Respondent has engaged in a pattern of behavior contrary to the position of a tenured teaching staff member.

CHARGE THREE: OTHER JUST CAUSE

4. The Board restates the allegations contained in Charge One Through Charge Two and re-alleges and incorporates them by reference as if fully set forth at length herein.
5. During the period from September 2017 to present, Respondent has additionally demonstrated other just cause to warrant dismissal in the following manner:
    a. The Respondent has improperly allowed her child to use the restroom in the nurse's office and without reason for same.
    b. The Respondent has improperly taken her children into the teacher's lounge to fill up their water bottles without authorization to do so.
    c. The Respondent has kept her child in the nurse's office for an improper amount of time, sometimes over four hours, resulting in missed instruction and without documented reason for the length of time spent in the nurse's office.
    d. The Respondent has kept her child in the nurse's office for recess and lunch although no medical documentation was provided to support her actions.
    e. The Respondent has kept her child in the nurse's office during outdoor physical education class causing the child to be absent from physical education without medical documentation to support her action.
    f. Respondent has sent her child to Occupational Therapy room for recess without medical documentation to support her action.
    g. Respondent has contacted teachers, therapists and child study team members during the school day to discuss child's progress, express her concerns and to request private evaluations be conducted after the Principal has directed Ms.

Sincaglia as shared with other employees to after hours and during scheduled meeting times.

h. The Respondent has used her position as school nurse to obtain the above unwarranted privileges and advantages for her children in contravention of Board Policy 3214.
i. The Respondent has consistently failed to follow instructions and violated the District's policies and procedures.

The cumulative effect of Respondent's misconduct as set forth above constitutes other sufficient cause sufficient to warrant dismissal.

Facts

Respondent

Respondent has been employed by the District as a School Nurse since September 2013 and has always worked at the Florence M. Burd Elementary School (FMB). She has consistently received high ratings on her observations and reviews and has no history discipline. Following the 2016-2017 school year, Respondent and her husband decided to transfer their child MS[1] - a special needs student - to the District from a small, private school. After some delay, MS's file was transferred to the District during the summer of 2017, a District Child Study Team (CST) was assigned to MS, and an initial, transfer IEP meeting was held by the Child Study Team and parents on August 1, 2017.[2] During the meeting Respondent expressed concern about keeping her roles of mother of a student and school nurse separate. The meeting resulted in a continuation of the then existing "Service Plan" previously in place at MS's former school, with the understanding that the District's CST would meet again after a period of observation and getting to know MS.

[1] Students are referred to herein only by their Initials. Respondent has two children enrolled in the District; of which MS is involved in this matter.
[2] All dates are 2017 unless otherwise indicated.

Respondent and her husband retained legal counsel on or about September 8 or 9 for purposes of representing themselves and MS in regard to the District providing MS "a free, appropriate public education." The record establishes that the District became aware of Respondent's legal representation on or about September 18.

MS

MS was enrolled in FMB. MS is classified as autistic and has asthma, multiple food allergies and cold urticaria. Cold-urticaria is an allergy to cold temperatures or chilling weather conditions and can result in hives and, in some cases, anaphylactic shock. As the parent of MS, Respondent supplied the school nurse with a prescribed inhaler for asthma and an epi-pen for anaphylactic shock. The record establishes that an "Allergy Action Plan" dated October 18 for peanut and tree nut allergies was in the school nurse's files. The Action Plan listed EpiPen and Proair HFA as medications and provided directions for EpiPen auto injection in the event of anaphylaxis.

September

During the first weeks of the school year, Respondent regularly "took a peek" at MS while the student was in the cafeteria to check that MS was not exposed to allergens, to check that the student was not experiencing hives from recess (recess for MS was scheduled immediately before lunch) and to check on MS's social interaction. The record also establishes that throughout the month of September and during the first week of October, teachers and other professionals such as the occupational therapist and speech pathologist would discuss MS in-passing with Respondent and Respondent would do the same with them. At one point during the month of September, Respondent asked her

school principal, Cindy Mizelle, to encourage other professionals in the school to not approach Respondent during her school day to discuss non-health related matters concerning MS, that those were parent matters to be raised at other times. Also during the month of September principal Mizelle became concerned that MS was going to Respondent's nurse's office to avoid class or use the lavatory there rather than those provided for students. Respondent shared this concern. However, Mizelle held the view that Respondent was too encouraging of MS's "going to the nurse conduct" and facilitated the student's use of the nurse's bathroom and visits to the nurse's office to avoid school. Mizelle was also concerned that Respondent was inappropriately engaging teachers and other staff during school hours to discuss non-health-related, school and/or IEP-related matters concerning MS.

Principal Mizelle testified that for the first five weeks of the 2017-2018 school year, Respondent performed her duties as a school nurse responsibly, in a proper fashion. In any event, Mizelle also testified that before an October 6 meeting between Respondent and management, Mizelle had not communicated her concerns or issues about the nurse's conduct to Respondent. However, Mizelle did communicate her concerns about Respondent's conduct to the District's Superintendent and was instructed to meet with Respondent to address the concerns.

October

Meeting of October 6

On October 6 Mizelle and District Supervisor of Special Services and Learning (and in charge of the District' Child Study Teams) Lee Ann Smith met with Respondent

to discuss issues related to Respondent's job performance.[3] As to the content of the discussions during the meeting, the memorandum documenting the meeting, written shortly after the meeting by Smith, provides:

> Friday, October 6, 2017
>
> Due to a number of reports, Mrs. Mizelle and myself met with her [Respondent] to remind her about not crossing the lines between being a nurse and being a mom. Son (Sic) reports from staff members are as follows:
> - Irene approached Mrs. Pepe regarding speech services asking for a change in frequency/duration of services
> - Irene approached the OT regarding her [child's] services
> - Irene brought her [child] into the teacher's lounge to fill up [the child's] water bottles from the teacher's water dispenser
> - Irene brought her [child] to have lunch in the nurse's office prior to any health plan
> - Irene continually went to the lunchroom to check on her [child]
> - Irene approach the case manager, Nick Wilbur regarding IEP concerns during the school day
> - Irene approached her [child's] teacher about various IEP concerns during the school day
>
> During the meeting she asked if the conversation was about her [child], to which Cindy replied "no". We brought up the concerns about her role as a nurse and not crossing the line. We shared reports and incidents to which she denied. Irene stated that people have approached her about her [child], not the other way around. She also stated that other parents that work in the district, such a Tara Rossi and Mindy DuCharme, check on their kids throughout the day. I told her that wasn't true but on the off chance it was I would remind them to not do that. There was a conversation to which Irene admitted taking her [child] to her office when [the child] needed a break from recess. We informed her that wasn't appropriate and recess was a break. There was a discussion about [the child] needing to use the restroom during lunch and [the child] tried to go to the nurse's office to use the restroom there and Cindy redirected [the child] to the student restroom off the gym. During the conversation Cindy asked Irene how she felt her [child] was

[3] When Respondent was asked to speak with Mizelle, she was told by the principal that the conversation would not be about MS and was not told that the Child Study Team supervisor would be present. The inclusion of the Child Study Team Supervisor – an individual who had a supervisory roll over MS's IEP process - in a discussion ostensibly relating *only* to the school nurse's performance and not to matters related to MS, highlights the interrelated, overlapping and confusing character of the conduct of the parties and the circumstances involved.

> doing in the new school, to which Irene replied" I'm not going to discuss my [child]". At that point Irene talked about her [child's] diagnosis of Cold Urticaria and explained the issues with the school day such as recess, gym class, etc. We informed her multiple time that she needed to treat her children as she would any other student while acting as school nurse.

According to Mizelle, earlier in the school year Respondent had come to her complaining that staff members were approaching her during the school day to discuss MS and asked that Mizelle speak with them. Mizelle thereafter instructed staff members not to discuss MS with Respondent during school time, but that staff members thereafter – and prior to October 6 - reported to Mizelle that Respondent was approaching them and discussing MS. In any event, Mizelle testified that at the October 6 meeting, she communicated to Respondent that the nurse should honor the line between her role as a school nurse and her role as a parent.

District Evidence of Respondent's Interaction with Staff

MS's third grade classroom teacher Jennifer Moriarty reported that MS ate lunch in the nurse's office "multiple times" in September and October, that "multiple times during the fall" Respondent approached Moriarty and asked how MS was doing, and "often" wanted to show the teacher the student's work and ask the teacher's opinion of it. At the hearing, Moriarty testified Respondent approached her about once a week and that on one such occasion Respondent had MS with her and asked Moriarty about work MS had done. Because she didn't think it appropriate to speak about the student in the presence of the student, Moriarty testified, she did not directly address Respondent's question.

CST case manager Nicholas Wilbur reported that "since September" he had observed Respondent in the lunch room on a number of occasions and had been approached by Respondent about MS's homework in late September and that Respondent had handed him Vanderbilt Assessments of MS during a school day "in November."

Speech therapist Jennifer Pepe reported that sometime in early September she went into Respondent's office and talked to Respondent about MS's speech schedule and that sometime "in the Fall" and after the principal had told Pepe Respondent did not want staff approaching her during the school day to discuss MS, Respondent saw Pepe in the hallway and asked Pepe to speak with her while Respondent was at the copy machine and asked the therapist about MS fabricating stories.

October 27 IEP Meeting

On October 27, the District conducted an annual IEP meeting for MS, attended by MS's IEP Case Manager Wilbur, Respondent and her husband and at different times during the meeting different members of the CST team, including MS's primary classroom teacher, the school's Occupational Therapist and the school's Speech Pathologist. CST supervisor Smith did not attend. Nor did principal Mizelle who is not a member of the CST. The meeting was recorded by both Respondent and the District. The Respondent's recording was transcribed and admitted into evidence at the Tenure hearing.

As reflected in the transcript of the IEP meeting, the October 27 meeting was long and establishes that rather than taking on a hearing-like quality, the meeting was a discussion-like forum with individuals frequently talking over or cutting off others as

they discuss various aspects of the challenges presented by MS and explored the student's learning-related and health-related concerns. Significant time was spent on discussions related to the student's food allergies, the student's Cold Urticaria, the student's emotional needs including the need to take sensory breaks to let off steam, the student's and parent's challenges with homework at home and wish that homework be done in school during the school day or in school during homework club, the concern that the student was being routinely pulled from math in order to attend sessions with the OT and Speech Pathologist, the concern that MS should not go outside for recess under conditions that could result in his getting hives due to his cold allergies – conditions that varied based upon temperature, wind and precipitation; concern about where MS would go if recess was not appropriate, concern about who would supervise MS during recess to monitor weather conditions and MS's skin condition, concern about the need for MS to take sensory breaks on a non-scheduled basis when the student was feeling anxious and how MS would be monitored for such need and where the student would go and who would supervise the student, concerns about potential scheduled breaks and where the student would go and who would supervise the student for such as well as what subjects the student would be pulled from for such scheduled breaks. The meeting was an exploration with many of the participants learning about different aspects of the students and the student's challenges for the first time.

Although case manager Wilbur offered very few explicit statements about details of the student's IEP or explicit answers to Respondent's questions during the meeting, the gist of Wilbur's statements and responses can fairly be interpreted as establishing: (1) that the CST's consideration of how best to address MS's needs was ongoing; (2) that the

CST had enough health-related information about cold urticaria and declined Respondent's offer to have the student's doctor provide information to the CST; (3) that the administration would have to determine which staff would be responsible for monitoring MS during recess and lunch and establish a plan on how to provide breaks, break locations and related supervision for MS; (4) that there was nothing different about Respondent asking Wilbur about her child's IEP-related questions during the school day than other parents calling the case manager about their children during the work day; (5) that Respondent was not precluded from providing MS school-nurse-services in the same manner she would provide such services to other students and (6) that Respondent would draft an individual health plan (IHP) for MS relating to cold urticaria to be attached to MS's plan.

Wilbur's wrote an email to Lee Ann Smith, Principal Mizelle[4] and consultant Courtney Wisinski during the afternoon of October 27 summarizing the meeting as follows:

> Hi All
>
> Had a very thorough meeting for [MS] this morning. A few things came up that I did not know how to fully address. Also, not sure if I may need administrative assistance, so we agreed that I would reach out to you guys.
>
> Irene brought up MS's allergy condition to cold weather. Since it is getting cold out, she asked for a medical/cold plan[5] to be developed. At first, she wanted it to be placed into IEP. I initially said I would check on this, but finished off by saying since it had no impact on his academic capabilities that it could be a plan outside of his IEP. His condition is already documented in his IEP. Basically, any temperature below 40 he definitely cannot go out. However, there

[4] Mizelle testified that she received no communication from Wilbur in the immediate aftermath of the October 27 meeting.

[5] I note that the plan to deal with MS's medical/cold allergy related conduct by the school is referenced in Wilbur's email in the singular.

has been instances when it was warmer than 40 and he has had an allergic reaction. Some ideas were brought up for recess time that include: helper at younger grade lunch, give him a chrome book, have a buddy come in to give him company. However, we did not finalize anything. Just begun conversation. Also, she questioned fire drills during cold weather.

Second thing she brought up was creating a "structured" break period for him during the day.[6] This had some back and forth. I feel she contradicted herself because she was telling me that we need to create more of a structure break period for him, but then she said that their private psychologist does not fully support break times because he uses it to avoid work. Anyway, we began discussing possibly creating a 5 minute "structured" break time in the afternoon. The only issue is to find adult supervision. I indicated that if we agree on a time for break, we would definitely be able to provide supervision. We ended by agreeing on that I would start the conversation with staff here and she would speak to her private psychologist.

The last thing Irene mentioned what should she do if staff approach her during school hours about MS? I truly did not know how to really respond to this because we call parents throughout the day. She gave an example of Donna approaching her about MS following an OT session. Irene asked is that OK or should it not happen? I think I may have said that Donna could email her instead of going to her directly. I do not fully remember how I responded…

November

Mizelle testified that throughout the month of October the CST as well as herself "mentioned" to Respondent the need for a health plan for MS. Mizelle did not identified any further detail of her claim other than to testify that:

> I would approach Ms. Sincaglia and let her know that we need to do a health plan and we would discuss that, yeah, we'll get

[6] The structured break idea referenced by Wilbur – in the sense of a standard time and place - was actually brought up by another member of the staff at the meeting in response to Respondent's explaining how MS needs occasional sensory breaks on an as-needed basis depending upon the circumstances and that those breaks are best to be of a "structured" or consistent character in terms of where they would be taken and who would supervise the child. Rather than such an open-ended, ever-changing process, it was suggested that a standard break time and place would be more logistically viable, with its time targeted to when the child is usually in need of a break, with the child then having the option to take advantage of the break or not.

> something on the calendar or she was waiting for more documents or something so there was a reason why, but we were aware that we needed to get one.

Mizelle also testified that the school nurse and school principal are responsible for preparing health plans and that it would normally take only a day or two to prepare them.

Mizelle testified that on or about November 15 Respondent came to her "distraught" about a fax Respondent was supposed to receive at FMB but had not come through. Respondent stated at the time that the fax contained confidential student health information. Mizelle testified that she spent "some time" with Respondent attempting to determine what had happened to the fax, including having the District's IT person review the fax machine log and determine that the fax had come through. According to Mizelle, Respondent did not tell her the fax was information related to MS or related to MS's health plan.

Mizelle also testified that at some point she was handed an envelope for hand-delivery to Respondent. Mizelle testified that she did not know what was in the envelope and that unbeknownst to her the envelope; (1) contained the fax for which Respondent was search on November 15 and (2) the fax was a health plan for MS signed by MS's doctor.

According to Mizelle, on November 20 she spoke to Respondent about scheduling a time to create a health plan and that Respondent responded that the lawyers were working on it. Mizelle testified that prior to that time she did not know "lawyers were involved in this." On November 21 or 22 Mizelle had another conversation with Respondent during which Respondent reported that she and her husband were taking MS to a new doctor and the new doctor thought there might be another condition going on

with MS and was going to try taking the child off medication and going to put the child on steroids without restrictions for going outside in the cold. Mizelle replied that that sounded great.[7]

On November 27 Mizelle was approached by Courtney Wisinski, the District's Special Ed Associate Consultant, and asked about the status of the health plan for MS. Mizelle reported that she had asked to schedule a meeting with Respondent and that Respondent had state that the lawyers were discussing the issue and the nurse was not sure if there was going to be a health plan or a 504 plan, and that Respondent did not want to discuss the matter until the lawyers had made a decision. Mizelle sent an email to Wisinski stating the same and by return email Wisinski expressed confusion about the matter of a health plan and referred to an enclosed copy of a November 16 email received by the District's attorney from Respondent's attorney stating, in relevant part:

> Thank you for your prompt responses. I spoke with my client.
>
> I was advised that mom, as school nurse, is working on developing a comprehensive health plan in consultation with [MS's] allergist. When it is completed she will provide a copy to the case manager and I will also send you a copy for your records…

In her view, Meltzer considered the information she had received about the MS health plan conflicted.

According to Mizelle's notes, on November 29 she again asked Respondent about the need for a health plan and the need to schedule a time to meet and that Respondent did not want to talk. As a consequence, Mizelle requested to meet at a specific time later

[7] As it turned out, it became apparent within a matter of days that the new strategy was not nearly as effective as had been hoped.

that day and Respondent asked that Union representation be present. At the meeting, Respondent was accompanied by the union building rep. Mizelle testified that she asked Respondent three pre-prepared questions and wrote down Respondent's answers.

First, Mizelle asked; "Do we have documentation from a doctor stating that this child needs a health plan?" To which Respondent answered no, that we had information from the school the child had attended last year and that information was forwarded to FMB, that the parents took the child to a doctor on November 27 and the treatment protocol may change and the child has another doctor appointment in two weeks. Mizelle testified she then asked; "Do we have a Health Plan on file for this child?" To which Mizelle testified, Respondent said "no," that the nurse created a plan with input from the doctor, the draft plan was shared with the parents and they have not signed and returned the plan, and the parent is waiting to hear from their attorney before sharing/signing the Health Plan with the school. Finally, Mizelle, testified, she asked; "Does this child require a Health Plan at this time?" to which Respondent answered she feels that yes, the child should have a plan.

According to Mizelle, on November 30 Respondent was out on sick leave and Mizelle telephoned her (or sent her a text) asking if MS had a prescription for an inhaler at the school. Mizelle confirmed that a doctor's note was in the school

Mizelle testified that on December 1 she attended a meeting with the members of MS's CST team, Superintendent Beck, Consultant Wisinski, and CST Supervisor Smith to "discuss our concerns about a lack of a plan." Mizelle went on to testify:

> ...The CST Team had a copy of an FMB health plan. It was the first time I had seen that plan....and that it was signed by a doctor...I was surprised, because in my numerous

conversations with her [Respondent], it had never been brought up that there was a plan.
Q. Okay. And what did you think of Ms. Sincaglia not telling you that a plan existed at some point?
A. It was concerning; concerning that information – she wasn't forthright with this information. It was concerning that – it became clear to me that the fax that she was looking for that she was so concerned over was in fact the health plan. Never was that shared with me.
Q. Okay.
A. So that just seemed – it was all very secretive and not forthright and it was –
Q. Okay. It was of concern to you?
A. it was of, yeah, great concern.
Q. Okay ..then…?
A. We met with Ms. Sincaglia to inform her she as being put on administrative leave. That was on December 4th.

Mizelle signed the tenure charges herein and testified as to the reasons for the charges:

Q. Turning on then, based on all the information that we have discussed today and your memoranda and your emails that you had sent, did you have concerns about Ms. Sincaglia's performance?
A. No. I mean I didn't have concerns – she was a good nurse, she was available for the students, but yeah, I do have concerns with her ability to –
A. Based on what we've been discussing this morning –
A. Yes.
Q. –and the issues that you've recounted, did you have concerns regarding her performance and –
A. Yes.
Q. –the events of the fall?
A. Yes.
Q. Okay. Could you share those with us?
A. Concerned that information - - she wasn't forthright with information, concerned that she was overstepping the bounds within her position to give special treatment to her child, not working with the team that was in place to support her child; the lack of information, the lack of what I felt is honesty to some of our questions is very much concerning.
Q. Okay. By honesty to questions, do you mean her comments regarding the health plan?

A. Right.
Q. And did you view that as insubordination?
A. Yes, At the time, I felt – kind of at the end, I realized it was. At the time you're trying to work with somebody and you're asking questions and you're taking them at face value and then – yeah…
…
Q. Okay. And then did you say anything to the superintendent about your concerns
A. Yes…I told him that I had a lot of concerns. I'm concerned that the relationship has been fractured, that there's not a sense of trust on either side at this time, and I have concerns with her concerning or continuing to be the nurse in my school…I felt we needed to have a conversation or we needed to move forward with having her dismissed.

Respondent's Testimony

The Meeting of October 6

Respondent testified that at the meeting both Mizelle and Smith made statements about being a mother and that Mizelle said two or three times something to the effect of Respondent needed to "back off" from her child. There were no warnings that if Respondent continued any activity that she could be subject to discipline or discharge.

Respondent recalled that she was upset that Mizelle began to discuss MS when the principal had stated that the meeting was not about MS and recalled that when the subject came up Respondent explained cold urticaria, said that they needed to have a plan because the weather was turning colder and was told they would talk at the next IEP meeting.

The October 27 IEP Meeting

Respondent testified that she did state at the meeting that MS was a risk of anaphylactic shock from the cold urticaria and that the CST members present seemed

confused. As a result, she attempted to explain that there was a real need to monitor MS closely and to have a plan about where MS would go if weather conditions were not good for recess and who would supervise him. In her opinion, at the time of the October 27 meeting there were already medical plans in the nurse's office for MS relating to food allergy, anaphylaxis and asthma. As for "the plan" that she agreed to do, it was her understanding that the plan was about how to address MS's need for breaks, and that Wilbur would begin discussions with the administration and they would come up with a plan as to "when and who" and that she would come up with a plan about what the person(s) designated would "do."

The Fax

Respondent testified that in response to a request from principal Mizelle that Respondent provide medical information from MS's doctor relating to MS's cold urticaria, Respondent had a conversation with MS's doctor's office on or about November 13 explaining what she needed and thereafter faxed the doctor's office the same materials Respondent had previously provided the CST about the condition as well as a blank Individual Health Plan form. Respondent testified that what she was to receive from the doctor was not a "health plan" but rather the documentation that Mizelle had requested.

On November 15 Respondent expected to receive a return fax from the doctor. When she arrived at school the fax was not at her school and she began to search for it, included principal Mizelle in the search, and later discovered that the fax had been sent to the District Board's fax machine. Later in the day of November 15 Respondent asked

Mizelle if the principal had seen the fax and Mizelle replied no, that the fax was with the Child Study Team and would bring it over. Respondent testified that Mizelle knew the fax related to MS. Still later in the day Mizelle came to Respondent's office. Also present was Mary Helen Coiro.[8] Mizelle handed Respondent the fax from MS's doctor. The fax was not in an envelope, Respondent testified, and she recalled Mizelle pushing the fax across the desk and saying it was not a plan and the Respondent replied it was a plan and needed to be implemented.

According to Case Manager Wilbur he was given the November 15 fax by the CST secretary on the day it came into the District, reviewed the fax, had copies made for Respondent and CST supervisor Smith and uploaded it into the District's Encore data base system. In his view, Wilbur testified, this was a "basic plan" but did not meet the specific needs of MS.

CST supervisor Smith testified that when she came to work on the day the fax came in, her secretary told Smith about a fax the secretary had found on her desk or in the fax machine. Smith looked at the fax and saw that it appeared to be a health plan for MS. So, Smith testified, she told the secretary to make copies and provide a copy to the case manager (Wilbur) and consultant Wisinski and to send a copy over to FMB.

According to Wisinski, although the fax may have been placed in her District mailbox, she does not check the box often and first saw the fax on or about November 30. According to Wisinski, she was told by Smith that Smith did not see the fax until November 20 and forwarded a copy to Respondent at that time.

November 21

[8] Neither party called Coiro as a witness.

Respondent testified that on November 21 Mizelle came to her and said she wanted to sit down and come up with a plan, and that Respondent said it was in the hands of the attorneys, they were working on it and she was not going to discuss it.

The School Lunch Filing Issue

District school business administrator Donna Mosner testified about Respondent's involvement in the application process for the District to receive reimbursement from the state for the free and reduced lunch program; an amount equal to approximately $25,000.00 annually. The District's policy provides that the school nurse is to determine the students eligible for the program. Respondent had served such a function since Mosner began working for the District in 2015. Mosner explained that for the 2017/2018 school year there were changes to the process including an option for school districts to complete their application for reimbursement on line. The District opted to continue to complete the process in paper form. Mosner explained that the program has a two-step verification process; that for the 2017/2018 school year Respondent completed the first step of the process on time. The second step of the verification process requires school districts to review in detail 3% of the free and reduced lunch applications and verify the accuracy of the information submitted by families on such applications. For the two previous school years for which Mosner is familiar, as well as for the 2017/2018 school year, that meant that the District had to complete such step-two verification for one application.

Mosner testified that she and Respondent communicated continuously throughout the process by email and telephone. On October 4 Mosner emailed Respondent asking

how many "error-prone" applications for the lunch program there were. (The step-two verifications are required to be from such error-prone applications). On November 6 Mosner received an email from Respondent stating she had not received the number of applications to verify. Mosner testified that she was "a little perplexed' by this as they had always had to verify only one application in the past. According to Mosner, in response to the November 6 email she telephoned Respondent, informed the nurse one application had to be verified and that Respondent needed to proceed because it can take a week or two to complete a verification. On November 30[9] Mosner emailed Respondent reminding that she had followed up with Respondent on November 28 and that Mosner needed the second-step verification by 3 o'clock that afternoon to file it on a timely basis. In addition to her emails, Mosner testified, the state sent at least two reminder emails to Respondent notifying that the verifications were due November 30. Mosner testified that although she and the state reminded Respondent of the November 30 verification deadline at least eight-plus times, by 3:45 pm on November 30 Respondent had not submitted the verification. At that time Mosner requested an extension to file the verification and the state granted a two-week extension. Mosner further testified that she did the verification and submitted it on time on December 15, and that Respondent never told her why Respondent was unable to complete the verification.

On cross examination, Mosner agreed that the District's regulations relating to the free and reduced school lunch program require that District verification activity be completed by December 15, that the District's information for the 2017/2018 school year was submitted on December 15 and that the District did not lose any money as a result of

[9] Respondent was out due to illness on November 30 and December 1.

the December 15 filing. Mosner also identified a September 27 email from Respondent expressing difficulties the nurse was experiencing as a result of various changes in the school lunch process and requesting training, and testified that she responded that training was only available in the summer and that she could contact the District's IT person for help with the District's food service software.

Respondent testified that on October 4 she completed all of the lunch-related applications and forwarded them to Mosner. Mosner signed the applications as she was required to do and then told Respondent to proceed with the verification process. Respondent responded by email asking "how many?" In this latter regard, Respondent explained, she needed Mosner's signature on the "verification tracker," before Respondent could send out any letters to families. Respondent testified that in regard to her "how many?" inquiry, she knew that it the past it had always been one, but she could not proceed on the verification until she actually received a number from Mosner and the signature that she had confirmed that particular application. Respondent testified that she did not receive a response that day from Mosner. The need for the signature was not new and Respondent identified an email from a year earlier, dated November 16, 2016 also asking Mosner for the number of applications to be verified for that year.

On November 10 Respondent sent Mosner an email identifying the error prone lunch program applications the District had received (three) because, Respondent explained, it is required that all verified application(s) submitted to the state be error-prone (reflecting family finances close to the applicable financial limits).

Respondent denied that Mosner called her on November 6 in response to Respondent's November 6 email asking how many applications needed to be verified and

further testified that Respondent took a half day that day and was not in school that afternoon.

The evidence establishes that the District was closed November 23-26 for the Thanksgiving holiday. Respondent was present on November 27, 28 and 29, was out sick November 30 and December 1, and was subject to interview and placed on administrative leave December 4.

Arguments

The parties submitted post hearing briefs containing exhaustive analysis of the factual and legal issues presented by the record, the entirety of which have been fully and carefully considered by the undersigned. Only summaries of the post hearing briefs are offered below.

The District

The District asserts that Respondent's dishonesty, breach of trust and violation of District policies warrants her removal. During the portion of the 2017-2018 school year at issue, Respondent violated numerous policies. District records establish that MS visited the nurse's office some 48 times during the period September through November. Respondent violated District policy by granting her child special privileges such as permitting the child to eat lunch in the nurse's office, permitting the child to avoid class by sitting in the nurse's office, permitting the child to use the nurse's office bathroom, allowing the child to fill the child's water bottle in the teachers' lounge and by interfering with her own work by monitoring her child in the lunch room and recess. Respondent

further interfered with the work of other school staff by discussing issues relating to MS with them and seeking benefits for MS. Notwithstanding being warned on October 6 to cease her inappropriate conduct, Respondent continued to violate District policy.

Although required to draft individual health plans for students who need them in a timely manner, typically in a period of days, Respondent failed and effectively refused to draft such a plan for MS; a student at risk for life-threatening anaphylactic shock due to the unusual condition of cold urticaria, and when Respondent had an individual health plan signed by the student's doctor in her possession, she hid the existence of the plan from her school's administration – specifically the school principal – and when asked by the principal if there was health plan for the student, lied to the principal and claimed there was no such plan. Respondent lied, was dishonest, was deceptive and was not forthcoming.

In addition, Respondent failed in her responsibilities relating to the free and reduced lunch program and caused to be at risk $25,000.00 in program-related aide. Although Respondent was responsible for completing the verification process by November 30 and received approximately ten reminders that she had to comply with the deadline from the District's business administrator, Respondent failed to complete the verification process and the business administrator had to seek an extension of time for submission of the verification and submitted the verification herself by the extended deadline.

Based upon her violations of District policies, her failure to meet her responsibilities and her dishonesty toward district administrators, Respondent has shown she does not have the trustworthiness required of a school nurse and the District has

justifiably lost confidence in Respondent such that she cannot be returned to the District. The tenure charges and the dismissal of Respondent should be sustained.

Respondent

The District has the burden of proof. Here, the District claims Respondent acted in an insubordinate manner. To prove insubordination, the District is required to show that Respondent engaged in willful disobedience, or willful refusal to obey orders or directives. The District has not proven such willful conduct by Respondent. Rather, the evidence establishes that the principal filed tenure charges at least in part because of Respondent's responses to the principal's attempt to inappropriately compromise the parental rights of the school nurse whose child was enrolled in the school, including statements by the principal that suggested Respondent could not give her own child services the child would otherwise be entitled to receive from a school nurse. Although principal Mizelle attempted to give "mother to mother" advise to Respondent about Respondent's role as both nurse and mother, Respondent was never warned that any conduct she had engaged in would amount to insubordination, or would result in discipline, let alone that Respondent's continued conduct would result in her removal. Moreover, the District failed to show that Respondent engaged in any conduct in her capacity of school nurse that warranted any form of discipline.

As for the District's primary claim that Respondent lied in response to principal Mizelle's inquiry if the school had a plan, or an individual health plan for MS, the evidence establishes that Respondent truthfully, and correctly, responded to the questions relating to an IHP that the school did not have a plan, but had a draft plan. As established

by the record, the school had received a plan drafted by Respondent and signed by MS's doctor but not yet approved by the student's parents. Further, as to inquiries about "the plan" Respondent consistently responded in a truthful manner about the plan for managing the monitoring and supervision of her child discussed at length at the child's October 27 IEP meeting relating to both; (1) the child's cold allergy and (2) the child's need for breaks due to non-allergy considerations; that being that she was waiting for the administration to provide guidance on "who" (i.e. who on staff would be responsible for monitoring and supervising the student under various conditions) and "where" (i.e. where the child would go when recess was unavailable for health related reasons or when the student needed a sensory-related break either on an impromptu or scheduled basis). The fact is, there was already an emergency, allergy related health plan on file in the nurse's office.

As for the reduced and free lunch related allegations, the evidence establishes that Respondent acted in accordance with District policy. She performed her responsibilities, and when she was faced with newly established aspects of the program sought assistance from business administrator Mosner for addressing those requirements, assistance not forthcoming. District policy requires that program related verification be completed by December 15; a deadline met by the District. When Respondent requested training relating to lunch program verification, she received a response from the business administrator that training was available only in the summer. The evidence establishes that Respondent completed the first part of the process well before the related deadline and that as of October 10 Respondent had done everything she was required to do up to that point. On November 6 Respondent emailed Mosner asking verification-related

questions about calculation of family income and how many applications she needed to verify. Mosner does not recall responding to Respondent's November 6 inquiries. On November 16 Respondent was notified by the state that part 2 of the verification process had not been completed by the District and on that same day Respondent again emailed Mosner asking how many applications needed to be verified and additionally supplied the administrator with form 30 information. On November 17 Mosner emailed Respondent that she needed a part 2 collection report by November 20 and on November 20 Respondent emailed Mosner asking if forms already submitted were what Mosner was looking for and again asked the business administrator how many applications needed to be verified. On November 24, the state reminded the District that verifications were due on November 30. On November 30 Mosner emailed Respondent that one application required verification and wrote that she had previously followed-up with Respondent on this issue on November 28 and that Respondent should try to complete the verification by 3:00 pm November 30. Respondent was absent on November 30 and December 1. She was placed on administrative leave on December 4. Mosner requested an extension, received the extension and submitted the required verification by December 15. The District was in no way penalized for the December 15 filing and at no time during the process was Respondent ever warned that she was being insubordinate or that her conduct amounted to conduct unbecoming.

The District has not met its burden of establishing the truth of its tenure charges against Respondent. The charges should be dismissed.

Discussion

This matter generally involves assertions by the School District that school nurse Respondent violated District policy by: (1) not keeping separate her roles as school nurse and parent to her special needs child/District student "MS"; (2) failing to timely draft and finalize an Individual Health Plan (IHP) for MS to be attached to the student's IEP; (3) being dishonest in responses to health-plan-related questions asked of her by her principal, and (4) failing to meet her obligations relating to required filings for District participation in the free and reduced school lunch program.

Considering the record as a whole, and particularly the arguments proffered by the District, it is plain that the primary and determining motivation for the District's filing of tenure charges against Respondent is the belief by District school principal Cindy Mizelle that in Respondent's capacity as school nurse, Respondent lied to Mizelle, or was otherwise not forthcoming, in her responses to questions asked by the principal relating to the status of MS's Individual Health Plan.

An Environment of Confusion

I find that the record establishes a set of circumstances that created fertile ground for the seeds of misunderstandings and miscommunication between participants, including Respondent and principal Mizelle. In this regard, the case presents: (1) a student with learning and health related challenges – including health challenges not previously known to anyone involved; (2) parents who take an activist role in working with the District to establish frameworks to address the education, health and safety interests of their child, one parent of which must also satisfy her role as school nurse for

that child as well as other students in the school; (3) a Child Study Team (CST) faced with challenges of working with a parent who is also a staff member of the subject student's school and is responsible for providing the CST certain information and documentation related to the student; (4) a student with multiple challenges, including a health-related allergic condition that is not singular in its causes/triggers or its manifestations and for which the parents are continuing to search for effective treatment and/or management from health care professionals; (5) numerous *plan*-related discussions among CST members, parents, Respondent and administration personnel including an IEP plan, an IHP plan, a plan for decisions on whether weather conditions permit MS to go outside for recess, where MS will be and how the student will be supervised when outdoor recess is not appropriate, a plan for when MS should be excused from gym and a plan to establish under what circumstances and/or when MS should be given a break for sensory reasons and supervision of MS during such times; (6) a CST case manager who represented to Respondent that, (a) he and the CST had sufficient documentation related to MS's condition of cold urticaria, and (b) it is permissible for the parent to contact him during the school day about IEP-related matters as that is when other parents contact him; (7) a CST case manager who has responsibility to facilitate an effective IEP for MS but does not have supervisory authority to direct employees or bind the District or school administration to any personnel-related action; (8) a school principal who is not a part of the CST and does not have direct access to CST deliberations, but nevertheless has responsibilities relating to the education, health and well-being of the student involved; (9) a school principal who communicated directives to Respondent that contradicted the CST's representation that it had sufficient medical

information on MS's cold urticaria and that Respondent could contact the case manager about the student's IEP during the school day; and (10) overlaying all such circumstances, the conflict between the "open communication" goal of the CST between it and the student's parents, and the fact that Respondent, her husband and her child are represented by counsel and said counsel being engaged in interaction with the District's legal counsel on IEP-related matters involving MS.

I find that the lack of experience of those involved with similar circumstances to those presented, the vagueness relating to the authority of the CST; the constrictions on communications that inherently occurred as a result of student health-related confidentiality requirements; the non-participation of the principal in the IEP process and the resulting lack of her specific knowledge of the deliberations of the CST; the pressure to funnel information and communication through the conduit of communications between counsel (a circumstance not previously experienced by many involved); and the amorphous quality of the health issues of MS and the consequent impact upon the educational plan of the student, resulted in confusion and potential for miscommunication among all participants.

Dishonesty

The recurring assertion by the District, and its overriding reason for terminating Respondent, is the claim that Respondent knew the November 15 fax from MS's doctor was in the possession of the District and knew the fax constituted an Individual Health Plan for MS, and that Respondent nevertheless kept the existence of the plan secret and outside of the knowledge of the CST team, the District's administration and

Respondent's school principal Mizelle, and that Respondent out-and-out lied to Mizelle about the existence and content of the faxed document. I find that the record does not support such assertions by the District.

Respondent did not Hide the November 15 Fax from the District

Contrary to the claims of the District that Respondent hid the November 15 fax from MS's doctor from District personnel, I find that the evidence establishes that as of November 15 the District had full knowledge and control of the November 15 faxed "Individual Health Plan" from MS's doctor. In this regard, the record establishes that the fax originally came into the Board's office where it was forwarded to the CST team, the fax was reviewed by CST team supervisor Smith and CST case manager Wilbur, copied, distributed and downloaded into the District's electronic records system, and then delivered to Respondent by principal Mizelle. Although Mizelle testified she did not look at the fax and delivered it in a closed envelope to Respondent, I credit Respondent that the fax was not in an envelope when Mizelle handed it to Respondent and that Mizelle spoke to Respondent about the MS-related contents of the fax at the time.[10]

[10] Although each of the two witness has incentive to recall events in a manner that supports her interests, I find that Respondent's version of events to be, under the circumstances, more likely, and consequently more reliable. My finding in this regard is also based upon the following considerations: (1) the overall demeanor of the two conflicting witnesses, (2) the testimony of Respondent that when Mizelle gave Respondent the November 15 fax it was not in an envelope and that such occurred in the presence of third party witness Coiro and the fact that the District failed to call Coiro to rebut such testimony of Respondent, and (3) the fact that District offered into evidence an October 27 email from Wilbur to Mizelle and others offering details of that afternoon's IEP meeting and Mizelle's inconsistent testimony that she was not informed of the contents of the meeting.

I find that Respondent's November responses to Mizelle's questions about the IHP – responses forming the District's primary support for its Tenure Charges - can only be fairly judged giving full consideration to the facts, which I find, that Respondent reasonably believed that Mizelle had received and read the November 15 fax; a faxed plan containing the doctor's signature but not the required signatures of the subject child's parents. Fair consideration of such circumstances also supports a finding, which I herein make, that at the time she responded to the principal's questions Respondent's believed the "plan" to which Mizelle was inquiring was the portion of "the plan" relating to who would monitor and supervisor MS under various circumstances.

Respondent Did Not Lie About the "Draft" Status of the Plan or About the Fact that She and Her Husband were Awaiting Advice from Their Attorney

Mizelle testified that when she asked Respondent about whether an IHP was completed, Respondent referenced a "draft plan." There is no dispute that at the time of Mizelle's inquiry, the contents of the November 15 fax in the possession of the District reflected the signature of MS's doctor but had not been signed by the student's parents. The fax did not present a complete plan. The record also establishes that from Respondent's perspective, a perspective reasonably supported by the circumstances and facts I have found herein, the "plan" was awaiting administrative decisions relating to the various breaks and monitoring issues discussed during the October 27 IEP meeting.

Nor are either Respondent's statement to the principal or her testimony that she and her husband were waiting for information from their attorney contradicted by the

evidence. Although the record contains a November 16 email from Respondent's counsel to the District's counsel stating, in part;

> ...mom...is working on developing a comprehensive health plan in consultation with her allergist. When it is completed she will provide a copy to the case manager and I will also send a copy to you for your records.

the attorney's email does not establish that Respondent was lying to Mizelle. The record establishes that as of November 16 Respondent was working on a plan and there is no evidence that the District's representative ever received the "completed plan" from Respondent's counsel promised in the November 16 email – an event that would have arguably contradicted Respondent's representations. Also, considering; (a) the relevant discussions between Respondent and Mizelle occurred on or about November 27-29, over ten days after the November 16 email, (b) the dynamic nature of the events involved, (c) the ongoing representation by counsel, and (d) the lack of evidence to contradict Respondent's testimony, I find that the evidence is insufficient to establish that Respondent lied or otherwise misrepresented when she stated that she and her husband were in ongoing conversations with their counsel and awaiting direction therefrom.

Respondent Did Not Represent to Mizelle That no IHP was Required

Contrary to the assertions of the Tenure Charges, I do not find that Respondent communicated to the District or Mizelle anything approaching notice that due to the treatment of MS by a new doctor in late November that the student did not need a health plan. In this regard, the conversation between the principal and Respondent focused upon by the principal and the District consisted of the Mizelle's passing inquiry about how a

doctor's appointment went and the nurse relaying the doctor's effort to apply a new treatment and, what can fairly be described as, the hoped-for result of the treatment. Respondent may have communicated that a new treatment was being pursued and the parents and doctor were in a state of optimism that it could turn out that no health plan would be needed, but the evidence does not establish any basis whatsoever for a conclusion that Respondent was affirmatively representing that an IHP would therefore not be needed.

Conclusion as to the District's Dishonesty-Relates Claims

Under the circumstances, I am not persuaded that Respondent intentionally or willfully lied, failed to be forthcoming or was otherwise dishonest in her communication with principal Mizelle or the District and find that the District has failed to show by a preponderance of the evidence that the dishonesty related allegations contained in the tenure charges are true.

Insubordination

I do not find sufficient evidence to support a finding that Respondent willfully refused to comply with directives of the principal or other District administrators or supervisors. In regard to the District's claims as they relate to the drafting of a health plan, I find that the plan-related-focus of principal Mizelle when she inquired of Respondent in mid-to late November was on the potential of harm to MS due to the student's cold allergy and possible anaphylactic shock. Whereas the plan-related-focus of Respondent at the time of the inquiries – knowing that an anaphylactic-epi-pen plan was

already present in the nurse's office relating to MS – was on the administration's plan to deal with the health related and educational related logistical needs of her child, including who would be responsible for monitoring and supervising the student under various conditions and where the child would go when recess was unavailable for health-related reasons or when the student needed a sensory-related break.

I am persuaded by the full record and the argument of Respondent that following the October 27 IEP meeting, Respondent was under the impression that school administration was considering and developing a plan for the District's "when and who" responses to the various needs of MS to avoid harm caused by cold urticaria and to provide the student necessary sensory breaks, and that her plan would be attached to the District's plan. As discussed above, during the District's deliberations relating to MS, confusion by the participants was endemic. Under such circumstances, confusion on the part of Respondent and Mizelle is entirely consistent with the continually evolving process involved. Such atmosphere of confusion does not support a finding Respondent willfully refused to assist in the drafting of the plan.

The District has failed to meet its burden of establishing the truth of its allegations that Respondent willfully and intentionally refused or failed to complete any assignment or directive.

Crossing the Mother/School Nurse Line

In regard to the other allegations raised by the District, the record fails to establish that; (1) Respondent was put on notice that conduct alleged in the tenure charges would

result in her discipline or termination, (2) the District applied progressive discipline or (3) Respondent engaged in much of the conduct alleged in the Charges.

There is insufficient evidence in the record that Respondent was informed during the October 6 meeting that she was receiving anything like a formal counseling or discipline relating to any conduct in which she may have engaged, nor was she warned that further conduct by Respondent identified by the administrators would result in Respondent being disciplined and/or terminated.[11]

Even assuming for argument purposes that Respondent's pre-October 6 conduct was the subject of supervisor counseling of Respondent at the meeting, progressive discipline allows only for consideration of the counseling itself or the noticed concomitant to the counseling to be considered in future discipline. Generally recognized standards of fairness do not embrace "double jeopardy" and considerations of fairness do not allow the specific conduct once the subject of counseling to be again "resurrected" later to support subsequent discipline. Here, the vast majority of evidence offered by the District of Respondent's conversations with other staff members about MS and the visits of MS to the nurse's office (many of which were health-related) occurred prior to the October 6 meeting and even assuming only for purposes of argument that such contact violated District policy, there is scant evidence that Respondent engaged in any significant similar conduct after October 6. Thus, the claimed "many reports" by staff of

[11] The District must bear the burden of any ambiguity of purpose inherent in the October 6 meeting. (i.e.; was the meeting counseling, disciplinary or truly focused upon MS?) In this regard, the District's claim that the meeting was only about Respondent's conduct as nurse was subject to a somewhat inconsistent message when the supervisor of District Child Study Teams – a District official with administrative responsibility over Respondent's son's IEP rather than Respondent's function as a school nurse - was waiting for her in the principal's office to meet with Respondent.

Respondent approaching them to discuss MS, was supported by testimony of only three employees which predominantly focused upon events that occurred prior to October 6 and/or the dates of which were not specified.

Conflict of Interest

As for the District's claim that Respondent violated the District's policies relating to conflict of interest, the record contains only speculation that Respondent's interest in her own child came at the expense of the care of any other student and contains insufficient evidence of any interest of the District that was compromised, or could have been compromised, by any conduct of Respondent.

The School Lunch Program Charge

The evidence is insufficient to support a finding that Respondent willfully failed to perform her responsibilities relating to the reduced and free school lunch program. There is no dispute that the final verification by the District was not submitted by November 30. However, I do not find sufficient evidence that such failure was caused by Respondent exclusively. In this regard, the record establishes that Respondent made reasonable attempts to complete the tasks associated with the program and was delayed in her final completion of the final verification by the failure of the business manager to identify and sign-off on the application to be subject to verification. Although this requirement may have been akin to a formality, the unrebutted testimony of Respondent establishes that she was not permitted to complete the process until such formality was satisfied, and that the formality was also subject to late-in-the-process communication

between the nurse and business administrator in 2016. Although the evidence does not exculpate Respondent from all responsibility for the District's failure to meet the November 30 deadline, a responsibility shared by the business manager, I find Respondent's conduct in this regard is insufficient to warrant a withholding of increase or removal.

Conclusion

Considering the record as a whole, including all evidence and arguments offered by the parties as well as my observations of the demeanor of all witness and resolution of credibility conflicts based thereupon, I find that the District has failed to meet its burden of establishing the truth of the allegations contained in the subject Tenure Charges.

Award

The subject tenure charges filed by the Board of Education of the Andover Regional School District against Respondent Irene Sincaglia are dismissed.

The District is ordered to:

1. Promptly offer Respondent reinstatement to her former position.

2. Make Respondent whole for any and all losses of pay, seniority and other benefits she may have suffered as a result of her being placed on leave from December 4, 2017 to the date of her reinstatement by the District.

3. Expunge any and all record of the subjects of the tenure charges from Respondent's disciplinary files.



Dated: July 5, 2018

Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Award in Agency Docket No. 264-9/15 relating to tenure charges against Irene Sincaglia on Thursday, July 5, 2018.



Timothy J Brown

210-18

JEANETTE CARTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a school bus driver – appealed the Department's determination to suspend her school bus endorsement pursuant to *N.J.S.A.* 18A:39-26 *et seq.* after an incident in which a kindergarten student was left on petitioner's school bus at the end of her morning route on February 13, 2018. Petitioner did not dispute that the child was in fact left on the bus, but explained that the child was lying down toward the rear of the vehicle and that petitioner had been distracted by an impending doctor's appointment. The respondent filed a motion for dismissal, which the ALJ addressed by way of summary decision, pursuant to *N.J.A.C.* 1:1-12.5.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; on February 13, 2018, petitioner parked the school bus at the end of her morning route and failed to properly inspect the bus as required by *N.J.S.A.* 18A:39-28; as a result, petitioner failed to discover that a kindergarten student remained on the bus after it was parked and otherwise emptied; petitioner presented no evidence of any sort in opposition to the facts offered in evidence on the motion by the respondent; and the unopposed certification offered by the Department amply supported summary decision in its favor. Accordingly, the ALJ concluded that the petitioner's six month suspension for leaving a child on the bus should be affirmed.

Upon full review and consideration of the record, Commissioner concurred with the findings and determinations of the ALJ. Accordingly, the petition was dismissed and the respondent was directed to notify the Motor Vehicle Commission of its obligation to suspend petitioner's school bus endorsement pursuant to *N.J.S.A.* 18A:39-26 *et seq.*, and to notify petitioner's employer that she is ineligible for the period of suspension for continued employment as a school bus driver.

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 7/11/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 06869-18
AGENCY DKT. NO. 102-3/18

JEANETTE CARTER,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION,
CRIMINAL HISTORY REVIEW UNIT,
Respondent.

Jeanette Carter, petitioner, pro se

Caroline Jones, Deputy Attorney General for respondent (Gubir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: June 1, 2018 Decided: June 4, 2018

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

STATEMENT OF THE CASE

Petitioner, Jeanette Carter, a school bus driver employed by Beloved Community Charter School, appealed the respondent, New Jersey Department of Education Criminal History Review Unit's determination to suspend her "S" school bus

Summary decision is a well-recognized procedure for resolving cases in which the facts that are crucial to the determination of the matters at issue are not actually in dispute and the application to that set of material facts of the applicable law and standard of proof lead to a determination of the case without the necessity of a hearing at which evidence and testimony need be taken. The procedure is equally applicable in judicial as well as executive branch administrative cases. N.J.A.C. 1:1-12.5. The standards for determining motions for summary judgment were defined by Justice William Brennan, then a New Jersey Supreme Court Justice, in Judson v. People's Bank and Trust Company of Westfield, 17 N.J. 67, 74-75 (1954). The Supreme Court later elaborated on the motion and its standard in Brill v. The Guardian Life Insurance Company of America, 142 N.J. 520 (1995). Under the Brill standard, as in Judson, a motion for summary decision may only be granted where there are no genuine disputes of material fact. The determination as to whether disputes of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits, and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of genuine disputes of material fact. The facts upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious." Judson, 17 N.J. at 75 (citations omitted). The Brill decision focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." Brill, 142 N.J. at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions.

The statutes that underlie the proposed suspension require few facts to form the basis for action thereunder. N.J.S.A. 18A:39-28 requires that a driver perform a visual inspection at the end of a route. The reason for this is stated as the need to assure that no pupil is left on the bus. I **FIND** that petitioner parked the bus at the end of her morning route and failed to properly inspect the bus, as required by N.J.S.A. 18A:39-28. As a result, she failed to discover that a kindergarten student remained on the bus after

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 4, 2018
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

June 4, 2018

Date Mailed to Parties:

JUN 5 2018

ljb

209-18

OAL DKT. NO. EDU 03717-18
AGENCY DKT. NO. 32-2/18

C.E., ON BEHALF OF MINOR CHILD, K.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the 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, it is noted that the settlement makes reference to payments that were to be made on May 14, 2018 and July 1, 2018. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the proposed terms.

Subject to the foregoing, 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 – provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 7/10/18

Date of Mailing: 7/11/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 03717-18N
AGENCY DOCKET NO. 32-2/18

C.E. ON BEHALF OF MINOR CHILD K.E.,

Petitioners,

v.

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

Respondent.

Corey Ellington, petitioner appearing pro se

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

Record Closed: June 4, 2018 Decided: June 5, 2018

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 12, 2018, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A hearing was scheduled for May 14, 2018. During the pendency of the hearing the parties reached a tentative settlement agreement, which was placed on the record. The tentative agreement was subject to Board approval. The

Board held its meeting on or about May 21, 2018. A telephone status conference was scheduled for June 20, 2018. Prior to that date, the parties submitted the fully executed Settlement Agreement and Extract from the minutes of the Board Meeting, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

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

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

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

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

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

6-5-18

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

Date Mailed to Parties: JUN 8 2018

ljb

CLEARY | GIACOBBE | ALFIERI | JACOBS LLC

FRANCES L. FEBRES, Partner
ffebres@cgajlaw.com

Reply to: Oakland Office

June 1, 2018

2018 JUN -4 P 1:07 OAL

VIA FAX (973-648-6124) and REGULAR MAIL
Honorable Kimberly A. Moss, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: C.E. o/b/o K.E. v. Board of Education of the Township of West Orange, Essex County
OAL DKT EDU 03717-2018 N

Dear Judge Moss:

This firm represents the respondent, the Board of Education of the Township of West Orange ("Board"), in the above-referenced matter. The parties have amicably resolved their dispute. Enclosed please find a copy of the parties' Settlement Agreement.

Counsel appreciates Your Honor's attention and assistance with this matter.

Respectfully submitted,

Frances L. Febres
Enclosure

C: Corey Ellington, Petitioner (via email)
Jeffrey Rutzky, Superintendent (via email)

Frances L. Febres, Esq., (ID No. 018542012)
CLEARY GIACOBBE ALFIERI & JACOBS, LLC
169 Ramapo Valley Road
Upper Level, Suite 105
Oakland, New Jersey 07436
Telephone: 973-845-6700
Facsimile: 201-644-7601
Attorneys for Respondent, West Orange Board of Education

2018 JUN -4 P 1:45

C.E. o/b/o K.E. Petitioner, vs. **WEST ORANGE BOARD OF EDUCATION,** Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDU 03717-2018 N **SETTLEMENT AGREEMENT**

This Agreement is entered into by and between the Petitioner, Corey Ellington, with an address of 530 Norwood Street, East Orange, New Jersey 07018 (hereinafter referred to as C.E.), and the Respondent, the West Orange Board of Education, with an office located at 179 Eagle Rock Ave, West Orange, New Jersey, 07052 (hereinafter referred to as the "Board") (collectively referred to as the "parties" and individually as the "party,"), and supersedes and replaces any and all prior agreements between the Board and the Petitioner.

WHEREAS, Corey Ellington ("C.E.") is the father of student, Kayla Ellington (hereinafter referred to as "K.E.").

WHEREAS, K.E. attends the West Orange Public School District.

WHEREAS, during the 2016-2017 school year, the West Orange Board of Education ("Board") determined that K.E. was not domiciled in the Township of West Orange and therefore was not eligible to receive a free public education from the Board.

WHEREAS, C.E. appealed the Board's determination to the Commissioner of Education

who ultimately affirmed the Board's decision to remove K.E. from its schools and ordered C.E. to pay the Board $17,069.00 for tuition.

WHEREAS, as of May 14, 2018, C.E. has not paid the Board, in full or in part, the $17,069.00 due and owing for K.E.'s 2016-2017 tuition.

WHEREAS, C.E. re-registered K.E. into the West Orange Public School District for the 2017-2018 school year, under a different address in the Township of West Orange.

WHEREAS, during the 2017-2018 school year, the Board conducted a residency investigation to determine whether K.E. was domiciled in the Township of West Orange.

WHEREAS, On January 10, 2018, the Board determined that K.E. was not domiciled in the Township of West Orange and was therefore ineligible for a free public education from the Board.

WHEREAS, C.E. appealed the Board's determination to the Commissioner of Education on or about January 19, 2018.

WHEREAS, on or about March 8, 2018, the Board Responded to the Petition of Appeal and asserted a counterclaim for a tuition assessment in the amount of $6,317.43 in addition to tuition during the period of appeal.

WHEREAS, as of May 14, 2017, the tuition costs for K.E.'s attendance at the West Orange Public Schools would be $14,897.82.

WHEREAS, a dispute exists with respect to whether K.E. is domiciled in the Township of West Orange and eligible for a free public education from the West Orange Board of Education; and

WHEREAS, without waiving their respective positions and without admissions by either party, the Board and the Petitioner desire to resolve all outstanding issues between them

amicably and without the need for further litigation;

WHEREAS, C.E. and the West Orange Board of Education have reached a settlement agreement that has been determined to be in the best interest of the parties;

NOW, THEREFORE, in consideration of the foregoing, the Board and the Petitioners agree as follows:

1. **Terms.** The Board agrees to accept Twenty Thousand Dollars ($20,000.00) in satisfaction of the K.E.'s tuition costs for the 2016-2017 and 2017-2018 school years in accordance with the terms and conditions set forth herein.

a. Corey Ellington is to pay the Board Ten Thousand Dollars ($10,000.00) by May 14, 2018;

b. By July 1, 2018, C.E, shall pay the remainder, in the amount of $10,000.00, by certified check payable to the West Orange Board of Education;

c. All checks shall be delivered to the Board Attorney, Frances L. Febres, Esq., of Cleary Giacobbe Alfieri Jacobs LLC, at the following address: 169 Ramapo Valley Road, Upper Level Suite 105, Oakland, New Jersey 07436;

2. In the event Corey Ellington fails to pay in accordance with the terms set forth in this Agreement:

a. C.E. shall be given fifteen (15) days from Notice of Default to cure same;

b. Thereafter, the Board may submit an ex parte certification to the Superior Court of New Jersey with notice to C.E., setting forth his failure to pay in accordance with the terms set forth herein, with a consent judgment for entry by the court, in the West Orange Board of Education's favor, and in the form annexed hereto, (the "Consent Judgment"). The West Orange Board of Education shall be the "Plaintiff" in any action

concerning the Consent Judgment.. The Consent Judgment shall be for the full assessed tuition for the 2016-2017 and 2017-2018 school years, in the amount of $31,966.82, less any payments made by C.E. to the Board pursuant to paragraph 1 (above);

c. C.E. waives all rights to contest entry of the Consent Judgment, an unexecuted copy of which is attached as Exhibit "A" to this Agreement. The Consent Judgment may be docketed with the Clerk of the Superior Court of New Jersey;

d. C.E. shall pay all of the Board's reasonable attorney's fees and legal costs associated with enforcing the Board's rights under this Agreement; and,

e. Any payments made above the minimum monthly payments shall be a credit towards the Board's future monthly payments; and,

3. No delay or omission on the part of the Board in exercising any right under this Agreement will operate as a waiver of that right or of any other right under this Agreement.

4. **Binding Effect.** All parties to this Agreement, as well as their heirs, successors, and assigns, are bound by it. The other party and/or parties may rely upon his/her actual authority in connection with the signing of this Agreement. Additionally, each party to this Agreement is an intended beneficiary hereof.

5. **Mutual Release and Hold Harmless.** Petitioner, on behalf of himself and on behalf of K.E., 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 Petitioner or K.E., arising out of events that have occurred prior to the date on which this Agreement is signed, including, but not limited to the provision of a public education to K.E. It is expressly understood and agreed, however, that the parties reserve the right to bring a claim before any tribunal of competent jurisdiction to enforce their

rights under this Agreement.

6. **Integration Clause.** This Agreement shall constitute the entire agreement among the parties and supersedes all prior or contemporaneous agreements, oral or written. This Agreement cannot be altered, amended, modified, terminated, or discharged except in a writing signed by the party against whom enforcement of such alteration, amendment, modification, termination or discharge is sought.

7. 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 either party.

8. The parties recognize that they sign this Agreement as their own voluntary act and deed, and that they fully understand the duties, obligations, requirements and limitations enumerated herein. The drafting and negotiation of this Agreement have been participated in by each of the parties and/or their respective counsel and, for all purposes, this Agreement shall be deemed to have been drafted jointly by each of the parties. No ambiguity shall be resolved against any party based upon authorship.

9. The Board hereby acknowledges that it has been represented by counsel throughout the above-referenced matter, throughout the negotiation of this Agreement, and at the execution of this Agreement, and has read and consulted with counsel regarding this Agreement. The Board acknowledges and agrees that it is satisfied with its legal representation in this matter.

10. The Petitioner hereby acknowledges and agrees that he has had an opportunity to consult with legal counsel regarding the negotiations and execution of this Agreement and has determined, on his own accord and volition, to proceed pro se. The Petitioner agrees that he has been actively involved in the negotiation and execution of this Agreement. The Petitioner

further acknowledges that he has read the entire Agreement and understands the purpose and effect of each of its terms and is satisfied with the Agreement.

11. **Governing Law & Venue.** This Agreement shall be governed by the laws of the State of New Jersey. Any controversies or disagreements arising out of, or relating to this Agreement or the breach thereof, shall be resolved in the Essex County Superior Court of New Jersey.

12. **Severability.** If all or any portion of any provision of this Agreement shall be held to be invalid, illegal, or unenforceable in any respect, then such invalidity, illegality, or unenforceability shall not affect any other provision hereof, and such provision shall be limited and construed as if such invalid, illegal, or unenforceable provision, or portion thereof, were not contained herein.

13. **Confidentiality.** As further consideration for the Agreement, the parties agree that they will keep all terms of this Agreement completely confidential. Notwithstanding anything to the contrary contained herein, it is expressly understood and agreed that neither party nor any representative of the parties will take any action to disclose the terms or nature of this Agreement except that disclosure is permitted: (i) as necessary with regard to any proceeding for the enforcement of this Agreement; (ii) to the student's immediate family, accountants and attorneys for the parties, who shall agree not to disclose the fact of or any of the terms of this Agreement as if they were a party to this Agreement; (iii) as may be required, through subpoena or otherwise, by any court or agency of competent jurisdiction; (iv) as may be required pursuant to the Open Public Records Act; and (iv) as may be required by law.

14. **Entire Agreement.** This Agreement contains the entire agreement between the parties hereto and is intended to resolve any and all disputes and issues, known or unknown,

between them as of the date of execution of this Agreement. The undersigned represent that they have the requisite authority to sign this Agreement on behalf of the respective party. This Agreement may be signed by the parties in counterparts on separate copies of the Agreement, and all signature pages shall be incorporated into the Agreement as if all the signatures are affixed on one (1) page.

15. **Ratification.** This Agreement is expressly conditioned upon ratification by the West Orange Board of Education.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth below.

BY SIGNING BELOW, THE PARTIES ACKNOWLEDGE THAT EACH HAS READ THE TERMS OF THIS AGREEMENT, UNDERSTANDS THE TERMS OF THIS AGREEMENT AND INTENDS TO BE LEGALLY BOUND BY THIS AGREEMENT AND ITS PROVISIONS. ADDITIONALLY, THE PARTIES ARE SIGNING BELOW VOLUNTARILY AND WITHOUT THREAT OR COERCION OF ANY KIND.

PETITIONER

COREY ELLINGTON

Date: 5/14/18

WEST ORANGE BOARD OF EDUCATION

Board President

Date: 5/30/18

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

The Board of Education of the West Orange School District, West Orange, in the County of Essex, New Jersey, convened in Regular/Work session on May 21, 2018 at 6:23 P.M., at Liberty Middle School, One Kelly Drive, West Orange, NJ.

The following members of the Board of Education were present:
President Charles, Mr. Robertson, Mrs. Mordecai, Mr. Alper

The following members of the Board of Education were absent:
Mr. Schwarzbaum

The following motions were offered by Mr. Robertson and seconded by Mr. Alper and adopted by the Board of Education by the following roll call vote:

Recommend approval of Tuition Settlement Agreement with parent of Student #1502025 as stipulated in closed session.

ROLL CALL: Ayes: Mr. Charles, Mr. Robertson, Mrs. Mordecai, Mr. Alper

Abstain: None

CERTIFICATE

I, John Calavano, Secretary of the Board of Education, of the West Orange Public Schools, West Orange, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on May 21, 2018, has been compared by me with the original minutes as officially recorded in my office in the minute book of said West Orange Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 24th day of May 2018.

John Calavano/Board Secretary

211-18

JENNIFER LEWIS-GALLAGHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Pro se petitioner alleged that the respondent Monroe Township Board of Education (Board) violated Board policies and the School Ethics Act, *N.J.S.A.* 18A:12-24.1, when it appointed Anthony Ayers to fill a Board vacancy following a resignation. The Board filed a motion to dismiss in lieu of an answer. Petitioner was advised of the deadline for submission of documentation or briefs in response to the Board's motion; however, no such submissions were received from petitioner. Subsequently, petitioner failed to appear at the hearing on May 29, 2018 and offered no explanation for her non-appearance.

The ALJ found, *inter alia*, that: the issue herein is whether the Board should be granted summary decision in its favor, or whether the petitioner is entitled to an evidentiary hearing to show that the Board vacancy was filled improperly; the Board asserted that there were no material facts in dispute, and the Board's filling of its vacancy was proper, based on the statutes, regulations and bylaws applicable to the filling of vacancies on a school board; although petitioner seemingly questioned the procedures used by the Board in filling the vacancy, she has not made any formal assertion of improprieties on the part of the Board, nor has she made any declaration to the court regarding any material fact in dispute; and petitioner failed to appear at the hearing and offered no explanation for her non-appearance. The ALJ determined that the matter was ripe for summary decision, and the Board acted properly in appointing Anthony Ayres to fills its vacancy. Accordingly, the ALJ granted the Board's motion to dismiss.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, the Initial Decision 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.

July 12, 2018

OAL DKT. NO. EDU 02437-18
AGENCY DKT. NO. 14-1/18

JENNIFER LEWIS-GALLAGHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER 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.

Upon such review, the Commissioner agrees with the Administrative Law Judge that the Board did not act in an arbitrary, capricious, or unreasonable manner – or in violation of any statute, regulation, or Board policy – when it appointed Anthony Ayers to fill its Board vacancy.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons thoroughly set forth therein, and the petition is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/12/18

Date of Mailing: 7/12/18

* 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 2437-18
AGENCY DKT. NO. 14-1/18

JENNIFER LEWIS-GALLAGHER,
Petitioner,
v.
TOWNSHIP OF MONROE BOARD OF EDUCATION, GLOUCESTER COUNTY,
Respondent.

No appearance by or on behalf of petitioner

John J. Armano, Jr., Esq., for respondent (Trimble & Armano, attorneys)

Record Closed: May 29, 2018 Decided: June 8, 2018

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE

Petitioner has alleged that respondent, the Township of Monroe (Gloucester County) Board of Education (the Board), illegally appointed Mr. Anthony Ayres to the Board, in violation of the School Ethics Acts, N.J.S.A. 18A:12-24.1. Respondent denied said allegation and has filed a Motion to Dismiss In Lieu of an Answer.

PROCEDURAL HISTORY

On January 17, 2018, petitioner filed a complaint with the New Jersey Department of Education (DOE), alleging that the respondent-Board violated ethical statutes and Board policies in appointing Anthony Ayres to the Monroe School Board. Respondent filed a Motion to Dismiss In Lieu of an Answer with an accompanying brief on February 5, 2018. The DOE Bureau of Controversies and Disputes transmitted petitioner's claim to the Office of Administrative Law (OAL), where it was filed on February 14, 2018. N.J.S.A. 52:14B-1 to -15; N.J.S.A.52:14F-1 to -13.

By letter from this Court dated March 28, 2018, the telephone conference scheduled for May 1, 2018, was converted to an in-person Hearing on May 2, 2018. Petitioner, a pro se litigant, was advised that any documentation or responsive briefs she wished to provide had to be filed no later than April 23, 2018. No documentation or responsive briefs were received from petitioner.

By letter dated April 26, 2018, petitioner requested a postponement of the in-person Hearing scheduled for May 2, 2018. In response, by letter dated April 30, 2018, respondent agreed to an adjournment of the May 2, 2018, Hearing, and requested that its Motion to Dismiss In Lieu of an Answer be decided by the Court on its moving papers. On May 1, 2018, this Court rescheduled the in-person Hearing to May 29, 2018.

Petitioner failed to appear at the Hearing on May 29, 2018, without explanation. Respondent-counsel was advised that the Court would decide respondent's Motion on the moving papers, and the record was closed on May 29, 2018.

FACTUAL DISCUSSION

Petitioner did not file an Answer to respondent's Motion to Dismiss In Lieu of an Answer, nor did she file a brief, Statement of Facts or sworn affidavits in response to respondent's Motion, nor did she file any documentation disputing the Statement of

Facts provided in respondent's Motion to Dismiss In Lieu of an Answer and brief. The parties had not stipulated to any Joint Statement of Facts.[1] Based upon the parties' submissions, and for purposes of deciding the Motion to Dismiss In Lieu of an Answer, I **FIND** the following:

1. On November 16, 2017, Ronald Coleman resigned as a board member from the Monroe Township Board of Education for health reasons. The Board unanimously moved to accept his resignation effective November 17, 2017. (Respondent Brief, Statement of Facts nos. 1 and 2 and Exhibit A.)

2. On December 16, 2017, the Board placed an advertisement in a single newspaper, the South Jersey Times, advertising a special Board meeting for December 19, 2017, at which interviews would be conducted to appoint a new member to the Board to fill the vacancy. (Respondent Brief, Statement of Facts no. 3 and Exhibit A.)

3. Seven candidates responded to the advertisement, and were interviewed for the vacancy during the Board's Executive Session at the December 19, 2017, Board meeting. Two candidates were nominated for the position: Anthony Ayres and Ms. Latasha Williams. During the roll-call vote on the Ayres nomination, a Board member questioned whether four or five votes were required to approve a candidate. The official vote was halted pending legal review by the Board's Solicitor, (respondent-counsel) John J. Armano, Jr. (Respondent Brief, Statement of Facts nos. 6 through 10.)

4. By email dated December 20, 2017, the Board Solicitor confirmed that five votes were required in order to fill a vacancy on the Board. The vote was rescheduled to the Board's previously advertised, regularly scheduled meeting of December 21, 2017. (Respondent Brief, Statement of Facts nos. 10 and 11.)

[1] A copy of petitioner's "Petition of Appeal" to the "Commissioner of Education of New Jersey" dated January 11, 2018, was provided to the Court. It contained a "Narrative" that was part factual summary, part allegations, part legal analysis, but primarily a list of rhetorical questions. This Narrative was taken into consideration in setting out the facts of this matter.

5. At the December 21, 2017, Board meeting, the full eight-person Board unanimously approved Ayres to fill the vacancy on the Board. As all eight members voted for the first candidate, no vote was taken on the other candidate, Latasha Williams. (Respondent Brief, Statement of Facts nos. 12 and 13.)

6. Ayres submitted information for his criminal background check on December 22, 2017. The background check was completed and approved by the New Jersey DOE on January 3, 2018, and a copy was received by the Board on January 9, 2018. (Respondent Brief, Statement of Facts nos. 14 and 19.)

7. The Board's January 4, 2018, Reorganization Meeting, where persons filling positions may be sworn in, and regular meeting of January 8, 2018, were cancelled due to inclement weather. (Respondent Brief, Statement of Facts nos. 15 through 18.)

8. Per his request, Ayres was sworn in to fill the Board vacancy on January 9, 2018, a day before the Reorganization was finally held. (Respondent Brief, Statement of Facts nos. 20 and 21.)

LEGAL DISCUSSION AND CONCLUSION

The issue is whether the respondent Board should be granted a Summary Decision in its favor or whether petitioner is entitled to an evidentiary hearing to show that the Board vacancy was filled improperly.

A Summary Decision may be granted when the papers and discovery that have been filed show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a mattèr of law. N.J.A.C. 1:1-12.5(b). "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. See Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995). The non-moving party has the burden "to make an affirmative

demonstration . . . that the facts are not as the movant alleges." Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App.Div. 1962).

Respondent has asserted that there were no material issues of fact in dispute, and that the Board's filling of its vacancy was proper, based on the statutes, regulations and bylaws applicable to the filling of vacancies on a school board.

While petitioner seemingly questioned the procedures used by the Board in filling its vacancy, she has not made any formal assertion of improprieties on the part of the Board. She has not made any declaration to this Court that there was any material fact in dispute. Petitioner filed no Answer, affidavit nor Statement of Facts, nor any other documentation with this Court stating that there was a genuine issue of fact to be determined via a full due process hearing. Petitioner failed to appear for the Hearing scheduled for May 29, 2018, therefore waiving her opportunity to present evidence of the existence of any genuine fact in controversy. Accordingly, petitioner has failed to meet her burden of proof as required by Spiotta.[2]

Further, even if petitioner's Petition of Appeal to the Department of Education dated January 11, 2018, was to be accepted, *arguendo*, as a valid affidavit or Answer to respondent's Motion to Dismiss In Lieu of an Answer from February 5, 2018, it failed to set out any genuine issue of material fact which might preclude the granting of respondent's Motion. Merely claiming that there were ethical violations did not meet the burden which must be borne by the non-moving party to a motion for summary decision. Citing to N.J.S.A.18A:12-24.1(a), (d) and (g), without explaining how those statutory sections had been violated, was insufficient to establish that there was any genuine issue of material fact which would require a full due process hearing.

In her Petition of Appeal, petitioner claimed respondent violated Board policy #162 by not publishing notice of a special meeting in two newspapers. However, policy #162 does not require publication when a vote takes place at a regular Board meeting. In this case, due to legal questions raised at the special meeting, the vote approving

[2] In addition to extensions of time given to petitioner to accommodate her as a pro se litigant, the Court provided her with contact information for legal assistance.

Ayres for the Board did not happen at the special meeting, but instead took place at the previously advertised, regular December meeting of the Board.

Petitioner claimed that no special accommodations were made for members of the public who were unable to attend the regularly scheduled December meeting, but provided no statutory or regulatory requirement that a board schedule votes for times convenient to every member of the public. Petitioner also claimed irregularities in the vote itself without citing any Board policy, statutes or regulations. The Board did not act improperly by not conducting a vote on the second candidate for the single vacant Board seat, because the first candidate received a unanimous, 8-0 vote in his favor. Finally, petitioner failed to prove any legal or ethical improprieties from the Board having sworn in its new member in private rather than in public.

As petitioner has failed to establish that there was any genuine issue of material fact in this matter, I **FIND** that this matter is ripe for Summary Decision, and I **CONCLUDE** that the respondent, Township of Monroe (Gloucester County) Board of Education, acted properly in appointing Anthony Ayres to fill its Board vacancy.

ORDER

I hereby **ORDER** that respondent Board's Motion to Dismiss In Lieu of an Answer is **GRANTED**. I further **ORDER** that 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.

June 8, 2018
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: June 8, 2018

Date Mailed to Parties: June 8, 2018

JNR/cb

APPENDIX

EXHIBITS

For petitioner:

Petition of Appeal" to the "Commissioner of Education of New Jersey," dated January 11, 2018

For respondent:

Motion/Brief, dated February 2, 2018

212-18LM

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

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

LAMONT O. REPOLLET, ED.D.
Commissioner

July 13, 2018

Sabino Valdez
P.O. Box 463
Paramus, New Jersey 07652

Board Secretary
Board of Education of the City of Union
3912 Bergen Turnpike
Union City, New Jersey 08087

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

Dear Parties:

I have reviewed Sabino Valdes' sixth motion to reopen this matter, wherein he specifically seeks to reopen "the final decision rendered in this matter by the State Board of Education."[1]

Based on my review of the present motion and the arguments set forth therein, and pursuant to the justifications addressed in the Commissioner's January 11, 2018, March 20, 2018, and May 17, 2018 decisions, Mr. Valdes' sixth motion to reopen is denied – without need for further adjudication – as he has not demonstrated good cause to reopen this matter.

Accordingly, the sixth motion to reopen the above referenced matter is hereby DENIED.[2]

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner of Education

c: County Superintendent
State Law Library

LOR/SLP/ATA

VIA REGULAR MAIL

[1] The procedural history of this matter has been fully set forth in the January 11, 2018 and March 30, 2018 decisions and is incorporated herein by reference.

[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).

214-18

R.T. AND C.T., on behalf of minor child, N.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioners challenged the respondent Board's decision to suspend N.T. for the duration of the 2017-2018 academic year following N.T.'s arrest for possession of marijuana with intent to distribute on school grounds. N.T. was arrested after an incident on November 30, 2017 in which he attempted to prevent a drug screening of a student who was reasonably suspected of using drugs at school by slipping the student a vial of "clean" urine in the nurse's office. Evidence was considered at a disciplinary hearing on December 21, 2017, after which the Board voted to suspend N.T. for the remainder of the school year; he was also barred from school grounds and all school activities, including prom and graduation. Home instruction was provided to N.T., which enabled him to graduate at the conclusion of the school year. A hearing in this matter was held on May 15, 2018; petitioners declined to appear at the hearing.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A-37.2, school districts may suspend or expel students found guilty of certain conduct, including possession of controlled dangerous substances on school grounds and any conduct that constitutes a continuing danger to the well-being of other pupils; the Board's District Policy 5530 provides that students who possess, consume, use or distribute alcohol or other drugs on or off school premises shall be subject to disciplinary action based on the severity of the offense; further, a student who is found to have distributed, attempted to distribute, or possessed with intent to distribute alcohol, drugs or drug paraphernalia shall be suspended for no less than ten days, subjected to a Board hearing, and possible expulsion; the Board charged N.T. with possession with intent to distribute, and possession of over 50 grams of marijuana within 1000 feet of the school property; the Board considered the severity of the drug offense at its December hearing, including unrefuted evidence that N.T. intended to distribute marijuana and to help at least one other student evade the school's drug policy; such conduct clearly constituted "good cause" for a long-term suspension under *N.J.S.A.* 18A-37.2; the incident herein was N.T.'s third drug infraction in three months, constituting continued and willful disobedience; and the search of N.T.'s backpack on November 30th revealed, in addition to packets of marijuana, a larger bottle of urine, indicative of an ongoing plan to help himself and others evade the school's drug policy through interference with regular and necessary drug screening performed in the nurse's office. The ALJ concluded that the Board was not arbitrary, capricious or unreasonable in imposing the long term suspension on N.T., and affirmed the Board's findings and penalty.

Upon comprehensive review, the Commissioner concurred with the ALJ's findings and conclusions, and dismissed the petition. In so doing, the Commissioner, *inter alia*, reminded the Board of the regulatory provisions of *N.J.A.C.* 6A:16-7.3(d)-(f), but determined that the Board's failure to revisit N.T.'s suspension would not have resulted in any change to either the penalty or his disciplinary record.

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

Issued: 7/11/18

214-18

OAL DKT. NO. EDU 5380-18
AGENCY DKT. NO. 70-3/18

R.T. AND C.T., on behalf of minor child, N.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENTS.	:	

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. In this case, the petitioners are challenging the Wayne Township Board of Education's (Board) decision on December 22, 2017 to suspend N.T. for the remainder of the 2017-2018 school year.

Upon a comprehensive review of this matter, the Commissioner concurs with the Administrative Law Judge that the Board's decision to impose a long-term suspension on N.T. based on the nature and extent of his conduct was not arbitrary, capricious or unreasonable. However, the Board is reminded that when it imposes a long-term suspension on a student, it must follow the applicable regulatory provisions governing the process for determining whether the long-term suspension should continue and/or when the student should return to the general education program. *N.J.A.C.* 6A:16-7.3(d)-(f). Typically, the suspension of a general education student shall not be continued beyond the district board of education's second regularly scheduled meeting following the suspension unless the district determines the suspension should continue. *N.J.A.C.* 6A:16-7.3(c). Therefore, the Board should have revisited the status of N.T.'s suspension

at the Board's second regularly scheduled board meeting following the December 22, 2017 notice of suspension.[1]

Despite the fact that the Board should have discussed whether to continue N.T.'s suspension at subsequent board meetings, the 2017-2018 school year is now complete;[2] thus, there is no recourse available to the petitioners at this juncture. Notably, since the Commissioner has determined that the long-term suspension was justified, the Board's failure to revisit N.T.'s suspension would not result in any changes to N.T.'s disciplinary record. It should also be emphasized that the petitioners did not appear at the hearing held at the OAL, nor did they file exceptions to the Initial Decision. Accordingly, the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 7/11/18
Date of Mailing: 7/12/18

[1] The Commissioner recognizes that based on the nature and extent of N.T.'s conduct it is likely that the Board would have voted to continue his suspension.

[2] The Board continued to provide N.T. with educational services throughout his suspension.

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT NO. EDU 05380-18
AGENCY REF. NO. 70-3/18

R.T. and C.T. o/b/o minor child, N.T.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,
Respondents.

No Appearance by petitioners

John G. Geppert Jr., Esq., (Scarinci Hollenbeck attorneys) for respondents

Record Closed: May 15, 2018 Decided: June 6, 2018

BEFORE **ERNEST M. BONGIOVANNI**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners appeal the suspension of N.T. from school for the duration of the 2017-2018 academic year by respondent, Wayne Township Board of Education (BOE). The incident giving rise to the suspension occurred at the Wayne Hills High School on November 30, 2017 at the Nurse's office during a drug screening. N.T. was arrested for possession of marijuana with intent to distribute it on the school grounds. On

December 21, 2017 a disciplinary hearing was held at the Wayne Township Board of Education (BOE). Evidence and comments were considered, and after deliberation, the BOE voted to suspend N.T. for the remainder of the school year. N.T. was barred him from the school grounds, participation in school activities and off campus events including sporting events. He was also barred from the prom and graduation ceremonies. N.T. was offered home instruction to complete his senior year studies in time to graduate by the conclusion of the school year.

An Appeal was timely filed by N.T.'s parents. The Department of Education, Bureau of Controversies and Disputes, transmitted this matter on April 11, 2018 to the Office of Administrative Law (OAL), where it was filed on April 13, 2018 as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to-13.

The parties exchanged informal discovery. The hearing was held on May 15, 2018. The petitioners, after claiming their son, N.T. had a fever, chose not to appear for the hearing.

ISSUES

(1) Did N.T. commit any acts that violated the Code of Student Conduct?

(2) Does the preponderance of the credible evidence support the BOE's decision?

(3) Was the penalty of suspension for the duration of the school year and additional penalties supported by the evidence or were they in whole or in part imposed in an arbitrary and capricious manner?

SUMMARY OF RELEVANT TESTIMONY

The Wayne Board of Education charged N.T. with involvement in inappropriate and threatening incidents by engaging in possession with intent to distribute and possession of over 50 grams of marijuana within 1000 feet of the school property.

Principal Michael Rewick

Principal Rewick testified he has been employed by the Wayne BOE for eighteen years, thirteen in administration. He is currently the high school principal.

According to Principal Rewick, on November 30, 2017, N.T. was observed in the Nurse's office at the Wayne Hills High School passing a "Visine bottle", later found to contain urine, to another student, K.S., who was undergoing drug screening. When questioned, N.T. admitted the bottle contained "just clean pee." Further questioning resulted in N.T. admitting he had marijuana in his backpack. Examination of the backpack revealed a mason jar filled with individual packets of marijuana and empty packets (R-5). All the evidence was turned over that day to the police who charged N.T. with possession with intent to distribute under 50 grams of marijuana within 1000 feet of a school (R-12). Principal Rewick believed the only explanation for N.T.'s conduct on November 30, 2017 was that N.T. was attempting to help one of his "customers," a student to whom he distributes marijuana, to prevent the customer from testing positive at a school drug screening. This was not his first offense. N.T. received a ten-day suspension for a drug offense earlier in November 2017.

N.T. received disciplinary charges stemming from the November 30, 2017 incident. A hearing on those charges was conducted by the BOE on December 21, 2017. At the hearing, the BOE suspended N.T. from the school for the duration of the school year, and banned him from entering school property. He was also barred from participating in any school activities including sports, prom and graduation ceremony (R-15).

Principal Rewick said the operative District School Policy (DSP) 5600, governing the Student District Code of Conduct, DSP 5610 governing suspensions, and DCP 5530 governing Substance abuse by students, were all followed by the Board. He noted that since the conduct was so egregious, N.T. could have been expelled and lost the opportunity to graduate. N.T. was suspended by the Board rather than expelled,

and the Board provided home instruction in English and Math, allowing N.T. to graduate by the end of the term.

Assistant Principal Christina Ventimiglia

Assistant Principal (AP) Ventimiglia has been employed by the Wayne BOE for fifteen years, the last five as a high school Vice Principal. She is responsible for grade level discipline and specifically in charge of the 2017-2018 senior class.

AP Ventimiglia noted that N.J.S.A. 18:37-2 and N.J.A.C. 18A-32- and 13.1 provide for suspensions for student behaviors such as drug offenses. After she learned of the incident concerning N.T., passing a Visine bottle containing "clean pee" to K.S., she and AP Cavins searched N.T.'s belongings. N.T. admitted he had marijuana in his backpack and the search revealed between 20-25 baggies of marijuana in a mason jar and a Poland Spring water container which turned out to contain urine. She said that after the marijuana and urine were confiscated, she asked for a chemical screening of N.T. The screening revealed the presence of a "negative dilute," which to her knowledge means that the sample had been "watered down" to mask the presence of Marijuana in the urine.

Regarding the suspension to the end of the school year, which included banning N.T. from all school activities, and from school grounds and places where school activities take place, AP Ventimiglia believed that a lesser penalty such as allowing N.T. to return to school before the end of the school year would be a "distraction" especially to other seniors and would send students the wrong message. She noted that academically, N.T. was a C plus B minus student, and that his education was on a college track. N.T.'s primary activity was being on the soccer team. N.T. had no disciplinary record prior to 2017-2018, but began the school year in possession of a "Vaping" device, employed by students for tobacco use (although they can be altered to use illegal substances), for which he received three hours detention. On November 13, 2017, N.T. was found to be using a vaping device during gym class, resulting in a ten-

day suspension. AP Ventimiglia noted the proximity between the conclusion of the suspension and the commission of a new offense of November 30, 2017.

Nurse Catherine Eck

Nurse Eck has been a nurse for forty years, employed as such by the Wayne BOE for nineteen years, the last two at the high school. In addition to nursing duties, her office assists in conducting random drug screening of students who volunteer in a program known as "Be Proud." These students, with their parents' permission, are subject to random screening as a preventative and as a way of treating illegal substance abuse. The nurse's office also conducts screenings by urine tests of students whom the staff reasonably suspect are under the influence at school or during school activities. She was conducting one such "reasonable suspicion" test was when she saw N.T. interfere with the drug screening of K.S. by attempting to surreptitiously pass the Visine bottle to K.S. while shaking his hand. She noted that N.T. had entered the nurse's office with a "fake" complaint about a sore throat. When she demanded to know what was passed, K.S. refused to hand it over. Eventually the assigned officer for the school, Detective Dubois, was called. Later, she conducted the drug screening of N.T.

Assistant Principal Jacob Cavins

AP Cavins testified is presently finishing his second year as AP at the high school, and among other things is involved in overseeing school disciplinary measures. Regarding the incident of November 30 at the high school, he stated that he "had never seen anything like this" during his eight years as a professional educator. He was particularly concerned with N.T.'s intent to undermine the chemical screening process. He believed that a lesser suspension would be counterproductive to the "life lesson" N.T. needs.

English Teacher & Home Instructor Holly Johnson

Ms. Johnson testified as to the academic services through home instruction being provided to N.T. to assist him in graduating. N.T. has been offered two hours of

English every week although he has only availed himself to a small portion of that instruction by continually cancelling meetings. She said that two hours of one on one teaching at home is "equivalent" to the daily 42 minutes (210 minutes a week) English a student gets at school with a full classroom. She believed that N.T. recently has improved his attendance and has been completing assignments as graduation date grows nearer.

FINDINGS OF FACTS

Based on the evidence presented at the hearing, as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** the following **FACTS:**

1. N.T. was caught "red-handed" at the high school nurse's office attempting to prevent a drug screening of a student who was reasonably suspected of using drugs while at school by passing him a bottle of "clean pee", a.k.a. urine clear of evidence of drug use.

2. After administrative staff in charge of student conduct and a police officer were called to the scene, N.T. was found to be in possession of marijuana in his backpack. N.T.'s attempted undermining of the drug screening, the packaging and quantity (20-25) of the marijuana packets led the school administration officials to reasonably infer that N.T. intended to distribute marijuana to fellow students while on school grounds.

3. School officials were particularly concerned with the calculated and deliberate nature of N.T.'s action and his possible drug distribution activities while on school grounds.

4. N.T. was receiving adequate home instruction to permit him to finish school and graduate by the conclusion of the 2017-2018 school year.

LEGAL ANALYSIS AND CONCLUSION

The laws governing the discipline of public school students are found in N.J.S.A. 18A:37-1 through -37. They obligate students to comply with the school's rules. N.J.S.A. 18A-37.2 provides that school districts may suspend or expel students found guilty of certain conduct and itemizes some, but not all, conduct which constitutes "good cause" for either penalty. "Good cause" includes

> 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....
> j. Knowing possession or knowing consumption without legal authority of alcoholic beverage or controlled dangerous substances on school grounds...[.]

District Policy 5530, Administrative Discipline Procedures, provides:

> 1a. Students who possess, consume, use or distribute alcohol or other drugs...on or off school premises shall be subject to disciplinary action pursuant to Board Policy. Discipline shall be graded according to the severity of the offense.
> ....
> 3a. (2) A student found to have distributed, attempted to distribute or possessed with intent to distribute alcohol or other drugs or drug paraphernalia, shall be suspended for no less than ten days, and subject to a Board hearing. Such activity may result in consideration for expulsion.

The school policies are authorized by N.J.S.A. 18A:37-2 and N.J.A.C. 6A:16-7.1 et. seq. They provide for a long-term suspension or expulsion for drug offenses committed at the schools. Marijuana is a drug in the Wayne Township list of substances warranting disciplining and treating student substance abuse offenders. District Policy 5530, Substance Abuse, incorporating "drugs" defined in N.J.S.A. 24:21-2 and 2C:35-10.4

At the hearing, the BOE had to consider the severity of the drug offense. If they found N.T. guilty of the intent to distribute drugs a long-term suspension of ten or more

days was mandatory ("shall be suspended"). On this administrative appeal, the BOE emphasized the unrefuted evidence that N.T. was in possession of a controlled dangerous substance, to wit, marijuana, while at the high school. Ample evidence of his intent to distribute it, and to help at least one other student evade the school's drug policy prohibiting the use of such products on school grounds, clearly constituted "good cause" for a long-term suspension under subsection j. of N.J.S.A. 18A:37-2.

N.T.'s conduct also fit the other cited "good causes" criterion in the statute for the penalty imposed. His conduct constituted continued and willful disobedience in that it was his third drug infraction in three months. He openly defied the authority of the school administration by faking a reason to enter the nurse's office, then willfully and knowingly interfering with a drug screening of another pupil while himself carrying 20-25 individual packets of marijuana, suitable for distribution. His deceptive conduct and brazen attempt to undermine drug screening, while apparently intending to distribute drugs as well, constituted an obvious danger to other students. The fact that his backpack contained a larger bottle of clean urine indicated that N.T. had an ongoing plan to help himself and others evade the school drug policy by unlawful interference with regular and necessary drug screening done at the school's nurse's office.

N.T.'s parents in their petition stated that the penalty, including banning N.T. from all school activities, including senior graduation, was harsh and presumably, unjust, and that N.T. was ultimately not charged with distribution, or intent to distribute by the law enforcement authorities of the County or township. The fact that authorities chose not to prosecute is of little consequence as the evidence of intent to distribute was clear and no contrary evidence explaining the conduct was even advanced. Moreover, there is no evidence upon which to determine that the permissible penalty of suspension for more than ten days was unjust or harsh.

I therefore **CONCLUDE** that the facts fully support the Board's long-term suspension of N.T. to the end of the school year and barring him from all school activities, as well as banning N.T. from school grounds. I also **CONCLUDE** that the BOE did not act in an arbitrary or capricious manner when it imposed the aforesaid

penalty against N.T. I **CONCLUDE** that the findings of the BOE and penalty imposed should be **AFFIRMED**.

ORDER

Based upon the foregoing it is **ORDERED** that the petitioner's Appeal is **DENIED** and the respondent's decision is **AFFIRMED.**

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

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

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

June 6, 2018

DATE

Ernest M Bongiovanni

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: 6/6/18

Date Mailed to Parties:

APPENDIX

LIST OF WITNESSES

For Petitioners

None

For Respondent

Principal Michael Rewick

Assistant Principal Christina Ventimiglia

Nurse Catherine Eck

Assistant Principal Jacob Cavins

English Teacher & Home Instructor Holly Johnson

LIST OF EXHIBITS IN EVIDENCE

For Petitioners:

None

For Respondent

R-1 District Policy No.: 5600 - Student Discipline/ Code of Conduct

R-2 District Policy No.: 5610 - Suspension

R-3 District Policy No.: 5620 - Expulsion

R-4 District Policy No.: 5530 – Substance Abuse

R-5 NT Incident Summary by Michael Rewick, dated November 30, 2017

R-6 Timeline of Events on November 30, 2017 for N.T. incident by School Nurses, Judy Daly, RN and Cathryn Eck, RN, undated

R-7 Timeline of Events for 2017-2018 School Year and November 30, 2017 Statement by Christine Ventimiglia, Assistant Principal, Wayne Hills High School

R-8 Statement of events by Kristy Stofey, dated November 30, 2017

R-9 Statement events by Jacob Cavins, Assistant Principal, Wayne Hills High School dated November 30, 2017

R-10 Student Safety Data System Incident Report Form 2017-2018 by Christina Ventimiglia, Assistant Principal, Wayne Hills High School, dated November 30, 017

R-11 School Security Incident Report at 1:30 p.m. dated November 30, 2017.

R-12 Wayne Township Police Department, Notification to School Principal of Juvenile Charged with Delinquency for N.T.by Detective Mark DuBois, dated November 30, 2017

R-13 Wayne Hills High School, Discipline Disposition Summary Report for N.T. from 2016-2018

R-14 Notice of Suspension Hearing from Mark Toback, dated December 13, 2017

R-15 Notice of Outcome of Board Hearing from Mark Toback, dated December 22, 2017

R-16 Text Messages between Brittany Warther, Home Instructor and N.T or C.T. regarding home instruction in month of January 2018

R-17 E-mails between Holly Johnson, Home Instructor and N.T. or C.T regarding home Instruction from March 22, 2018 to April 10, 2018

R-18 Home Instruction Log for N.T.

215-18E

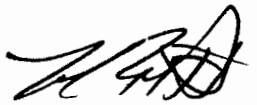
OAL DKT. NO. EDU 8954-18
AGENCY DKT. NO. 147-6/18

T.F. AND R.F., on behalf of minor child, R.F.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE TOWNSHIP OF PITTSGROVE, SALEM 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 the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 7/12/18

Date of Mailing: 7/12/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION ON EMERGENT RELIEF
OAL DKT. NO. EDU 08954-18
AGENCY DKT. NO. 147-6/18

T.F. AND R.F. ON BEHALF OF R.F.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PITTSGROVE, SALEM COUNTY,
Respondents.

Jerry L. Tanenbaum, Esq. for petitioners (Mattleman, Weinroth & Miller, P.C., attorneys)

Kerri A. Wright, Esq., for respondent (Porzio, Bromberg & Newman, P.C., attorneys)

Record Closed: June 27, 2018 Decided: June 28, 2018

BEFORE **JEFFREY R. WILSON**, ALJ:

STATEMENT OF THE CASE

T.F. and R.F. (petitioners) on behalf of their minor son, R.F. bring an action for Emergent Relief against the Board of Education of the Township of Pittsgrove, Salem County (respondent), seeking an order requiring the respondent to immediately provide

the full and complete investigatory file relating to the March 23, 2018, incident that resulted in a finding against the minor child, R.F, for an alleged violation of the respondent's Anti-Bullying Policies against Harassment, Intimidation and Bullying (HIB). Furthermore, the petitioners seek to adjourn the Board appeal until at least ten days, but no later than thirty days, following the production of the complete file. Finally, the petitioners seek an award of costs and reasonable attorney fees if deemed appropriate by the Commissioner.

The respondent opposes the relief requested and asserts that the petitioners' application is legally defective as none of the arguments in their petition provide a basis to grant the requested emergent relief. The respondent argues that the petitioners cannot satisfy any of the mandatory prerequisites outlined in Crowe v. DeGoia, 90 N.J. 126 (1982).

PROCEDURAL HISTORY

Petitioners filed a request for emergent relief on June 15, 2018, at the New Jersey Department of Education (NJDOE). On June 25, 2018, the NJDOE transmitted the matter to the Office of Administrative Law (OAL) as a contested case seeking emergent relief for the petitioners. The parties presented oral argument on the emergent relief application on June 27, 2018, at the OAL offices in Atlantic City and the record closed.

FACTUAL DISCUSSION

T.F. and R.F. are the mother and father, respectively, of R.F. The family resides in Pittsgrove, New Jersey. R.F. is presently fourteen-years-old and recently completed eighth grade at the Pittsgrove Township Middle School in the respondent's school district. An alleged act of HIB was reported to have been committed by R.F. while in school.

According to the HIB Specialist's Report, R.F. and the alleged victim were in math class together on March 23, 2018. The report further indicated that R.F. was aware that the alleged victim experienced suicidal ideations. Based on the HIB Specialist's investigation, she found that:

> The alleged target was asked a question by the alleged perpetrator about her history with suicidal thoughts. The question, which alleged perpetrator admits to asking, made the alleged target feel like the alleged perpetrator was telling her to "kill herself' and made her very upset. The second comment was only overheard by the alleged target during the course of a third party conversation. The alleged perpetrator did not direct the comment towards the alleged target nor was the comment part of a conversation between the alleged perpetrator and the alleged target.
>
> The alleged perpetrator admitted the question he asked the alleged target was a "stupid joke" and he "should have never said it." (Petitioners' Brief, Exhibit D at 4-13.)

The petitioners were notified of the allegations on March 26, 2018, by the school's principal, via telephone. (Petitioners' Brief, Exhibit D at 7.) On April 20, 2018, the Interim Superintendent issued a letter to the petitioners that notified them that the HIB investigation results were reported to the Board of Education on April 19, 2018, and that the HIB Specialist found that R.F. committed HIB. (Petitioners' Brief, Exhibit A.) On April 23, 2018, the petitioners, through their attorney, notified the Interim Superintendent that they intended to appeal the HIB finding against their son and requested to "see the actual evidence that was before the District when it reached its decision." (Petitioners' Brief, Exhibit B.)

By correspondence, dated May 4, 2018, the District reminded the petitioners that that they had previously received the statutorily required information through the Interim Superintendent's April 20, 2018, correspondence. Notwithstanding, the following additional documentation was provided to the petitioners: the Superintendent's HIB Report for the period of March 23, 2018, through April 17, 2018; the letter from the Interim Superintendent, dated April 20, 2018; the HIB Specialist's Report; the correspondence between the petitioner's and the school's vice principal, dated April 4, 2018. (Respondent's Brief, Exhibit A at 1-17.)

In his May 9, 2018, email, petitioner's counsel requested that the District provide him with the "full investigatory file upon which the District's decision was based." He further advised the District that "we will have to postpone the hearing until after the full file

can be produced." (Petitioners' Brief, Exhibit E.) Based upon this request, as of the date of this hearing on the emergent petition, the District had not held a hearing to address the HIB allegations against R.F.

LEGAL ANALYSIS AND CONCLUSION

The standards for emergent relief are set forth in Crowe v. DeGoia, 90 N.J. 126 (1982), and codified at N.J.A.C. 6A:3-1.6. These standards for emergent relief include 1.) that the party seeking emergent relief will suffer irreparable harm if the requested relief is not granted; 2.) the existence of a settled legal right underlying the petitioner's claim; 3.) that the party seeking emergent relief has a likelihood of prevailing on the merits of the underlying claim; and 4.) a balancing of the equities and interests that the party seeking emergent relief will suffer greater harm than the respondent. The petitioner bears the burden of satisfying all four prongs of this test. Crowe v. DeGoia, 90 N.J. at 132–34.

The petitioners argue that irreparable harm is established because the District's failure to produce the full and complete investigatory file relating to the March 23, 2018, incident renders meaningless all of R.F.'s hearing and appeal rights. The petitioners contend that without the full and complete investigatory file that R.F. will have no idea of what the Board would consider other than what R.F. can proffer or glean from the documents provided by the District. This argument is without merit. The petitioners were provided a copy of the HIB Specialist's Report that was created and generated through *myK12 HIB Manager*[1]. That report provided a detailed summary of evidence collected and reasoning for the HIB determination at hand. Furthermore, the petitioners still maintain their right to appeal any alleged procedural errors to the Commission of Education. Here, there has been no showing of irreparable harm to the petitioners or their son. In light of the aforementioned, I **CONCLUDE** that the petitioners have not met their burden of establishing irreparable harm.

[1] myK12 HIB Manager is a cloud based software solution that collects information to a system that understands the requirements and workflows involved with conducting a HIB investigation. The program ensures legal compliance and helps guide the user through the reporting process to ensure that they gather all the information needed to conduct an investigation. myK21 HIB Manager walks the Anti-Bullying Specialist through the tasks needed to be completed while conducting an investigation and provides them with a determination wizard to confirm that the incident meets the criteria set forth in the anti-bullying statute when making a determination.

The next prongs of the Crowe test to be addressed are the existence of a settled legal right underlying the petitioner's claim and that the party seeking emergent relief has a likelihood of prevailing on the merits of the underlying claim. Here, the petitioners' petition fails because they failed to demonstrate a well settled right to the requested emergent relief. The petitioners' counsel admitted that there is a petition pending before the NJDOE / Controversies and Disputes relative to the exact issue at hand. Because there is no well settled right to the request emergent relief, there is no likelihood of the petitioners prevailing on the merits of the underlying claim.

In light of the aforementioned, I **CONCLUDE** that the petitioners have not met their burden of establishing the existence of a settled legal right underlying the petitioner's claim and that the party seeking emergent relief has a likelihood of prevailing on the merits of the underlying claim.

The final prong of the Crowe test requires a balancing of the equities and interests that the party seeking emergent relief will suffer greater harm than the respondent. The petitioners failed to demonstrate any harm they would suffer if the requested emergent relief is not granted. In contrast, the harm to the District if the requested relief is granted would be considerable. The District has a significant interest in ensuring their students' continued participation in HIB investigations and encouraging victims to come forward and to speak candidly. Thus, I **CONCLUDE** that the respondent would suffer greater harm than the petitioner if the requested relief was granted.

ORDER

Having concluded that the petitioner has not satisfied any of the four requirements for emergent relief, the petitioners' request for emergent relief is **DENIED**.

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** 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.

6-28-18
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency: 6-28-18

Date Sent to Parties: 6-28-18

JRW/dm

APPENDIX

WITNESSES

For Petitioner:

None

For Respondent:

None

EXHIBITS

For Petitioner:

P-1 Petitioners' petition and brief with supporting documents, filed June 21, 2018

For Respondent:

R-1 Respondent's brief and supporting documents, filed June 26, 2018

222-18

CECELIA MULLANAPHY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured school nurse employed in respondent's school district – asserted that the respondent Board acted in an arbitrary, capricious and unreasonable manner when it withheld her salary increment for the 2015-2016 school year. The Board contended that petitioner's increment was withheld for good cause – specifically for failure to follow required nursing protocols during an incident on February 5, 2015, wherein an elementary student fainted during a school concert.

The ALJ found, *inter alia*, that: in February 2015, a fifth-grade student, C.D., felt light-headed and briefly fainted while singing in a school choral concert; petitioner was called to that location and found C.D. seated in a chair, having been attended to by teachers who had given her water and taken her vitals; petitioner determined that the situation was not urgent and escorted C.D. to the nurse's office, where she had C.D. put her legs up and drink more water before releasing her back to class unsupervised; petitioner contacted C.D.'s mother and generally described that C.D. had become dizzy during a concert and was brought to the nurse's office, where she fully recovered; nursing protocols utilized by the District are self-described as guidelines, and care is to be based on clinical presentation. The ALJ concluded, *inter alia,* that: tenured teachers may not be dismissed or reduced in compensation except for inefficiency or other just cause; the standard for overturning a Board decision is high; however, in this case there is no qualified opinion in the record to contravene petitioner's course of action, as the superintendent's testimony in this matter is outside his scope of expertise; and the protocols set forth in the District's Health Services Manual are recommendations rather than requirements, as medical care must be based on clinical presentation. Accordingly, the ALJ determined that the Board's action was arbitrary, capricious and unreasonable, and ordered the reinstatement of petitioner's increment for the 2015-2016 school year.

Upon comprehensive review, the Commissioner rejected the Initial Decision, finding, *inter alia,* that the Board's decision to withhold petitioner's increment was reasonable based on her performance in connection with the February 4, 2015 incident, and that petitioner failed to meet her burden to prove otherwise. In so determining, the Commissioner noted that the ALJ's analysis here ignores a critical distinction between respective burdens of proof in tenure matters and increment withholdings. The Commissioner found the Board's decision to be reasonable based on petitioner's failure to follow several protocols outlined in the Health Services Manual; petitioner's failure to accurately document the incident and communicate it to C.D.'s mother; and petitioner's unwise decision to send C.D. back to class unsupervised.

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 7/26/18

OAL DKT. NO. EDU 12092-16
AGENCY DKT. NO. 187-7/16

CECELIA MULLANAPHY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO MONMOUTH 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 Marlboro Board of Education (Board) and Petitioner Cecelia Mullanaphy's reply thereto. This matter involves a claim by the petitioner, a school nurse, that the Board's decision to withhold her increment for the 2015-16 school year was arbitrary, capricious and unreasonable. The Board's decision to withhold the petitioner's increment was based upon the petitioner's failure to follow required nursing protocols during an incident on February 5, 2015, where a student fainted at a school concert. Following a hearing at the OAL, the ALJ found that the Board's decision to withhold the petitioner's increment was arbitrary, capricious and unreasonable. As a result, the ALJ ordered the Board to restore the petitioner's increment.

In its exceptions, the Board maintains that the ALJ improperly applied a heightened standard of review and wrongfully substituted her own judgment for that of the Board. The ALJ incorrectly cited and blurred the line between the standard for dismissal of tenured teachers and the standard for withholding an increment. In the Initial Decision, the ALJ states "tenured teachers may not be dismissed or reduced in compensation except for inefficiency or other just cause,

N.J.S.A. 18A:29-14." Initial Decision at 5. The ALJ actually quoted from *N.J.S.A.* 18A:6-10 while citing *N.J.S.A.* 18A:29-14. *N.J.S.A.* 18A:6-10, titled "Dismissal and reduction of persons under tenure in public school systems," states:

> No person shall be dismissed or reduced in compensation if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state ... except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle.

On the other hand, *N.J.S.A.* 18A:29-14, titled "Withholding increments; causes; notice of appeals," provides:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjusted 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.

The Board emphasizes that it is well settled that to withhold an increment, "it is not necessary to show shortcomings on the part of a teacher sufficient to justify dismissal." *Brunilda Bauer v. State-Operated School District of the City of Jersey City, Hudson County*, Commissioner Decision No. 179-98, decided April 30, 1998. Further, the scope of review in increment withholding matters is "not to substitute h[er] judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." *Kopera v. Board of Education of West Orange*, 60 *N.J. Super.* 288, 296 (App. Div. 1960). The Board asserts that when the Commissioner applies the correct legal standard, it will be clear that the Board's decision should be affirmed.

The Board also argues that the ALJ misapplied the Heath Services Manual, and failed to consider substantial testimony and evidence that the petitioner failed to follow required protocols for fainting students. Specifically, the ALJ erroneously found as fact that the "[n]ursing

protocols utilized by the District are self-described as guidelines and care is to be based on clinical presentation." Initial Decision at 5. The only section of the Heath Services Manual that contains "guidance" language is found in the *Standing Operating Protocols and Standing Orders* section, which applies to how a student should be triaged as either emergent, urgent or non-urgent based on the severity of the incident. The testimony revealed that the *Standing Operating Procedures for School Nurses* contains mandatory requirements, and that section is distinct from the *Standing Operating Protocols and Standing Orders* section. The *Standard Operating Procedures for School Nurses* outlines what must be followed when a pupil faints. Joint Exhibit 21 at 59. The petitioner did not have the discretion to ignore those procedures regardless of whether she felt that the matter was non-urgent. The distinction between *Standing Operating Protocols and Standing Orders* and *Standing Operating Procedures for School Nurses* was reflected in the testimony of Dr. Hibbs, the Superintendent of the District, who conducted an extensive and thorough investigation into this matter.

The Board argues that the Commissioner cannot find that the Board lacked a rational basis to withhold the petitioner's increment for the failure to follow the *Standing Operating Procedures for School Nurses*. After C.D. fainted: the petitioner did not apply a cold compress to her head; the petitioner did not review C.D.'s health history with her or her parents; the petitioner did not loosen C.D.'s clothes; the petitioner did not monitor C.D.'s vital signs; the petitioner did not assess C.D.'s breathing and pulse; the petitioner did not call 911 or activate the Medical Emergency Response Team (M.E.R.T.); and the petitioner did not inform C.D.'s parent that C.D. had fainted. *See*, Joint Exhibit 21 at 59. Seven of the required procedures were not followed by the petitioner; therefore, Dr. Hibbs appropriately found that the petitioner was derelict in her duties, and the ALJ's finding to the contrary is simply incorrect.

The Board further argues that the ALJ improperly concluded that "the decision to withhold the petitioner's increment rests solely on perceived errors in her management of the February 4, 2015 incident." Initial Decision at 6. Petitioner's increment was withheld based on objective – not "perceived"– errors in petitioner's handling of the incident in which C.D. fainted. Moreover, the Board had a rational reason to withhold the petitioner's increment based on the failures detailed in Dr. Hibbs' letter that was the result of an extensive investigation into the incident. The petitioner failed to follow the mandatory procedures for administering aid to a fainting student as prescribed in the *Standing Operating Procedures for School Nurses*; she failed to properly investigate whether C.D. lost consciousness; and she failed to relay complete and accurate information to C.D.'s parents. Regardless of whether the ALJ subjectively believes the Board is being hypercritical, petitioner's handling of the February 4, 2015 incident cannot objectively be deemed meritorious service warranting a salary increase.

In reply, the petitioner contends that the ALJ relied upon substantial factual evidence to properly conclude that the increment withholding was arbitrary and capricious, and that the petitioner's increment for the 2015-2016 school year should be restored. Contrary to the allegations in the Board's exceptions, the ALJ did not substitute her own judgment for that of the Board and, in fact, the ALJ strictly complied with the *Kopera* standards. The petitioner cited to excerpts from the Initial Decision to argue that the ALJ applied the District's *Standard Operating Procedures for School Nurses* to the actions taken by the petitioner during the incident in question. The petitioner argues that the Board did not present a scintilla of credible evidence that the petitioner failed to comply with the policies and protocols enumerated in both sections of the Health Services Manual. The petitioner also points out that the Board only cited to portions of the Heath Services Manual in its exceptions to support its position, instead of including the entirety of

the *Standard Operating Protocols and Standing Orders* – which demonstrates that it is not intended to indicate an exclusive course of treatment or to be applicable in all circumstances. The Board also failed to present any credible evidence that challenged the testimony of the petitioner, who was found to be credible by the ALJ. Therefore, the Initial Decision should be adopted as the final decision in this matter.

Pursuant to *N.J.S.A.* 18A:29-14, a local board of education may withhold an employee's salary increment for inefficiency or other good cause. *Probst v. Board of Education of the Borough of Haddonfield*, 127 *N.J.* 518 (1992). The recommendation and decision to withhold an employee's increment is "a matter of essential managerial prerogative which has been delegated by the legislature to the board." *Bernards Twp. Bd. of Educ. v. Bernards Twp. Educ. Ass'n.*, 79 *N.J.* 311, 321 (1979). Moreover, a board of education's exercise of its discretionary powers "may not be upset unless patently arbitrary, without rational basis or induced by improper motives." *Kopera*, *supra*, at 294. Therefore, when a school employee challenges a salary increment withholding, the employee bears the burden of proof "of demonstrating that the decision was unreasonable, arbitrary, without rational basis or induced by improper motives." *Kopera*, *supra*, at 297. In evaluating whether the increment withholding is reasonable, the issues to be determined are: (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 their expertise. *Kopera*, *supra*, at 296-297.

Upon a comprehensive review of the record, the Commissioner finds that the Board's decision to withhold the petitioner's increment for the 2015-16 school year was reasonable based on the petitioner's performance in connection with the February 4, 2015 incident. As a threshold matter, the ALJ's analysis appears to ignore the critical distinction between the

respective burdens of proof in tenure matters and increment withholdings. The decision to withhold an increment does not require a showing sufficient to justify suspension or the revocation of a teacher's tenure. "To do so would convert an increment withholding action into a tenure case, and accordingly shift the burden of proof to the board. Such is not the purpose of an appeal to the Commissioner under the provisions of *N.J.S.A.* 18A:29-14." *Reilly v. Parsippany-Troy Hills Twp. Bd. of Educ.*, 1989 *S.L.D.* 1830, 1843 (citations omitted). The District did not have the burden of proving that the increment withholding was reasonable; but rather it was the petitioner's burden of proving that the District's action was unreasonable. A review of the record indicates that the petitioner did not meet that burden.

The *Kopera* factors require an analysis as to whether the underlying facts were consistent with those outlined in Dr. Hibbs' letter notifying the petitioner of the Board's decision to withhold her increment, and whether it was reasonable for the Board to withhold the petitioner's increment based on those facts. Joint Exhibit 24. Importantly, "the 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 conclusion." *Kopera*, *supra*, at 296. Dr. Hibbs conducted an investigation of the February 4, 2015 incident that included reviewing statements from other teaching staff members present at the concert prior to recommending that the Board withhold the petitioner's increment for the 2015-2016 school year. After the petitioner had an opportunity to appear before the Board, the Board voted unanimously to withhold the petitioner's increment for the 2015-2106 school year.

The video evidence clearly demonstrates that C.D. fainted at the concert. Despite the petitioner's assertion that she was initially unaware that C.D. actually fainted, it was reasonable for the Board to determine that her investigation of the incident was unacceptable, and that there

is an expectation that the school nurse would inquire as to exactly what happened from the other teachers that assisted C.D. during the concert.[1] Likewise, it was reasonable for the Board to find that petitioner did not comply with the nursing protocols that are outlined in the District's *Standard Operating Procedures for School Nurses.*[2] Regardless of whether the District's *Standard Operating Procedures for School Nurses* simply provide guidelines for certain situations, i.e. fainting or heat exhaustion, or require strict adherence in every case, the petitioner failed to follow many of the listed protocols for treatment of a student who has fainted or suffers from heat exhaustion.[3] Throughout her testimony, petitioner contends that the listed protocols to be followed when a student faints were unnecessary because by the time the petitioner had arrived at the concert location, the student was responsive and had recovered from the syncope (fainting) incident. (2T32:1-19). Therefore, petitioner determined it was not necessary to apply cold compresses; loosen C.D.'s clothes; place her in a horizontal position or elevate her feet; monitor C.D.'s vital

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[1] Petitioner contends that she only heard from the other teachers that C.D. "felt faint" during the concert. The statements submitted by the other teachers paint a much different picture. For example, one teacher noted, "[w]hile we were watching the chorus concert, there was a 5th grade girl in the top row of the risings who suddenly collapsed into the backing of the top row. She was not getting back up and seemed to pass out." Joint Exhibit 20. Another noted, "[a]s I was watching the concert I noticed that [C.D.] was starting to slump over and I realized that she was passing out. I jumped up to hold her as best I could. Her eyes were closed and she was unresponsive for about 15 seconds." Joint Exhibit 19.

[2] Under the District's Health Services Manual (Joint Exhibit 21 at 59), the following procedures for treatment should be followed when there is a fainting incident:

> a. mild symptoms (weakness, dizziness), have patient lie or sit down with head lowered between knees.
> b. Apply cold compress to head.
> c. Give Fluids. Review with student/parent health history.
> d. If patient has lost consciousness, loosen clothing, place in horizontal position and elevate feet.
> e. Monitor vital signs
> f. Assess breathing and pulse.
>
> 1. Call 911. Activate Emergency Response Team or M.E.R.T.
> 2. Notify Parents/Guardians.

[3] The Board argues that the District's *Standard Operating Procedures for School Nurses* lists protocols that must be followed when certain events occur. On the other hand, the petitioner contends that they are simply guidelines and each circumstance is evaluated differently. It is not clear from the record whether the protocols must be strictly adhered to, however, that does not change the outcome in this case or the fact that the petitioner did not prove that the Board's decision was arbitrary, capricious or unreasonable.

signs; or assess C.D.'s breathing or pulse.[4] Again, the Board's determination that the petitioner should have taken at least some of these actions was not unreasonable.

The ALJ stated that Dr. Hibbs is not a medical doctor and thus "his testimony gives no indication that by experience or training he is qualified to assess whether this was an emergency." Initial Decision at 6. Dr. Hibbs was not required to have a medical background to find that the procedures outlined in the Heath Services Manual were not remotely followed by the petitioner.[5] Although the ALJ determined that the petitioner "credibly related that placing C.D. in a supine position and loosening her clothing were unnecessary," the petitioner did not demonstrate that Dr. Hibbs' overall assessment of the incident was unreasonable. Other factors were identified as problematic by Dr. Hibbs, including the petitioner's failure to accurately document the incident in the District's student information system; the petitioner's unwise decision to send C.D. back to class unsupervised; and the petitioner's failure to relay accurate information to C.D.'s parents. Therefore, the Commissioner rejects the ALJ's determination that "the decision to withhold the petitioner's increment rests solely on perceived errors in her management of the February 4, 2015 incident." Initial Decision at 6. Further, a review of the transcript indicates that even after viewing the video of the student fainting and losing consciousness, the petitioner still does not appear to grasp the seriousness of the situation.[6] Therefore, it was reasonable for the District to assess a

[4] The petitioner did provide C.D. with fluids and she monitored her at the nurse's office for approximately 30 minutes.

[5] The ALJ determined that it was "worth noting that neither Ms. Attanasio, the nursing supervisor, nor Dr. Lee, the District's physician, were called as witnesses." Initial Decision at 6. It is not clear what weight the ALJ afforded to the lack of testimony, if any, but a negative inference against the Board cannot be drawn from the decision not to call the nursing supervisor or the District's physician.

[6] As Dr. Hibbs stated in his letter, "(Petitioner's) lack of proper treatment, judgment, and investigation could have resulted in a serious medical emergency if an underlying medical issue existed. The fact that one (did) not exist is irrelevant."

degree of accountability to the petitioner in the form of an increment withholding[7], which is not a matter of right but rather "a reward for meritorious service to the school district." *North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ.*, 96 *N.J.* 587, 593-594 (1984).

Accordingly the Initial Decision is rejected. The Board's decision to withhold the petitioner's increment for the 2015-16 school year was not arbitrary, capricious or unreasonable based on the petitioner's handling of the February 4, 2015 incident.

IT IS SO ORDERED.[8]

COMMISSIONER OF EDUCATION

Date of Decision: 7/26/18

Date of Mailing: 7/26/18

[7] The Commissioner is mindful that the petitioner has received positive evaluations in the past; however, the Board's decision to withhold the petitioner's increment for 2015-2016 was based exclusively on her handling of the February 4, 2015 incident.

[8] 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 12092-16
AGENCY DKT. NO. 187-7/16

CECELIA MULLANAPHY,
Petitioner,
v.
TOWNSHIP OF MARLBORO BOARD OF EDUCATION,
Respondent.

Stephen B. Hunter, Esq., for petitioner (Detzky, Hunter & DeFillippo, LLC, attorney)

Mark H. Zitomer, Esq., for respondent (Schenck, Price, Smith & King LLP, attorneys)

Record Closed: October 4, 2017 Decided: June 18, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE

Petitioner Cecelia Mullanaphy appeals a decision of the Marlboro Board of Education, denying her salary and adjustment increments for the 2015-2016 school

year. Petitioner alleges that the Board's action was arbitrary, capricious and unreasonable and must be reversed.

PROCEDURAL HISTORY

On May 5, 2015, the Board voted to withhold petitioner's salary and adjustment increments for the 2015-2016 school year. The Board advised petitioner by Letter of Reprimand/Notice of Board Action signed by the Superintendent and dated May 11, 2015. It sets forth the Superintendent's concerns over petitioner's performance, judgment and overall handling of an incident on February 4, 2015. (J-24.) Petitioner first sought relief from the Public Employee Relations Commission (PERC) by filing a Scope of Negotiations petition, but PERC dismissed the matter holding that it was more properly before the Commissioner of Education. Petitioner filed an appeal with the Bureau of Controversies and Disputes on July 12, 2016. The Commissioner 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; N.J.S.A. 52:14F-1 to -13.

I held a hearing on May 22, and 23, 2017. The record was left open for counsel to submit written summations, which they did. I received replies on October 4, 2017, and on that date, the record closed.

FACTUAL DISCUSSION

Certain facts are undisputed. Petitioner was hired by the District as a school nurse in 1994 and has served continuously in that role. Petitioner was assigned to the Asher Holmes Elementary School, which includes first through fifth grade. Petitioner's evaluations throughout her career have been excellent. Her year-end evaluation in 2015 was also positive, though the school principal makes opaque reference to the incident at bar, suggesting petitioner might in the future want to develop the record of an episode more completely. (J-3).

On February 4, 2015, the school was holding its winter choral concert in the cafetorium. The room was full with students and faculty. C.D., a 5th grader, was in the

bleachers singing when she felt light-headed and briefly fainted. She was helped down to floor level by two teachers, given a bottle of cold water, and seated in a chair. Phillip Lozada, a teacher also certified as an Emergency Medical Technician, hurried over to assist. He took C.D.'s pulse and assessed her breathing, which he reported as normal. When petitioner arrived Mr. Lozada informed her that C.D. had been standing in the bleachers for approximately one hour and may have fainted, but was recovering (J-18). After speaking to C.D, petitioner determined that emergency services were not required and that the child could walk with her to the nurse's office. Petitioner had C.D. sit on a cot with her legs elevated and drink water. After observing her for twenty to thirty minutes, petitioner allowed C.D. to return to class. There was a second child in the office who had also suffered a dizzy spell during the concert.

Petitioner testified that when she first arrived in the cafetorium C.D. was pale, her skin was clammy and she was lethargic. Her head had been placed in a downward position. Petitioner asked C.D. whether she was hurt and she said no. As C.D. began to revive, petitioner assessed that the situation was not an emergency, and that C.D. was suffering from heat exhaustion. The concert continued and in her experience it is preferable in such situations to proceed calmly and avert commotion. As a precaution she escorted C.D. to the nurse's office. The cafetorium was stuffy owing to the number of students and staff present in close proximity. Petitioner testified that a student feeling faint in that setting is not all that uncommon. C.D. has no medical history of concern and when she returned to the office petitioner checked her computer to make sure. She did not place C.D. in a supine position, loosen her clothing, or take vital signs as these measures were unnecessary. She continued to speak to and observe C.D.; her color had returned to normal and her skin was dry to the touch. C.D. and the other student in her office were speaking to each other. Before releasing C.D., petitioner asked how she was feeling and C.D. answered that she felt fine.

Petitioner then called C.D.'s mother and informed her of the incident. She said that C.D. had become faint during the concert, but that she had recovered and returned to class. The mother called back and asked to speak with her daughter; petitioner brought C.D. back to the nurse's office to speak with mom and thereafter C.D. again

resumed her class schedule. That same day petitioner went home sick and was out of work the next two days.

Dr. Eric Hibbs is the Superintendent of Schools in Marlboro. He was not present at the concert, but began to hear of the C.D. incident that same day. The school principal as well as C.D.'s mother contacted him. He eventually also met with Mrs. D. She was "furious" and felt that petitioner had endangered her daughter's health and then failed to accurately communicate the seriousness of her condition. She thought emergency services should have been called. Mrs. D. also shared her dissatisfaction with the members of the school board. Dr. Hibbs testified that he generally agreed with Mrs. D. that petitioner performed ineptly during this incident. Dr. Hibbs felt that the incident should have been treated as an emergency because C.D. had fallen unconscious and was not merely faint. He would have expected emergency services to be called. Even adopting petitioner's mischaracterization of the event as non-urgent, school nursing protocols for non-urgent care were not followed. In such circumstances the child is to be maneuvered into a supine position, given a cold compress for the head, clothing is loosened, and vital signs are monitored. Further, petitioner allowed C.D. to walk to her office and then allowed her to walk back to class unattended. These decisions reflect a failure to apprehend the seriousness of the situation. Moreover, petitioner's explanation to Mrs. D. that day was inaccurate and incomplete. Dr. Hibbs testified that he also reviewed this issue with the nursing supervisor, Ms. Linda Attanasio, and with Dr. May Yee, the school physician. For these reasons he recommended withholding petitioner's increment.

Craig Vaughn was the Human Resources Director in the District when this incident occurred. He interviewed petitioner concerning the event and had her fill out an accident report. He testified that during their conversation petitioner allowed that she wasn't feeling well on February 4, 2015 and might have asked more questions of those around her to fill in details of the event.

FINDINGS OF FACT

Based on the evidence admitted at the hearing, as well as the opportunity to observe the witnesses and assess their credibility I **FIND** the following:

1. On the morning of February 4, 2015 C.D., briefly fainted during a school concert and was brought down from bleachers and seated in a chair.
2. C.D. was given cold water, her head was placed in a downward position, and her vital signs were assessed as normal by a teacher who is also credentialed as an EMT.
3. On petitioner's arrival in the cafetorium, she spoke with and evaluated C.D., determining that the situation was not urgent.
4. The concert had been in progress for some time and the room was hot.
5. Petitioner correctly understood that C.D. was suffering from heat exhaustion and required rest and hydration.
6. Petitioner escorted C.D. to her office and there seated her, had her put her legs up, and drink more water.
7. Petitioner spoke with and observed C.D. in the office for twenty to thirty minutes before releasing her back to class.
8. Nursing protocols utilized by the District are self-described as guidelines and care is to be based on clinical presentation.
9. Petitioner contacted Mrs. D. and generally described events to the effect that her daughter had become dizzy during a school concert, and was brought to the nurse's office, where she fully recovered.

CONCLUSIONS OF LAW

The case is close because the standard for overturning a Board decision is high, Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288 (App. Div. 1960). Even so, I am hard pressed to sustain this action. Tenured teachers may not be dismissed or reduced in compensation except for inefficiency or other just cause, N.J.S.A. 18A:29-14. Petitioner is a school nurse of long experience who has received laudatory evaluations

throughout her career. These refer to her variously as attentive, kind, diligent and knowledgeable. Her evaluations in 2015 were also positive, but for a reference to this incident. Increments are based on annual performance, Probst v. Bd. of Educ., Borough of Haddonfield, 127 N.J. 518 (1992); Bd. of Educ. V. Bernards Twp. Educ. Assoc., 79 N.J. 311 (1979). In the absence of other concerns, the decision to withhold petitioner's increment rests solely on perceived errors in her management of the February 4, 2015 incident.

From this record it appears petitioner accurately evaluated C.D. and then took precautions to assure she was not in danger. C.D. was suffering from heat exhaustion and was taken from the bleachers, seated with head down, and given cold water. Mr. Lozada, took her pulse, assessed her breathing, and found these vital signs to be normal. He reported this to petitioner and that he thought C.D. was recovering. Mr. Lozada felt no need to call for emergency services. C.D. was then escorted by petitioner to her office, seated on a cot with legs up, given more water, and watched for twenty to thirty minutes before being released back to class. There is no qualified opinion in the record that contravenes petitioner's course of action. Dr. Hibbs felt that petitioner had badly mishandled the situation, beginning with her failure to treat the incident as an emergency. Yet, Dr. Hibbs is an educator, not a medical doctor. His testimony gives no indication that by experience or training he is qualified to assess whether this was or was not an emergency. Thus, the central tenet of his criticism is without foundation. It is worth noting that neither Ms. Attanasio, the nursing supervisor, nor Dr. Lee, the District's physician, were called as witnesses.

The Board correctly argues that its decision is presumptively valid and must be sustained unless arbitrary. It searches therefore within the health services manual for a degree of confirmation. Initially, these protocols are guidance. They enumerate many potential illnesses that might present in school and list steps to be taken. Understanding that a manual of this type cannot possibly anticipate the subtleties that each case poses, the authors state plainly that care must be based on clinical presentation, that the "recommendations" in the document are not an exclusive course of treatment, nor are they applicable in all circumstances. (J-21). Dr. Hibbs was unable to square this statement with his insistence on strict adherence to each protocol item.

Petitioner credibly related that placing C.D. in a supine position and loosening her clothing were unnecessary. These are recommended when a student is unconscious; C.D. had already begun to recover when she first observed her. Again the Superintendent opined on a matter outside his scope of expertise.

Dr. Hibbs maintained also that petitioner inaccurately described the incident to Mrs. D. Petitioner testified that as this was not an emergency there was no reason to alarm the parent and she emphasized that C.D. was fine. It strains to refer to this as false, or misleading. The communication was inexact, but perfect pitch in a telephone conversation of this kind is challenging. Much depends on the parent's disposition. Moreover, petitioner's acknowledgement to Mr. Vaughn that she might have asked additional questions is not, as the District suggests, an admission of error, but rather her effort to replay the event to see if more might have done. An unreasonable decision is not cured by being hyper-critical.

ORDER

Based on the foregoing, it is **ORDERED** that petitioner's increment for the 2015-2016 school year be reinstated and any necessary adjustments be made for subsequent years.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 18, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: June 15, 2018

Date Mailed to Parties: June 18, 2018

/caa

APPENDIX
WITNESSES

For Petitioner:

Cecelia Mullanaphy

For Respondent:

Eric Hibbs
Craig Vaughn
Angelina Zarko Marino

EXHIBITS

Joint Exhibits:

J-1 Petitioner Cecilia Mullanaphy's Certification dated March 9, 2016
J-2 Marlboro Township Public Schools Job Description for Certified School Nurse
J-3 Petitioner Cecilia Mullanaphy's Year End Evaluation dated June 4, 2015
J-4 Petitioner Cecilia Mullanaphy's Year End Evaluation dated June 7, 2013
J-5 Marlboro Township Public Schools School Nurse Observation Report dated May 13, 2013
J-6 Petitioner Cecilia Mullanaphy's Year End Evaluation dated June 4, 2014
J-7 Traditional Classroom Observation Report dated November 22, 2013
J-8 Traditional Classroom Observation Report dated February 14, 2014
J-9 Traditional Classroom Observation Report dated June 4, 2014
J-10 Year End Evaluation dated June 4, 2015
J-11 Traditional Classroom Observation Report dated March 15, 2015
J-12 Visit Report for C.D., Asher Holmes Elementary School dated February 4, 2015
J-13 Email from Cecilia Mullanaphy to Marc Edery dated February 6, 2015
J-14 Email from Marc Edery to Cecilia Mullanaphy dated February 6, 2015
J-15 Email to Cecilia Mullanaphy dated February 5, 2015 from C.D.'s mother

J-16 Email from Cecilia Mullanaphy to C.D.'s mother
J-17 Marlboro Township Public Schools Accident Report dated February 13, 2015
J-18 Email from Philip Lozada to Marc Edery dated February 6, 2015
J-19 Email from Courtney Carrig to Marc Edery dated February 6, 2015
J-20 Email from Angelina Zarko to Marc Edery dated February 6, 2015
J-21 Health Services Manual for 2015-2015 School Year
J-22 Email dated March 9, 2015 from C.D.'s mother to Board Members
J-23 Email dated June 26, 2015 from C.D.'s mother to Michael Lilonsky
J-24 Letter from Superintendent Eric Hibbs to Cecilia Mullanaphy dated May 11, 2015
J-25 Craig's Notes

For Petitioner:

None.

For Respondent:

R-1 Interrogatory Number—Questions Number 7
R-2 Video

223-18LM

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

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

LAMONT O. REPOLLET, ED.D.
Commissioner

July 27, 2018

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Re: *B.J. v. State-Operated School District of the City of Newark, Essex County, A. Robert Gregory, Angelica Allen McMillan, Kathleen Tierney, Agency Dkt. No. 126-5/18.*

Dear Parties:

I have reviewed the materials filed in connection with respondent's combined Motion to Dismiss and/or Motion for Summary Decision in the above-captioned petition of appeal.[1]

In this matter, petitioner alleges that respondent violated the Department of Education's Transition Plan for the Return of Local Control to Newark Public Schools ("Transition Plan") because the administration at Science Park High School ("SPHS") "used a new unauthorized admissions algorithm to rank students" for the 2018-2019 school year, without having followed the directives of the Transition Plan. Petitioner further alleges that prior to changing its admissions algorithm, SPHS did not notify the Board of same, and no vote was taken

[1] The Commissioner acknowledges – as both parties have noted same – that the parties recently litigated a related matter, *B.J., on behalf of minor child, T.J. v. State-Operated School District of the City of Newark, Essex County, and Gabrielle Ramos-Solomon, Executive Director, Office of Student Enrollment*, OAL Dkt. No. EDU 08133-16, Commissioner Decision No. 166-18 (June 1, 2018), where petitioner filed an appeal with the Commissioner following the District's denial of admission of his minor child, T.J., into the Science Park High School ("SPHS"). In that matter, petitioner alleged that the District discriminated against T.J. on the basis of race and/or sex by placing too much weight on standardized assessments in its admissions consideration for SPHS, while the District asserted that T.J. was properly denied enrollment at SPHS because his grades and standardized test scores were significantly below those of students accepted into the school. The Administrative Law Judge ("ALJ") found that petitioner failed to establish that the use of standardized test scores as an admissions criteria had a disparate impact on black students and male students in the District. The ALJ further found that the District's admissions criteria are gender neutral, and petitioner failed to establish that the District discriminated against T.J. on the basis of his race. The Commissioner concurred with the ALJ's findings and conclusions, and issued a final decision in the matter reflecting same.

by the Board members to change the "admissions algorithm formula."[2] Petitioner, therefore, requests – among other relief – that the results of the 2018-2019 student matches for admission into SPHS be withdrawn.

Respondent filed a Motion to Dismiss, arguing that the petition of appeal should be dismissed because the Transition Plan and the Administrative Code do not provide an individual right of action, and that petitioner has also failed to allege any injury or violation of rights as a result of the District's alleged actions pertaining to SPHS's admissions algorithm. In the alternative, respondent proffers a Motion for Summary Decision, arguing that petitioner lacks standing to challenge SPHS's admissions criteria, and that contrary to petitioner's assertions, the admission policies for the Newark Public Schools have not changed.

As a preliminary matter, the Commissioner notes that petitioner – as a resident of Newark and a parent in the District – has standing to challenge the Board's policies and conduct if he believes that the Board is violating the school laws of the State. Whether petitioner may bring a claim based on an alleged violation of the Transition Plan is a separate issue.

The Transition Plan – which serves as the basis for petitioner's claim – sets forth the terms and conditions for the return of local control to the Newark Public School District, pursuant to *N.J.A.C.* 6A:30-7.2 and 7.3. Nothing in the Transition Plan or in the governing statute and regulations provide a private right of action to individuals for alleged violations of the terms of the Transition Plan. Therefore, petitioner cannot bring an action against respondent on the basis that it allegedly violated the Transition Plan. Since petitioner's claims are exclusively based on the terms of the Transition Plan and alleged violations thereof, petitioner has failed to state a claim upon with relief can be granted; therefore, dismissal of this petition of appeal is proper pursuant to *N.J.A.C.* 6A:3-1.10.[3] For the sake of completeness, however, the Commissioner will briefly address petitioner's contentions with regard to alleged violations of the Transition Plan.

Petitioner alleges that "[i]n direct violation of directives in the [Transition Plan], the administration at [SPHS] used a new unauthorized admissions algorithm to rank students for SPHS student enrollment in the 2018-2019 academic year." Petitioner further asserts that "the Board received no notice and no vote was taken by Board members to change the SPHS admissions algorithm formula." The Transition Plan states in relevant part:

> Any review or reconsideration of the current District policies governing student enrollment shall be conducted only under a new permanent superintendent and implemented for student enrollment in the 2019-20 school year and beyond. If the Board and a new Superintendent decide in future years to consider implementing a new or materially revised system, it is expected that they will seek

[2] The admissions "algorithm" or "formula" for the 2018-2019 school year was as follows: 70% standardized test scores; 25% student transcript; 5% attendance. For the 2017-2018 school year the admissions criteria was as follows: 80% standardized test scores; 15% student transcript; 5% attendance.

[3] The Commissioner may dismiss a petition of appeal on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true. *See N.J.A.C.* 6A:3-1.10

> feedback from all relevant stakeholders and families (both district and charter) as well as leverage any existing studies and reports. Finally, all policy and process changes must be publicly and transparently articulated before adoption. Any material change to the District's enrollment policies and processes must be completed, announced, and voted on by the Board, with sufficient advance notice.

A review of the District's current policies and practices reveals that each magnet school conducts its own admissions review and makes its own enrollment decisions. SPHS's decisions are based on the following "three key indicators" – standardized test scores, grades, and attendance. Newark Enrolls further informs applicants that "[t]est scores carry the most weight followed by grades and attendance." This policy and practice has not changed. The documents submitted by petitioner reveal that SPHS has maintained the aforementioned admissions criteria since at least 2013, and the only difference is the weight given to the three categories, *e.g.*, in 2013, 83% for standardized test scores, 13% for grades, and 4% for attendance; from 2015 through to the 2017-2018 school year, 80% for standardized test scores, 15% for grades, and 5% for attendance; and for the 2018-2019 school year, 70% for standardized test scores, 25% for grades, and 5% attendance.[4] While the weight given to test scores has decreased, the overall admissions policy and practice – test scores carrying the most weight, followed by grades and attendance – has not changed. Furthermore, a minor shift in the weight given to the criterion certainly does not constitute "material change" to the enrollment policies and processes of the District, nor is it considered "implement[ation] of a new or materially revised system." As such, SPHS's decision to shift 10% of the weight from standardized test scores to grades did not result in a change in the District's enrollment policies and did not violate the Transition Plan.

Accordingly, respondent's motion to dismiss is granted for petitioner's failure to advance a cause of action upon which relief can be granted, the petition of appeal is hereby dismissed with prejudice.[5]

Sincerely,



Lamont O. Repollet, Ed.D.
Commissioner of Education

c: State Law Library

LOR/SLP/ATA
VIA REGULAR MAIL

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[4] Under the current policy and practice, any changes in weight of the admissions criteria – or the formula used to make enrollment determinations – falls within the individual magnet schools' discretion and does not require Board approval.

[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).

224-18

BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MILLSTONE, MONMOUTH COUNTY AND BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

The Board of Education of the Upper Freehold Regional School District (Upper Freehold) and respondent Millstone Board of Education (Millstone) participate in a send-receive agreement whereby Millstone – a K-8 school district – sends its high school students to petitioner's Allentown High School (AHS). In the instant case, Upper Freehold challenged Millstone's decision – pursuant to *N.J.S.A.* 18A:38-15 – to send a group of its students to Red Bank Regional High School (Red Bank) for specialized high school courses of study not offered at Allentown High School. Petitioner disputed the applicability and scope of *N.J.S.A.* 18A:38-15 with respect to Millstone's determination to pay tuition for several of its residents to attend Red Bank instead of AHS.

The ALJ found, *inter alia*, that: Upper Freehold and Millstone have been in a send-receive relationship since 1964; Millstone sends students to Red Bank because it determined that AHS does not provide a "course of study" in certain areas, such as Finance, Information Technology, Engineering, Visual and Performing Arts, and Culinary Arts; Millstone maintains that it is legally sending students to Red Bank pursuant to *N.J.S.A.* 18A:38-15, as Upper Freehold does not provide a "course of study" in these areas; Upper Freehold argued that: 1) *N.J.S.A.* 18A:38-15 is not applicable to Millstone as it only applies to districts that have their own high school, 2) the Commissioner's approval is necessary before Millstone can modify its send-receive relationship to include Red Bank; and 3) Millstone is precluded from sending students to Red Bank because AHS offers a "course of study" in the subject areas of each the Red Bank Academies; with respect to testimony at hearing, the expert witness for Upper Freehold was not credible as she was inconsistent with the facts and documentation, whereas respondents' expert witness was credible and consistent with the facts and documentary evidence; and the course of study provided at Red Bank in each of the disciplines in question is quantitatively and qualitatively superior to what is offered at AHS. The ALJ concluded that: Upper Freehold's arguments were without merit, and the controlling case in this matter is *Board of Education of the City of Asbury Park v. Board of Education of the Red Bank Regional School District, et al.*, 97 *N.J.A.R.2d* (EDU) 464, *affirmed*, Commissioner Decision No. 156-96, decided March 27, 1997, *affirmed*, State Bd. of Educ. Decision No. 43-97, decided September 3, 1997, *affirmed*, No. A-1043-97 (App. Div. March 17, 1999), which stands for the proposition that a K-8 school district can invoke *N.J.S.A.* 18A:38-15; Upper Freehold failed to carry its burden to prove that AHS furnishes courses of study comparable to the specialized programs offered at Red Bank, and there is nothing in the record to indicate that Millstone was arbitrary, capricious or unreasonable in sending students to Red Bank for specialized programs.

The Commissioner concurred with the ALJ's findings and conclusions, 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 7/26/18

224-18

OAL DKT. NO. EDU 6068-16
AGENCY DKT. NO. 108-4/16

BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MILLSTONE, MONMOUTH COUNTY AND BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Upper Freehold Regional School District Board of Education (Upper Freehold), and the reply thereto by the Millstone Board of Education (Millstone) and the Red Bank Regional Board of Education. Upper Freehold, who is in a send-receive relationship with Millstone, is challenging Millstone's decision to send a group of its students to Red Bank Regional High School (Red Bank) pursuant to *N.J.S.A.* 18A:38-15,[1] which provides that:

> [a]ny board of education not furnishing instruction in a particular high school course of study, which any pupil resident in the district and who has completed the elementary course of study provided therein may desire to pursue, may, in its discretion, pay the tuition of such pupil for instruction in such course of study in a high school of any other district.

Millstone sends the group of students to Red Bank because it determined that Allentown High School does not provide a "course of study" in certain areas.[2]

[1] Millstone does not have a high school, so it entered into a send-receive relationship with Upper Freehold whereby Millstone sends its high school students to Allentown High School and Upper Freehold charges Millstone tuition.

[2] Of the students from Millstone in question, approximately: two attend Red Bank Regional's Academy of Finance; two attend the Academy of Information Technology; four attend the Academy of Engineering; seven attend the Visual and Performing Arts Academy; and one attends a culinary program. The Initial Decision lists all of the course offerings at Allentown High School and Red Bank for the disciplines at issue in this case.

After the matter was transmitted to the OAL, both Upper Freehold and Millstone filed a motion for summary decision. On September 29, 2016, the ALJ issued an Order finding that Upper Freehold failed to demonstrate that *N.J.S.A.* 18A:38-15 does not apply to Millstone because Millstone does not operate a high school. The ALJ also concluded that Millstone's decision to send the group of students out of district under *N.J.S.A.* 18A:38-15 did not violate the send-receive relationship between the Districts. The ALJ further found that there were issues of material fact that required a hearing as to what constitutes a "course of study," as well as whether what is provided by each school constitutes a course of study in the five separate disciplines in question. Finally, after several days of testimony, the ALJ found that Allentown High School does not furnish a course of study in the disciplines at issue in this case; therefore, Millstone did not abuse its discretion by sending its students to Red Bank.

In its exceptions, Upper Freehold reiterates the statutory arguments made below, maintaining that the ALJ erred by denying its motion for summary decision and ultimately concluding that Millstone can invoke *N.J.S.A.* 18A:38-15 to send certain students to Red Bank. Upper Freehold argues that the plain language of *N.J.S.A.* 18A:38-15 unambiguously states that it only applies to a board of education "not furnishing instruction in a particular high school course of study." As a result, a board of education who does not operate a high school, like Millstone, cannot invoke this provision. Additionally, implicit in the Legislature's use of "particular" in the statute is a requirement that the board of education invoking the provision furnishes some form of high school course of study. Upper Freehold also suggests that the evolution of *N.J.S.A.* 18A:38-15 plainly demonstrates that the statutory provision only applies to boards of education that operate high schools. Thus, the only reasonable way to interpret *N.J.S.A.* 18A:38-15 in light of its plain language, companion provisions, and legislative history is to conclude that it may only be used by a board of education that operates a high school.

Additionally, Upper Freehold contends that the ALJ erroneously concluded that *Board of Education of the City of Asbury Park v. Board of Education of the Red Bank Regional School District, et al.*, 97 *N.J.A.R.2d* (EDU) 464, *affirmed*, Commissioner Decision No. 156-96, decided March 27, 1997, *affirmed*, State Bd. of Educ. Decision No. 43-97, decided September 3, 1997, *affirmed*, No. A-1043-97

(App. Div. March 17, 1999), stands for the proposition that a K-8 school district can invoke *N.J.S.A.* 18A:38-15. The *Asbury Park* case was decided under the laws governing vocational education; therefore, Upper Freehold asserts it has no precedential value in this case. Instead, petitioner argues that the decision in *Board of Education of Union Beach v. Board of Education of Keyport*, Commissioner Decision No. 124-832, decided May 5, 1983, *aff'd as modified on other grounds*, State Board of Education Decision No. 60-83, decided September 7, 1983, is the controlling decision in this matter. Upper Freehold maintains that in *Union Beach* the Commissioner and the State Board found that the sending district could not invoke *N.J.S.A.* 18A:38-15 because it does not operate its own high school. Upper Freehold stresses that the decision in *Union Beach* represents the proper application of what the Legislature intended when it enacted *N.J.S.A.* 18A:38-15.

Upper Freehold also argues that interpreting *N.J.S.A.* 18A:38-15 to permit a sending K-8 district to avoid its obligations under *N.J.S.A.* 18A:38-11 and -13 anytime it determines a course of study at another high school is different from its designated receiving school eviscerates the protection the Legislature provided through the sending-receiving relationship. It is undisputed that Millstone designated Allentown High School as the high school for its students and there has been no application made to the Commissioner to modify that agreement as required by *N.J.S.A.* 18A:38-13. Additionally, the ALJ's construction of *N.J.S.A.* 18A:38-15 ignores the fact that the K-8 school district is not in the best position to evaluate whether the receiving high school furnishes instruction in any particular course of study. The decision to send the group of students to Red Bank was made exclusively by Millstone's Superintendent, which cannot be the process envisioned by *N.J.S.A.* 18A:38-15. Therefore, Millstone should be enjoined from violating the send-receive agreement.

Upper Freehold further argues that the ALJ misconstrued *N.J.S.A.* 18A:38-15 by reading a comparability or equivalency test into the statute that the Legislature did not include. There is no requirement that Allentown High School offers an identical or even comparable program to Red Bank; it must only furnish instruction in a course of study. The evidence at the hearing demonstrates that Allentown High School furnishes instruction in all of the courses of study in which Millstone students are enrolled in

Red Bank. It makes no difference that Allentown High School does not offer all of its courses of study under an "academy" umbrella or whether the courses are State-approved as career and technical programs (CTE programs).

In addition to the statutory arguments, Upper Freehold asserts that the ALJ's credibility determinations were not supported by the record, and should be rejected by the Commissioner. The ALJ erred by concluding that Dr. Gayle Carrick – Upper Freehold's expert – was not credible because "[s]he had numerous definitions of course of study and her testimony and opinions were not consistent with the facts and documentation." Upper Freehold cited to various excerpts from the transcript to argue that Dr. Carrick consistently defined a course of study as "a series of individual courses within a specific content area or educational program designed to further learning and mastery of that education content." Furthermore, Upper Freehold asserts that the Commissioner cannot adopt the ALJ's baseless conclusion that Allentown High School does not furnish a course of study in the disciplines at issue because it is not supported by the uncontroverted expert testimony. During the hearing, Dr. Carrick unequivocally testified that Allentown High School furnished the relevant courses of study, and Millstone's expert – Mr. Peter Carter – never once testified to the contrary.

Upper Freehold also maintains it was arbitrary for the ALJ to criticize Dr. Carrick for not speaking to anyone from Red Bank about her report considering that Mr. Carter never spoke to anyone from Allentown High School about his expert report. It was not necessary for Dr. Carrick to provide an analysis of Red Bank's courses because Upper Freehold is not alleging that Red Bank does not have the requisite course of study; rather, Upper Freehold maintains that Allentown High School also has the requisite course of study in the disputed subject areas. In fact, Mr. Carter testified that "[t]here was no need, in [his] expert opinion ..., to look into the day-to-day operations of Allentown High School" because this "case was not about Allentown High School per se." (8T27-9 to 13).[3] In light of Mr. Carter's admission, the ALJ should not have given any credit to his opinion. Upper Freehold cited to various

[3] The transcripts are referenced as 1T-8T, in order by date of the hearing.

excerpts from the transcript to contradict the ALJ's finding that Mr. Carter's testimony was "consistent with the facts and documentary evidence in the case."

Finally, Upper Freehold avows that the ALJ's findings of fact were not supported by the record; as a result, the Commissioner must reject those findings. First, Upper Freehold contends that the ALJ failed to make critical findings of fact regarding the instruction that Allentown High School furnishes, in violation of *N.J.A.C.* 1:1-18.3. Three of the factual findings the ALJ did make contradict the record, as there is no support for the findings that: Red Bank's courses are limited to academy students; Red Bank academies are CTE-approved; and Allentown High School does not furnish instruction in the disputed courses of study. Again, Upper Freehold cited to excerpts from the transcript to argue that the ALJ's findings were erroneous, contending that even when considering only the classes that Allentown High School runs consistently, it is clear that Allentown High School furnishes all of the relevant courses of study. In its exceptions, petitioner outlined all of the courses that it argues provide a course of study in each of the designated areas. Therefore, Upper Freehold asserts that the Millstone students who attended Red Bank should be required to attend Allentown High School pursuant to the send/receive relationship.

In reply, Millstone likewise reiterated the arguments it made below contending that the ALJ properly determined that *N.J.S.A.* 18A:38-15 is available to all school districts, including Millstone. This case is about Millstone's discretion under *N.J.S.A.* 18A:38-15; it is not related to the parties' sending-receiving relationship. The operative statute in this case, *N.J.S.A.* 18A:38-15, does not even create a cause of action for Upper Freehold because the statute contemplates two entities. *N.J.S.A.* 18A:38-15 provides resident districts the discretion to assist their students when they seek an educational choice outside of the high school to which they have been assigned.

Two cases analyzing disputes over out-of-district students' enrollment at Red Bank determined that local boards of education have the absolute discretion to permit their students to enroll at Red Bank even if they do not operate their own high school. *D.M., on behalf of minor child, A.M. v Board of Educ. of the City of Long Branch, Monmouth County*, Commissioner Decision No. 391-00, decided November 28, 2000; *Asbury Park, supra.* The crux of *Asbury Park* is that *N.J.S.A.* 18A:38-15 grants school

districts the discretion to pay for their students' attendance at programs offered in other districts. Although some state laws have changed with regard to vocational schools in general, what has not changed is the fact that districts may choose to pay the tuition for their students to attend programs not offered at their designated high school. Further, no reasonable reading of either *Asbury Park* or *D.M.* could lead to the conclusion that *N.J.S.A.* 18A:38-15 cannot be utilized by districts that do not operate their own high school. Millstone also contends that the holding and dicta in *Union Beach* are misapplied by Upper Freehold. The posture of *Union Beach* is entirely different from the current case. *Union Beach* was attempting to modify its sending-receiving relationship with Keyport, and it sought to misapply *N.J.S.A.* 18A:38-15 to change its high school designation for all of its students simultaneously. That decision is not determinative here because Millstone is not trying to replace Allentown High School as its designated high school; rather, it is simply sending a handful of students to Red Bank to pursue a course of study that is not available at Allentown High School.

To the extent that Upper Freehold characterizes the ALJ's interpretation of *N.J.S.A.* 18A:38-15 as reading into the statute a "comparability test," such a reading is proper. Millstone stresses that there must be some comparison between the offerings at the two schools at issue in order to determine whether a course of study is available at Allentown High School. Millstone also contends that the ALJ properly deemed that its expert was credible while finding Upper Freehold's expert was not credible. Mr. Carter's opinions were also based on a more thorough analysis and he reviewed more materials than Dr. Carrick. Unlike Dr. Carrick, he did not rely solely on Allentown High School's Course of Study Guide, but rather he reviewed the curriculum for each school. Mr. Carter also spoke at length with Scott Feder, Millstone's Superintendent, who was already familiar with the offerings at both schools. The law provides that the Commissioner should only disrupt the credibility determinations of an ALJ under the rarest circumstances, and the burden is high on the party seeking to overturn an ALJ's credibility determinations.

Millstone argues that the ALJ correctly found that Dr. Carrick presented numerous definitions of "course of study" and that her testimony was not consistent with the remaining evidence. For

example, Dr. Carrick presented a lengthy, and seemingly tangential, method of defining course of study, while at the same time stating that a single class could constitute a course of study. (2T213:12-21). Clearly a "series of individual courses' and a "single course" are not the same thing. Additionally, Dr. Carrick was unclear whether extracurricular activities like clubs would be included in a course of study. Dr. Carrick also failed to address the piece of the statute permitting students to attend high school elsewhere unless their school "furnishes instruction" in a particular course of study as opposed to merely offering something in a course guide. Millstone also asserts that Dr. Carrick's report was so unclear, and incorrect in many respects that the ALJ requested that she supplement or revise her report in the middle of her testimony. For example, Dr. Carrick "over included" items with regard to Allentown High School – such as extra-curricular activities and courses that were not, in fact, offered in a particular year – while failing to include courses or activities that should have been attributed to Red Bank. In its submissions, Millstone outlined all of the inconsistencies and inaccuracies it argues are found throughout Dr. Carrick's report that negatively impacted her credibility.

With respect to Upper Freehold's exceptions concerning the ALJ's factual findings, Millstone first contends that the ALJ's factual findings comport with *N.J.A.C.* 1:1-18.3. Next, Millstone concedes that not all academy courses at Red Bank are limited to academy students, as found by the ALJ. While some of the academies at Red Bank will, on occasion, allow non-academy students to take some of the courses if space is available, the program for the academy students is prescribed and restricted. Regardless of the ALJ's finding that all academy classes are closed to non-academy students, the ALJ's larger conclusion is supported by ample evidence in the record; namely, that all students in every Red Bank Academy are beholden to the specialized sequence of the course of study for each academy. Second, the ALJ correctly determined that the Red Bank Academies are CTE-approved courses of study. While the term academy is only a title or a name, the programs underlying those titles are in fact CTE programs. Upper Freehold's focus on the "academy" title used in the Initial Decision is not only semantics, but is also belied by its own witnesses, who testified that the academy label was irrelevant. Finally, the evidence supports the finding that Red Bank furnishes instruction in courses of study not furnished at Allentown

High School. Millstone argues that it more than adequately demonstrated that the courses of study furnished at Red Bank are substantially and qualitatively different from those furnished at Allentown High School. Millstone outlined the differences between the classes taught at each high school in support of the ALJ's overall finding that Allentown High School did not furnish a course of study in the disputed areas. Upper Freehold, who has the burden of proof in this case, failed to demonstrate otherwise. Therefore, the Initial Decision should be adopted as the final decision in this matter.

Upon a comprehensive review of the record, the Commissioner concurs with the ALJ's determination that Millstone is not prohibited from invoking *N.J.S.A.* 18A:38-15 simply because it does not operate its own high school. The relevant case law makes clear that local boards of education have the absolute discretion to permit their students to enroll at Red Bank, even if they do not operate their own high school. *D.M., supra*; *Asbury Park, supra*.

In *Asbury Park*, the Asbury Park Board of Education had a send-receive relationship with multiple school districts, and filed a petition claiming that because its sending districts sent a select group of students to Red Bank, the sending districts were in violation of *N.J.S.A.* 18A:38-15. In that case, the ALJ found that the allegations raised by the Asbury Park Board of Education were without merit, noting that "[t]he legal basis for the attendance of pupils from the correspondent districts at Red Bank Regional High School is both clear and firm." 97 *N.J.A.R.2d* (EDU) 464 at 15. The ALJ further explained, "[t]his case differs from other, recent sending-receiving cases in that the pupils involved here have not simply opted to attend another high school. Rather, under the clear provisions of *N.J.S.A.* 18A:38-15, parents and pupils have decided that the pupils will attend particular, specialized vocational education programs offered neither at the county vocational school nor at Asbury Park High School, the designated receiving school." *Id.* at 13-14. Significantly, the Commissioner, the State Board of Education and the Appellate Division affirmed the Initial Decision in *Asbury Park*. *See also, D.M., supra*, at 48 ("Although the administrative law judge's opinion [in Asbury Park] ... spoke in terms of parental choice, in fact, the basis for the decision was *N.J.S.A.* 18A:38-15.... The provisions of that statute make clear that the ultimate discretion concerning whether a student will attend a program in another district at public expense lies with

the local board.") Although *D.M* and *Asbury Park* also examined other statutes such as *N.J.S.A.* 18A:54-5 through -7 and the change in law regarding vocational school status, the findings under *N.J.S.A.* 18A:38-15 are clear and are controlling in this case.

The Commissioner is not persuaded by Upper Freehold's attempt to suggest that *Asbury Park* is not relevant in this matter. In discounting that argument, the Commissioner recognizes that in *Union Beach* it was stated that the protections of *N.J.S.A.* 18A:38-15 may not be invoked by the sending district because it does not operate its own high school. First, in that case the petitioning sending district was seeking to modify its sending-receiving relationship by changing the designated high school for all of its students – as opposed to invoking *N.J.S.A.* 18A:38-15 for its intended purpose of supporting students in pursuing specialized programs based on their individual needs. Additionally, *Union Beach* was decided in 1983, well before the Appellate Division confirmed in 1999 that local boards of education have the absolute discretion to permit their students to enroll at Red Bank even if they do not operate their own high school. Although Upper Freehold maintains that *Asbury Park* is not applicable because the case is about a vocational school, this is not accurate as *N.J.S.A.* 18A:38-15 was directly cited and considered in *Asbury Park*. *Asbury Park* stands for the premise that local boards of education have the absolute discretion to permit their students to enroll at Red Bank even if they do not operate their own high school.

The Commissioner is also in accord with the ALJ's determination that Millstone's decision to send the group of students to Red Bank in accordance with *N.J.S.A.* 18A:38-15 did not violate the send-receive relationship between the Districts, nor does it constitute a modification of the relationship. Despite Upper Freehold's assertions to the contrary, Millstone is not trying to circumvent the send-receive relationship, it is simply sending a small group of students to Red Bank to pursue a course of study that is not available at Allentown High School.[4] Nor does the decision in this case establish precedent encouraging sending districts to blatantly ignore their send-receive relationships and start randomly sending their high school students anywhere they choose. This matter is limited to a select number of high school students

[4] During the 2016-2017 school year, there were approximately 588 high school students from Millstone that went to Allentown High School, while the dispute in this matter was limited to approximately 20 students or less.

who: have completed an elementary course of study; wish to pursue a focused course of study in high school; and were accepted into one of Red Bank's specialized programs. Moreover, the record indicates that Millstone has been approving the tuition payment for Millstone's students to attend Red Bank since at least 2011. (4T141:3-7). That reality, coupled with *Asbury Park* – which was decided by the Appellate Division in 1999 – seriously undermines Upper Freehold's supposition that if sending districts are able to invoke *N.J.S.A.* 18A:38-15, it will gravely impact all send-receive relationships throughout the state.

The Commissioner agrees with the ALJ's assessment that it is "illogical to preclude sending districts from the right to send students to a specialty high school." Order, September 29, 2016, at 4. Further, a student who resides in a district that does not operate a high school should not be precluded from pursuing a course of study envisioned by the statute. As was succinctly stated by the Appellate Division, "the students at Asbury Park, no less than those assigned there from the respondent sending districts, should be entitled to a vocational program meeting the constitutional levels of thorough and efficient education." *Asbury Park, supra*, A-1043-97 at 9.

Having found that *N.J.S.A.* 18A:38-15 is available to Millstone, the analysis shifts to whether Millstone's determination that Allentown High School did not furnish a course of study in the areas in dispute was an abuse of its discretion. Here, Upper Freehold is challenging Millstone's action to send its students to Red Bank; therefore, Upper Freehold bears the burden of proof in this matter.[5] A board's exercise of its discretionary powers "may not be upset unless patently arbitrary, without rational basis or induced by improper motives." *Kopera v. Board of Education of West Orange*, 60 *N.J. Super.* 288 (App. Div. 1960). As such, Upper Freehold must prove that Millstone abused its discretion by arbitrarily and capriciously sending its students to Red Bank to pursue a designated course of study pursuant to *N.J.S.A.* 18A:38-15. Upon a comprehensive review of the entire record, which included the transcripts

[5] Millstone has argued that Upper Freehold does not have standing to bring this action; however, in light of the sending-receiving relationship between the Districts, the Commissioner finds that Upper Freehold does have standing in this case.

from eight days of hearings conducted at the OAL between February 21, 2017 and May 1, 2017, the Commissioner is in accord with the ALJ's determination that Upper Freehold did not meet that burden.

Although *N.J.S.A.* 18A:38-15 does not provide a test for determining whether a school furnishes a course of study, in order to evaluate whether Millstone's decision to send the students to Red Bank was arbitrary, capricious or unreasonable, it is necessary to compare the programs offered at Allentown High School with those offered at Red Bank. Upper Freehold attempts to suggest that the course of study provided by Red Bank is irrelevant; however, in *Asbury Park,* the Appellate Division emphasized that its decision to affirm the State Board of Education's decision that the students in question should be permitted to attend Red Bank was "based upon a lack of comparable vocational programs in Asbury Park." *Asbury Park, supra,* A-1043-97 at 9.

The ALJ had the opportunity to listen to eight days of testimony related to the extent of the offerings at Allentown High School and those at Red Bank in the designated areas. This included testimony of fact witnesses who discussed the number of courses offered; the sequence of the courses; the curricula; and the depth and variety of courses in each discipline at the respective schools. In the Initial Decision, the ALJ included her analysis of witness testimony in conjunction with the evidence presented at the hearing to find that Allentown High School did not furnish a course of study in the designated areas.[6]

Importantly, Millstone's Superintendent credibly testified regarding the decision making process that he undertook to determine whether Allentown High School furnished the requisite courses of study.[7] After evaluating the offerings at both schools, Mr. Feder concluded that Red Bank offered four-year sequential, rigorous State-approved CTE programs.[8] He emphasized that Red Bank's Academies also provided a vigorous curriculum; the classes had a defined order and sequence; and they are offered every

[6] Upper Freehold's assertion that the ALJ did not make the requisite findings of fact under *N.J.A.C.* 1:1-18.3 is unfounded.

[7] The ALJ found that all of the fact witnesses were sincere and credible, and the testimony of each witness was fully reviewed even though not all the witness testimony is outlined in this decision.

[8] The ALJ stated that the academies are CTE-approved. The proper nomenclature is that the programs in the academies are "approved CTE programs." This distinction does not change the outcome in this case.

year. (4T:11- 24; 4T201:21-202:8). Mr. Feder did not find that there were similar opportunities at Allentown High School, and he provided detailed testimony as to why he determined that Allentown High School does not furnish a course of study in the designated areas. (4T174:17-5T14:11). In this regard, the ALJ likewise found that Allentown High School does not furnish a course of study in the designated areas, and noted that the majority of courses at Allentown High School are electives that were often cancelled or not offered due to lack of interest. Further, the courses are not offered in a sequence; there are no prerequisites for many courses; and many of the courses are general courses which are offered in several different disciplines. The Commissioner does not find any evidence in the record, including the testimony of Upper Freehold's witnesses, to negate the ALJ's characterization of the courses at Allentown High School.

With respect to the expert testimony, the ALJ found that Upper Freehold's expert was not credible because she had numerous definitions of course of study, and her testimony and opinions were not consistent with the facts and documentation. On the other hand, the ALJ found that Millstone's expert's testimony was credible, and consistent with the facts and documentary evidence. A review of the transcript indicates that Dr. Carrick did routinely state that course of study was "a series of individual courses within a specific area or education program designed to further learning, and mastery of that education content." However, it was difficult to ascertain from a review of the transcript what exactly a program would need to provide in order to meet that definition.[9] Further, the overall credibility of Dr. Carrick was significantly damaged by the fact that her expert report was based on inaccurate information in that several courses that she relied on to opine that Allentown High School furnished a course of study in the designated areas were not actually offered in a given year. (2T112:11-22).[10] The evidence at the hearing demonstrated that even though certain courses were listed in Allentown High School's Course of Study Guide it does not mean that

[9] Dr. Carrick did testify at one point during the hearing that course of study could include a single course. (2T213:12-21).

[10] During the hearing, Dr. Carrick made notations to her report to reflect the courses that did not actually run in a given year at Allentown High School which had been listed in her report. Dr. Carrick also made notations to reflect Red Bank courses that were left off of her report. *See*, Exhibit UFR 4 and UFR4a. A review of those exhibits demonstrates that there were numerous errors in Dr. Carrick's report.

those courses were consistently offered, and there was no guarantee that certain courses would be offered in the future. Importantly, *N.J.S.A.* 18A:38-15 does not simply require the existence of a course of study; rather, the school must also furnish the instruction. Upper Freehold emphasizes that Dr. Carrick still found that Allentown High School furnished a course of study in the designated areas even without certain courses being offered in a given year. At that point, however, Dr. Carrick's credibility had already been compromised. Thus, the ALJ's determination that Dr. Carrick was not credible, based on the fact that her testimony was inconsistent and her report was based on inconsistent facts and documentation, was reasonable. Likewise, the ALJ's determination that Mr. Carter credibly testified that Allentown High School did not furnish a course of study in the designated areas was not inconsistent with the record.[11] Therefore, the Commissioner finds that the ALJ's overall assessment of the credibility of the expert witnesses is consistent with the record and cannot be disturbed.

Upper Freehold carried the burden in this case, and failed to prove that Allentown High School furnishes a course of study in the designated areas. In the future, Allentown High School may furnish a course of study in certain areas; but based on the evidence in this record, such claim is not tenable at the present time. Further, there is nothing in the extensive record to indicate that Millstone's decision to pay the tuition for its students to attend Red Bank was arbitrary, capricious or unreasonable. 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.[12]

COMMISSIONER OF EDUCATION

Date of Decision: 7/26/18

Date of Mailing: 7/26/18

[11] A review of the transcript reveals that Dr. Carter's report contained a few omissions from the list of courses offered at Allentown High School. The omissions did not affect his overall credibility, as his testimony demonstrated he did not base his opinion strictly on a listing of courses. Instead he evaluated the courses, curricula and other factors in order to provide his opinion that Allentown High School did not furnish a course of study in the designated areas.

[12] 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 06068-16
AGENCY DKT. NO. 108-4/16

BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MILLSTONE AND BOARD OF EDUCATION OF RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondents.

Stephen R. Fogarty, Esq., for petitioner Upper Freehold Regional School District Board of Education (Fogarty and Hara, attorneys)

Kerri A. Wright, Esq., for respondent Millstone Township Board of Education (Porzio, Bromberg & Newman, P.C., attorneys)

Bruce E. Helies, Esq., for respondent Red Bank Regional High School District Board of Education (Wolff, Helies, Spaeth & Lucas, attorneys)

Record Closed: March 16, 2018 Decided: April 30, 2018

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE

Upper Freehold Regional Board of Education (Freehold) and Millstone Township Board of Education (Millstone), which are engaged in a send-receive agreement by which the latter school district, which does not operate its own high school, pays for its resident high-school-aged children to attend Allentown High School (AHS) in the former school district. Petitioner dispute the applicability and scope of N.J.S.A. 18A:38-13 and N.J.S.A. 18A:38-15 with respect to Millstone's decision to pay for several of its residents to attend Red Bank Regional High School academies instead of AHS.

PROCEDURAL HISTORY

On April 11, 2016, petitioner Freehold filed a Verified Petition and application for emergent relief with the Commissioner of the Department of Education. The Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed for hearing as a contested case on April 21, 2016. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Respondent Board of Education of Millstone filed opposition to the petition on April 27, 2016. Respondent Red Bank Regional High School District (Red Bank) filed an answer and opposition to the petition on April 29, 2016. On May 9, 2016, Freehold filed a reply to Millstone's opposition. On May 16, 2016, Millstone filed an answer and cross-petition. Oral argument was heard on June 10, 2010. By Order dated June 14, 2016, the request for emergent relief was denied.

On August 10, 2016, Freehold filed a motion for summary decision. On August 11, 2016, Millstone filed a motion for summary decision. On August 19, 2016, Red Bank Regional Board of Education advised that it would rely on the briefs filed and submitted by counsel for Millstone. Millstone filed opposition to petitioner's motion for summary decision on September 15, 2016. By Order dated September 29, 2016, the motions were denied. Hearings were held on February 21, 22, 24, and 27, March 6, April 3, and 11, and May 1, 2017. The parties filed post-hearing submissions on

February 15, 2018, and oppositions to same were filed on March 14, and 16, 2018, and the record was closed on that date.

FACTUAL BACKGROUND

Freehold is a public body organized pursuant to N.J.S.A. 18A:10-1 et seq. Freehold is a K–12 school district serving the Borough of Allentown, the Township of Upper Freehold, and students from Millstone. A send-receive relationship has existed between Freehold and Millstone since 1964. However, it has never been memorialized. At the time the instant matter was filed, there were 623 students from Millstone that attended AHS pursuant to the send-receive relationship. Freehold charges Millstone $12,433 per student, per year, for tuition.

Millstone sends[1] students to the Red Bank Regional High School District and pays Red Bank tuition in the amount of $13,900 per student, per year. Busing is also provided for these students from Millstone to Red Bank. The children apply, and if they are accepted, the Millstone considers and approves the payment of tuition pursuant to N.J.S.A. 18A:38-15. The statute provides as follows:

> Any board of education not furnishing instruction in a particular high school course of study, which any pupil resident in district and who has completed the elementary course of study provided therein may desire to pursue, may, in its discretion, pay the tuition of such pupil for instruction in such course of study in a high school of another district. N.J.S.A. 18A:38-15.

The Millstone students who attend Red Bank Regional High School are enrolled in the following education programs: Academy of Finance, Academy of Information Technology, Academy of Engineering, Academy of Visual and Performing Arts, and the Culinary Program. The Culinary Program was eliminated during the pendency of this litigation, so this is no longer an issue. Millstone maintains that it is legally sending these students to Red Bank pursuant to N.J.S.A. 18A:38-15, as Freehold does not

[1] Millstone advised that four of the sixteen students who were the subject of the within matter graduated in June 2016. However, an additional six were admitted to Red Bank academies for the 2016–17 academic year, bringing the total students for the 2016–17 academic year to eighteen. There are additional students for the 2017–18 academic year.

provide a "course of study" in these areas. These academies at Red Bank have been State-approved as career and technical education (CTE) programs. [2] There are no such CTE programs at AHS.

Freehold has asserted three separate legal theories in support of its petition. First, it argues that N.J.S.A. 18A:38-15 does not apply to Millstone because Millstone does not have its own high school. Freehold maintains that the foregoing statutory provision is only available to districts that have their own high school. Freehold also argues that this sending relationship between Millstone and Red Bank alters the nature of the send-receive relationship between Millstone and AHS, and thus, commissioner approval is necessary to modify the relationship. Freehold's final argument is that Millstone is not permitted to send its students to Red Bank because "a course of study" in the subject areas of each of the Red Bank academies is provided at AHS. Testimony was presented over the course of the hearing on what courses are provided at AHS, as well as those provided at Red Bank Regional. There are four remaining programs at issue: finance; engineering; information technology; and fine, visual, and performing arts, including creative writing.

TESTIMONY

For petitioner

Constance Embley

Ms. Embley is the principal at AHS. The school has approximately 1,250 students, coming from Freehold, AHS, and Millstone. She testified that AHS has academies for fine and performing arts and engineering. In addition to the academies, AHS has courses of study in the areas of finance and information technology. The

[2] "'Career and technical education' means organized educational activities that: offer a sequence of courses that provide individuals with the coherent and rigorous content aligned with challenging academic standards and relevant technical knowledge and skill needed to prepare for further education and careers in current or emerging professions; provides technical skill proficiency, an industry-recognized credential, a certificate, or an associate degree; may include prerequisite courses (other than a remedial course) that meet the requirements of this definition; and include competency-based applied learning that contributes to the academic knowledge, higher-order reasoning and problem-solving skills, work attitudes, general employability skills, technical skills, and occupation-specific skills, and knowledge of all aspects of an industry." N.J.A.C. 6A:19-1.2.

process of being accepted into one of the academies in AHS is like that in Red Bank, in that the students need to apply and be accepted. Since AHS provides these particular courses of study, the students should be precluded from going to Red Bank.

Ms. Embley went through each subject matter to discuss the courses that were offered in the respective areas at AHS. She referred to the AHS Course Selection Guide during her testimony. In finance, AHS offers Computerized Accounting, Financial Literacy, Economic Honors, and AP Macroeconomics and Marketing. She also pointed out several business courses that are provided at AHS, but there is no specific academy in finance. In information technology, she referred again to the Course Selection Guide and listed ten separate business and computer courses. Some of the courses were general business courses such as Business Law, Marketing, and Accounting. There is no academy for information technology at AHS. Ms. Embley testified that an information technology "course of study" was offered at AHS, since AHS offered several courses that were in sequential order.

The next area that she discussed was the Engineering Academy at AHS. She referred to several different courses that were offered, including Introduction to Engineering Design, Principles of Engineering, Aerospace Engineering, and Engineering Design and Development. The courses in the academies at AHS are elective courses offered to all students, and they are not reserved exclusively for academy students.

Ms. Embley testified that in the area of Visual and Performing Arts, AHS offered courses in vocal music, instrumental, video production, studio art, dance, theatre, and creative writing. She referred to the course guide and listed Broadway MasterClass, Performance Preparation, Musical Theater, Principles of Dance, Music Theory II, Theatre Arts, Direction/Performance, Dance History, Madrigal Choir, Show Choir, Classical Masters Choir, History of Theater, Theater Tech, Set Design, Costume Construction, Playwriting/Screenwriting, Audition/Direction, Radio/TV/ Film Research & Criticism, electronic magazine and newswriting, and painting. In Visual Arts, AHS offers Fundamentals of Art I, Art II, Art III and Art IV, AP Studio Art, Ceramics, and Sculpture.

The school also has extracurricular activities, such as art club. They also have photography, video production, computer animation, and graphic design.

With respect to Performing Arts, AHS lists courses in Theater Arts, Theater Arts II, and Advanced Theater Arts. She conceded that some of the courses are not actually offered, because they do not have enough students that enroll in these electives. AHS also offers Dance I, Dance II, and Choreography, as well as Concert Choir, Music Theory, and AP Music Theory. There are also theater productions that are performed in the spring. In Instrumental Music, they have a symphony band and lessons that are offered to the band members. They do not have separate instrumental classes for piano or guitar, and the jazz classes are not offered if there are not enough interested students. These classes are offered to all students, not just the students in these respective academies. The final subject area discussed was creative writing. She indicated that there were several different writing courses available, but not a specific academy in creative writing.

Ms. Embley testified that students from Millstone have been applying to and attending the Red Bank academies for years. She testified that she works with Millstone every year to determine the number of students that will be coming to AHS. They are never sure of the exact number. She testified that Freehold does not have CTE programs in the areas that she discussed, and the only CTE-approved program at AHS is Agriculture. She was not familiar with the CTE process, but maintained that AHS had courses of study in all the curriculum areas for which the students are attending Red Bank.

Mark Guterl

Mark Guterl is the assistant superintendent for curriculum and instruction at AHS. He oversees the curriculum for AHS. He testified that a "course of study" was more than a single class. It was a sequence of classes in a specific area. He conceded that there are courses listed in the Course Guide that do not run, and he is not familiar with the curriculum in all the courses that are offered. There are academies in AHS, for which interested students must apply. The accepted students are given first choice of

certain courses. He went on to list the courses offered in the areas of finance, information technology, engineering, and the arts. AHS has no approved CTE program in these areas and no international baccalaureate programs. He indicated that there are several writing opportunities, but not a specific academy in creative writing. However, if a student has an interest in a certain area, AHS can create an independent study for the student. Finally, he indicated that in addition to courses that are offered as part of the curriculum, there are many extracurricular activities available to students at AHS. Guterl testified that he believed that AHS did offer courses of study in all the areas for which students from Millstone are going to Red Bank.

Gayle Carrick

Gayle Carrick was accepted as an expert in education and curriculum development. She has been a superintendent for the Cranford, N.J., school district and has worked as a principal in several other districts. Carrick prepared a report in which she addressed the issue of whether AHS provides or offers a course of study in the subject areas for which the Millstone students are currently attending Red Bank. Ms. Carrick looked to the New Jersey regulations and statutes for a definition of "course of study," but found only references to the term. Ms. Carrick defined course of study in her report to mean "a series of individual courses within a specific area or education program designed to further learning, and mastery of that education content." She also provided several other definitions in her report. Ms. Carrick did a side-by-side analysis of all the course offerings at AHS and at Red Bank. In this analysis, she provided a description of course offering at both schools, and concluded in her expert opinion that AHS offered a course of study in all the subject areas at issue in this case. Her seventy-one-page report is broken down into the different academies and a list of class offerings in each discipline. She concluded that opportunity exist at both schools and that a "comparable educational opportunity exists" at AHS. On cross-examination, it was pointed out that she omitted several courses offered at Red Bank, and had not met with or discussed the classes or curriculum with anyone at Red Bank. In addition, several of the courses listed at AHS were in fact not offered because there was not enough student interest in them.

Richard Fitzpatrick

Richard Fitzpatrick is the superintendent of schools for the Freehold. Mr. Fitzpatrick testified that they have a send-receive relationship with Millstone. The relationship has existed since the 1960s but has never been memorialized. This fact is not disputed by either party.

For respondents

Bernard Biesiada

Bernard Biesiada is the business administrator at the Millstone. He has served in that role for approximately eight years. He is familiar with the process by which other districts are paid for their students. There are several other high schools that the Board has authorized children to go to, and the tuition bills are approved by the Board and paid. Some are vocational schools and others are out-of-district placements for special-education students. Millstone pays annual tuition of $14,200 to Red Back for each student and provides bussing. There were approximately 588 students in Millstone sent to the Freehold in 2016–17. There are approximately twenty students from Millstone attending Red Bank academies. The Board of Education reviews and approves each application and pays the tuition to Red Bank.

Scott Feder

Scott Feder was the superintendent of the Millstone until May 2017. He testified that the majority of Millstone high-school children attend AHS. Approximately thirty-five to forty students attend the Monmouth County Vocational School District High School, and approximately twenty go to Red Bank. There are also students who leave the district to go to private school, so they never know exactly how many students will go to AHS. He testified that Millstone has been sending children to Red Bank since 2011, and Freehold was always aware of this situation and never expressed any concerns. He believes that based upon the nature of the courses of study at Red Bank, Millstone was justified in sending its students to Red Bank and paying their tuition.

All the academies that Millstone's students attend at Red Bank are CTE academies, and there are no such academies at AHS. He has compared the courses offered at AHS and Red Bank, and feels that Red Bank provided a course of study in these areas at CTE-approved academies. The type of sequential course offerings at Red Bank, where the courses build on one another, is not available at AHS. He also felt that the level of sophistication of the course offerings at the Red Bank academies was far superior to AHS. In addition, students are not guaranteed to get a course at AHS, as a course may not be offered and others may have priority. The classes are just electives, and you are not guaranteed to get them, and if you do, you are in the classes with general-population students. The courses at AHS are available to all students, not just students in the academies. Finally, Mr. Feder noted that the admissions process at Red Bank is very selective. He concluded that the Board was appropriate as there was no comparable course of study at AHS.

Adam Recktenwald

Adam Recktenwald is the supervisor of several of the academies at Red Bank. He testified that all of the academies at Red Bank are CTE approved. All of the academies consist of a course of study with a specific academic sequence that has been approved by the State through the CTE office in Trenton. He testified about the CTE process that Red Bank had gone through to obtain CTE approval. The classes are not random electives, but rather a series of sequential courses. He went into some detail about the Visual and Performing Arts Academy, as well as the Finance Academy and the Creative Writing program. He discussed the classes that are offered at AHS, and why they do not compare to what is offered at the Red Bank academies.

Peter Carter

Peter Carter was qualified as an expert in educational administration and curricular and co-curricular programs. He has worked in the public-school system for thirty-five years and has been involved in curriculum development as a superintendent and assistant superintendent. He also worked as a county superintendent. He testified

that after reviewing all the courses offered, it was his expert opinion that AHS did not have courses of study in finance, information technology, creative writing, visual and performing arts, and engineering. He further testified that in his expert opinion, the Red Bank academies did have courses of study in all of these areas.

He is familiar with the Department of Education's CTE program, and testified that the process is very stringent and the curriculum is looked at very closely by the State in determining CTE status. Mr. Carter opined, after reviewing the courses and curricula at both AHS and Red Bank, that the total number of credits at Red Bank far exceeds those at AHS in each discipline. Moreover, there are course requirements for students in the academies at Red Bank, as opposed to AHS electives, which have no core requirements and little to no sequence to the classes. He compared each academy, and found that the credit courses at Red Bank far exceeded those at AHS, and that the sequential nature of the Red Bank courses met the requirements of a course of study, as opposed to the limited number of random elective courses at AHS.

The following is a list of all the course offering at AHS and Red Bank. The list was provided in the expert report of Ms. Carrick, and supplemented by both her testimony and that of Mr. Carter.

AHS	**RED BANK**
Finance	
Principles of Business	Principles of Financial Success
Introduction to Accounting	Ethics in Business Literacy
Business Law and Ethics	Accounting I
Computerized Accounting	Marketing/Entrepreneurship
Financial Literacy	Business Economics
Economic Honors	Honors Accounting
AP Macroeconomics	AP Economics
Senior Practicum	AOF Financial Planning, Inv. & Insurance
	Honors Accounting 2
	Business Management/Managerial Operations
	AP Economics

Personal Financial History
Digital Literacy
Business and Global Economy
Applied Finance
Summer Internship

Engineering

Introduction to Engineering Design
Computer Science I
Principles of Engineering
Aerospace Engineering
Mechanics and Technology
Advanced Mechanics and Technology
Computer Science II
PLTW Engineering Design and Development
Senior Practicum/Internship

Introduction to Computer Science
Introduction to Engineering Design
Honors Principles of Engineering
Digital Electronics
Honors Computer Integrated Manufacturing
Honors Civil Engineering
Honors Aerospace Engineering
Honors Biotechnical Engineering
Honors Engineering Design
Invention and Innovation
Prototype Design
Transportation Technology
Women in Engineering

Information Technology

Principles of Business
Computer Science I
Computer Applications I
Computer Applications II
Computer Science II
Marketing
Business Law and Ethics
Computerized Accounting
Computer Science

AP Computer Science Principles
Introduction to Computer Systems
Honors Computer Science 2
Honors Networking
AP Computer Science
Honors Cyber Security
AOIT/AOE elective
Web and Mobile Application Development
Honors Digital Forensics
AOIT/AOE elective

Fine, Visual, and Performing Arts—Instrumental Music

Jazz Band or Symphonic Band (club)
Concert Band
Lessons
Marching Band

VPA Music Theory
Piano I, Piano II, Piano III, Piano IV
Strings, Guitar I, II, III, IV
Instrument Level I, II, III, IV

Music Theory I	Band
Music Theory II	Orchestra
Music Technology	VPA Musicianship
Band SB/WE	AP Music Theory
AP Music Theory	VPA Advanced Music Technology
All Shore/Regional Band (club)	
Marching Band (club)	
Senior Practicum	

Fine, Visual, and Performing Arts—Vocal

Concert Choir (club)	VPA Vocal Music Theory
Music Theory	Concert Choir
Show Choir (club)	Vocal Level II
AP Music Theory	VPA Musicianship
Classical Masters Choir (club)	Vocal Level III
A Cappella Choir (club)	AP Music Theory
	Vocal Level IV
	VPA Advanced Music Technology

Fine, Visual, and Performing Arts—Dance

Dance History	Level I
Dance I and II	Level I
Choreography	Level II
Principles of Dance	Level II
Musical Theatre	Level III
Director/Performance	Level III
	Level IV
	Level IV

Fine, Visual, and Performing Arts—Theatre Arts/Drama

Theatre Arts	Drama Level I
Advanced Theatre Arts	Theater Arts/Creative Writing I
Theatre Arts II	Drama Level II
Musical Theatre	Theater Arts/Creative Writing II
A number of courses were listed, but not provided	Drama Level III
	Theater Arts/Creative Writing III
	Stage Technology
	Drama Level IV

Theater Arts/Creative Writing IV

Fine, Visual, and Performing Arts—Video Production

Video Production I	Introduction to Interactive Media
Video Production II	Digital Literacy/PFL
Computer Graphic Design I	Interactive Media I
Computer Graphic Design II	Interactive Media II
Computer Animation	Graphic Communications III
Advanced Video and Digital Cinematography	Interactive Media III

Radio/TV/Film Research & Criticism (not offered 2016–17)

Fine, Visual, and Performing Arts—Studio Art

Fundamentals of Art I	Art I
Art II	Art II
Ceramics	Art III
Art III	Art IV
Sculpture	Crafts
Art IV	Crafts II
AP Studio Art	Fine Arts Appreciation
	IB Visual Arts
	IB Visual Arts HL

Fine, Visual, and Performing Arts—Creative Writing

Advanced Writing and World Literature Honors	Level I Creative Writing
AP English Language & Composition	Level II Creative Writing
English IV: Creative Writing	Level III Creative Writing
	Level IV Creative Writing

FINDINGS OF FACT

The resolution of this case, requires that I made a credibility determination with respect to certain critical facts. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of fact. Freud v. Davis, 64 NJ. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witnesses, but it also has to be credible in itself. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. Super.

546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' 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, 719 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth. In re Perrone, 5 N.J. Super 514, 521-22 (1950).

Having had an opportunity to carefully observe the demeanor of the witnesses, it is my view that all of the facts witnesses were sincere and credible. With respect to the expert testimony, I **FOUND** that the testimony of Ms. Carrick was not credible. She had numerous definitions of course of study and her testimony and opinions were not consistent with the facts and documentation. I **FOUND** Mr. Curtin's testimony to be credible and consistent with the facts and documentary evidence in the case, which evidenced a course of study in all the subject areas at Red Bank and the absence of such a course of study at AHS.

Based upon the testimony and documentary evidence, I **FIND** as **FACT** that Red Bank offers significantly more classes, and a sequence of classes, in each discipline. I further **FIND** as **FACT** that the academies at Red Bank are all CTE approved. I further **FIND** as **FACT** that the depth and variety of courses in each discipline is more extensive at Red Bank. I further **FIND** as **FACT** that the classes offered in Red Bank are limited to those students accepted into the respective academies, as opposed to the general-elective nature of the courses offered and open to all students at AHS in each discipline. Accordingly, I **FIND** as **FACT** that Red Bank provides a course of study in all the subject disciplines. Conversely, I **FIND** as **FACT** that AHS does not offer such a course of study in the disciplines at issue.

LEGAL ANALYSIS

Is Millstone, as a sending district permitted to send its students out of district pursuant to N.J.S.A. 18A:38-15?

This issue was addressed in Freehold's previous motion for summary decision. For the reasons set forth in my initial Order, I again conclude that Millstone is not precluded from sending students out of district because Millstone is in a send-receive relationship with Freehold. The same issue was addressed by the Commissioner of Education, as well as the Appellate Division, in Board of Education of Asbury Park v. Board of Education of the Red Bank Regional School District, 97 N.J.A.R.2d (EDU) 464, affirmed, State Bd. of Educ. (September 3, 1997), affirmed, No. A-1043-97T5 (App. Div. March 17, 1999). In that case, Asbury Park sought to enjoin several sending school districts engaged in a send-receive relationship with Asbury Park from instead sending their children to Red Bank Regional High School pursuant to N.J.S.A. 18A:38-15.

The State Board of Education "recognized that the sending districts, although obligated to assign specified percentages of their students to Asbury Park High School, were not required to ensure that some of those assigned did not exercise their right to secure statutorily authorized vocational education at Red Bank Regional when comparable programs were not available at the Asbury Park school." The State Board of Education, affirming the decisions of the administrative law judge and the Commissioner of Education, found:

> [I]n contrast to other sending-receiving cases, the parents and pupils in the respondent districts herein were acting under the express authority of N.J.S.A. 18A:38-15, which allowed pupils to attend a specialized course of study not offered by their designated receiving district, and that Red Bank Regional was acting under the authority provided district boards by N.J.S.A. 18A:54-5 through 18A:54-7 to establish and maintain a vocational program. In so doing, the ALJ rejected Asbury Park's allegation that its performing arts program at Brookdale Community College was equivalent to the program offered by Red Bank Regional. The ALJ found that Asbury Park's contention had not withstood the unrebutted testimony of Red Bank Regional's

> experts that there was no equivalency between the programs. The ALJ also noted that the audition process required for admission to Red Bank Regional's program was part of a set of stringent criteria and that nearly half of those who had participated in the most recent auditions had not been accepted.]

The Commissioner concluded that he was "satisfied with the ALJ's conclusions that respondents and the parents residing within respondent districts are acting under legislative authority, conferred upon them at N.J.S.A. 18A:38-15, N.J.S.A. 18A:54-5 to -7, when allowing their children to attend the specialized vocational programs offered by respondent Red Bank." The Appellate Division affirmed the State Board of Education decision finding that the sending districts were permitted to send students out of district pursuant to N.J.S.A. 18A:38-15. Thus, the Asbury Park decisions stand for the proposition that a sending district may, under N.J.S.A. 18A:38-15, exercise its discretion to pay for its resident children to attend a high school other than the receiving high school without violating the send-receive arrangement so long as the receiving high school does not "furnish[] instruction in a particular high school course of study" offered by the other high school. This conclusion is not altered by the fact that the vocational-school provisions, N.J.S.A. 18A:54-5 to -7, do not apply in this matter because Red Bank Regional High School is no longer a "vocational" school. That same case rejected the argument that a sending district would have to seek commissioner approval to modify the send-receive relationship to avail itself of the statutory provision of N.J.S.A. 18A:38-15. The undersigned likewise rejects this argument for the reasons set forth in my initial order.

Does Freehold provide a course of study in the subject disciplines?

The final argument asserted by Freehold is that it provides a "course of study" in all the subject areas at issue, and, therefore, Millstone is precluded from sending any of its students out of district. The hearing in this matter focused primarily on the courses of study provided at AHS, and those provided in Red Bank. Both parties provided experts on the issue of what "course of study" means, and whether Freehold provided a course of study in the areas in question. The Asbury Park decisions provides instruction on

the analysis to be conducted on this issue. The Appellate Division summarized the appeal in Asbury Park as follows:

> The Board of Education of the City of Asbury Park . . . appeals from a decision of the State Board of Education . . . which concluded that the vocational education programs of the respondent Red Bank Regional High School District were approved by the Department of Education . . . ; that arts and vocational programs offered at Asbury Park High School were not comparable to the Red Bank program; and that respondents Bradley Beach, Belmar, Allenhurst, Avon-By-The-Sea, and South Belmar Boards of Education (the sending districts) were authorized under N.J.S.A. 18A:38-15 and N.J.S.A. 18A:54-5, 6 and 7 to send students who had been assigned to Asbury Park High School, but desired such vocational or performing arts education, to the Red Bank Regional High School because comparable programs were not available at Asbury Park High School.
>
> [Board of Education of Asbury Park v. Board of Education of the Red Bank Regional School District, No. A-1043-97T5 (App. Div. March 17, 1999) (emphasis supplied).]

It is clear from this analysis and the absence of any statutory definition of "course of study" that it is necessary to compare the programs in Red Bank with the programs at AHS to determine if it was appropriate for Millstone to send the students out of district pursuant to N.J.S.A. 18A:38-15. Moreover, although the Asbury case involved a vocational school and a different statute, the analysis is identical and directly on point.

Freehold argues that if it provides "a" course of study in the relevant disciplines, then the analysis should end there. However, based on the Asbury Park decisions and the absence of a statutory definition of what "course of study" means, a comparison of the programs in each district is essential to the determination in this case. Although the Asbury Park case involved a vocational school, the analysis in that case did not end after finding that the receiving district had a course of study in such a discipline. The case referenced a determination whether an "equivalent" or "a comparable program" was provided. The ALJ in that case rejected Asbury Park's allegation that its performing-arts program at a Community College was equivalent to the performing-arts program offered by Red Bank Regional. The ALJ considered the testimony and found

that there was no equivalency between the programs. The ALJ also noted that the audition process and the stringent requirements, as well as the limited acceptance rate, set the Red Bank program apart from that of Asbury Park. I likewise find that such an analysis is required to determine if the courses of study in AHS are "equivalent" or "comparable" to the courses of study offered at Red Bank Regional.

I have **FOUND** as **FACT** that the course of study provided at Red Bank in each of the disciplines at issue is quantitatively and qualitatively superior to that offered at AHS High School. There is a sequence of courses in all disciplines at Red Bank. There are more electives in each discipline at Red Bank. The courses in each Red Bank academy are limited to the students in those academies. In addition, the courses are consistently offered every semester at Red Bank, and finally, the academies at Red Bank are all CTE approved.

Conversely, none of the programs at AHS are CTE approved. The majority of the courses at AHS are electives, which are available to all students, not just those pursuing such a course of study or in such academies. Moreover, several of the electives at AHS were cancelled or not offered due to lack of interest. In addition, the courses at AHS are not all in a sequence, nor are there prerequisites for many of the courses. Many of the courses listed at AHS were general courses which are offered in several of the different disciplines, as opposed to just the academy being analyzed, further evidencing a lack of a program with the depth that Red Bank offered.

CONCLUSION

For the foregoing reasons, I **CONCLUDE** that petitioner has failed to demonstrate that N.J.S.A 18A:38-15 is not available to a sending district. I further **CONCLUDE** that sending approximately twenty students out of district pursuant to N.J.S.A. 18A:38-15 does not violate the send-receive relationship and does not constitute a modification of the send-receive relationship. I further **CONCLUDE** that AHS does not have a courses of study in the disciplines at issue, and, thus, Millstone was permitted to exercise its statutory right to send students to the respective Red Bank academies. Having found that Millstone had such a right under the statute, I further

CONCLUDE that Millstone did not abuse its discretion is sending its students to the respective Red Bank academies.

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

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

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

Sarah G. Crowley

April 30, 2018
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: April 30, 2018 (emailed)

Date Mailed to Parties:

SGC/mel

APPENDIX

WITNESSES

For Petitioner:

Constance Embley
Mark Guterl
Gayle Carrick
Richard Fitzpatrick

For Respondents:

Bernard Biesiada
Scott Feder
Adam Recktenwald
Peter Carter

EXHIBITS

For Petitioner:

UFR-1	2016–17 Allentown High School Course Selection Guide
UFR-2	2017–18 Allentown High School Course Selection Guide
UFR-3	2016–17 Allentown High School Master Scheduled printout
UFR-4	Carrick Report
UFR-4a	Carrick Report, marked-up during cross-examination
UFR-5	2017–18 Red Bank Regional Course of Study Guide
UFR-6	List of relevant courses conducted at Allentown High School during 2016–17 school year
UFR-7	Millstone website printout ("Our District" page)
UFR-8	Millstone Bylaw 041.1
UFR-9	Transcript of S.A., Red Bank Regional Academy of Finance student
UFR-10	Transcript of D.B., Red Bank Regional Visual and Performing Arts Academy student

UFR-11	Transcript of J.M., Red Bank Regional Interactive Media Student
UFR-12	Allentown High School Foods & Nutrition Unit Planner
UFR-13	Allentown High School Advanced Foods Unit Planner
UFR-14	Allentown High School Honors Food Chemistry Unit Planner
UFR-15	Allentown High School Theater Arts 9–12 Unit Planner
UFR-16	Allentown High School Advanced Theater Arts Unit Planner
UFR-17	Allentown High School Principles of Dance Unit Planner
UFR-18	Allentown High School Choir Unit Planner
UFR-19	Allentown High School Journalism Unit Planner
UFR-20	Transcript of E.D., Red Bank Regional Academy of Information Technology student
UFR-21	Transcript of G.G., Red Bank Regional Academy of Engineering student
UFR-22	Allentown high School Creative Writing Unit Planner
UFR-23	Allentown High School English 1 Honors Unit Planner
UFR-24	Allentown High School Advanced Writing Unit Planner
UFR-25	Allentown High School AP English Unit Planner
UFR-26	August 24, 2015, Millstone Meeting Minutes
UFR-27	Red Bank Regional June 15, 2016, correspondence to the NJDOE Office of Career Readiness requesting one-year extension of its Five-Year CTE Plan, and attaching a copy of the Plan

For Respondent Millstone Township Board of Education:

M-1	Printout of Allentown High School Academy Website
M-2	Printout of Allentown High School arts of Academy website
M-3	Printout of Instrumental Music offerings at Allentown High School
M-4	Upper Freehold Regional Response to Interrogatories
M-5	Certification of Mark Guterl
M-6	Mark Guterl's comparison of Allentown High School and Red Bank Regional
M-7	2016–17 Allentown High School Course Selection Worksheet
M-8	Certification of Richard Fitzpatrick

M-9	January 10, 2017, letter supplementing interrogatory responses on behalf of Upper Freehold Regional
M-13	Allentown High School PowerPoint regarding 2015–16 Courses
M-17	Student applications to Red Bank Regional
M-18	Transcript of A.S., Red Bank Regional IB Diploma/Creative Writing student
M-19	Carter résumé
M-20	Carter report dated August 11, 2016

For Respondent Red Bank Regional High School District:

None

225-18

DIANE BASILE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – who had been employed in Fairview schools for twenty years as a Speech Language Pathologist, under an Educational Services Certificate – was transferred by the respondent Board to a full-time teaching assignment as a second grade teacher for the 2017-2018 school year. Petitioner did not consent to the transfer, and subsequently filed the within appeal challenging her reassignment. Petitioner asserted that the Board's action violated her tenure rights under *N.J.S.A.* 18A:28-5. The Board denied any violation of petitioner's tenure rights, contending that she suffered no loss in compensation or rank. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: the factual background which led to the filing of the within petition is not in dispute, and the matter is ripe for summary decision; petitioner is tenured as a speech language pathologist pursuant to her Educational Services Certificate with an endorsement as a Speech Correctionist, as she had been employed with the Board in this capacity for over twenty years; the Board's decision to transfer petitioner from the position of Speech Language Pathologist to classroom teacher was done without petitioner's consent and not for disciplinary reasons; for the 2017-2018 school year, the Board employed two other speech language pathologists who were not tenured; transfers made during a reduction in force, or for disciplinary reasons, or those made with the consent of the employee are legitimate exceptions to the tenure statute, but do not apply in this case; and the Board's reliance on *Carpenito v. Board of Education of the Borough of Rumson,* 322 *N.J. Super.* 522, is misplaced, as this decision clearly affirms that it is within the Board's managerial discretion to transfer a tenured teacher, *however,* such transfer must be within the scope of the teacher's certification so as not to violate the tenure statute. The ALJ concluded that the Board erred in transferring petitioner to a teaching position, as she is tenured under her educational services certification and could only be transferred to other positions within the scope of her certification. Accordingly, the ALJ granted petitioner's motion for summary decision, denied the Board's cross motion, and ordered the Board to reinstate petitioner to her tenured position as Speech Language Pathologist.

Upon review, 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.

Issued: 7/26/18

225-18

OAL DKT. NO. EDU 11837-17
AGENCY DKT. NO. 127-6/17

DIANE BASILE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner adopts the Administrative Law Judge's recommended decision for the reasons expressed therein. Accordingly, petitioner's motion for summary decision is granted and respondent's motion for summary decision is denied.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 7/26/18
Date of Mailing: 7/26/18

[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
SUMMARY DECISION
OAL DKT. NO. EDU 11837-17
AGENCY DKT. NO. 127-6/17

DIANE BASILE,

Petitioner,

v.

BOARD OF EDUCATION OF FAIRVIEW PUBLIC SCHOOLS, BERGEN COUNTY,

Respondent.

Gregory T. Syrek, Esq., for petitioner (Bucceri & Pincus, attorneys)

Stephen F. Pellino, Esq., for respondent (Basile, Birchwale & Pellino, LLP, attorneys)

Record Closed: June 18, 2018 Decided: June 21, 2018

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Diane Basile (Basile), a tenured teacher employed as a speech therapist, challenges the action of the Fairview Board of Education ("the Board") decision to transfer her from speech therapy to a full-time teaching assignment.

On June 29, 2017, Basile filed a Verified Petition with the Commissioner of Education, contesting the Board's decision of June 8, 2017, to transfer her from her position as speech therapist [1] to a second-grade teacher. Basile did not consent to the transfer and she contends that the Board violated her tenure rights under N.J.S.A. 18A:28-5.

On August 3, 2017, the Board filed its Answer to Verified Petition, denying Basile's charge that the Board violated her tenure rights, inasmuch as she suffered no loss in compensation or rank.

On August 15, 2017, the Commissioner of Education transmitted this matter to the Office of Administrative Law (OAL) for a hearing on the merits of the underlying claims raised in the petition. The same was filed with the OAL Clerk's Office on August 17, 2017.

On October 4, 2017, a telephonic prehearing conference was held and a Prehearing Order was filed thereafter. On December 15, 2017, a telephonic status conference was held and a hearing was scheduled for February 23, 2018. On February 9, 2018, following a telephonic status conference, the parties agreed to waive a hearing and agreed to submit mutual motions for summary decision concerning the issue of whether the Board violated Basile's tenure rights under N.J.S.A. 18A:28-5, in transferring her from her position of a speech therapist to second grade teacher.

On April 9, 2018, Basile filed her motion for summary decision, and on April 12, 2018, the Board filed its motion for summary decision. Oral argument was heard on June 18, 2018, at which time the record was closed.

DISCUSSION

The parties concede that the factual background which led to the filing of the petition is not in dispute and have mutually submitted a Stipulation of Facts and Exhibits

[1] The job title of "Speech Language Pathologist" is the same title as "Speech Therapist". Both titles are interchangeable (Exhibit A, Board, Stipulation of Facts and Exhibits, stipulation 5).

(Stipulation).[2] The salient facts contained in the Stipulation are set forth below, and I **FIND** them to be the **FACTS** of this case:

1. Basile holds an Educational Services Certificate with endorsements as a Speech Correctionist, issued in August 1980. She also holds a Speech Language Specialist Equivalent, issued in 2012.
2. Basile holds an Instructional Certificate, with the following endorsements: Elementary School Teacher, issued October 1982, Teacher of the Deaf or Hard of hearing, issued August 1980, Reading Specialist, issued September 1991, Teacher of the Handicapped, issued December 1980, and Teacher of Reading, issued October 1983.
3. From 1997 forward, with the exception of an approved leave of absence from January 2012 to January 2013, Basile was employed by the Board as a speech therapist.
4. Basile's current job title "Speech Language Pathologist" is the same as the title "Speech Therapist" used in describing Basile's employment history. The titles "Speech Language Specialist" and "Speech Therapist" are interchangeable.
5. For the 2017-2018 school year, the Board transferred Basile to teach second-grade in the elementary school, where she has an appropriate endorsement.
6. The Board's decision to transfer Basile to teach second-grade was done without Basile's consent and not for disciplinary reasons.
7. The transfer of Basile to teach second grade was done without loss of pay or benefits and without a change in her tenure.
8. For the 2017-2018 school year, the Board employed two other speech language therapists (pathologists) who are not presently tenured.

Although not stipulated to by the parties or conceded by the Board, **I FIND** that by operation of law under N.J.S.A. 18A:28-5, Basile is tenured as a speech therapist pursuant to her Educational Services Certificate with an endorsement as a Speech

[2] The Stipulation was submitted as Exhibit "A", with corresponding exhibits labeled "J-1 through J-8". For purposed of this decision, the Stipulation will be identified as Exhibit J-1A, and it along with exhibits J-1 through J-8 are made part of the record.

Correctionist, as she has been employed with the Board in this capacity for over twenty years.

Basile and the Board 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 judgment requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Our courts have held that the "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Anderson, 477 U.S. at 252. Conversely, it is critical that a favorable ruling on a summary judgment motion not "shut a deserving litigant from his [or her] trial." Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 77 (1954).

The parties having stipulated to the facts in this matter, what is at issue here is whether the Board's transfer of Basile is violative of her tenure rights under N.J.S.A. 18A:28-5.

Basile argues that she is entitled to the full protection and the security of tenure in the position of speech therapist. Her claim of tenure status is based on the operation of

N.J.S.A. 18A:28-5. This statute provides the requirements for achieving tenure as a staff member in a school district. [3]

Basile submits that she is entitled to full tenure rights and protections in the position of speech therapist. Specifically, she argues that she cannot be transferred to a position outside the area of her tenure protections: a transfer from speech therapist (tenure based on her Educational Services Certificate) to classroom teacher (within the scope of her Instructional Certificate) is contrary to law and should be reversed.

The Board argues that Basile may be assigned to another position, since Basile's transfer was done without loss of pay or benefits and leaves her essentially in the same position she was prior to the transfer, albeit as a second-grade teacher. As justification for its decision, the Board relies exclusively on Carpenito v. Board of Educ. of Borough of Rumson, Monmouth County, 322 N.J. Super. 522 (App. Div. 1999), and Vidal-Turner v. Board of Educ. of Atlantic City, 2017 N.J. Super. Unpub. LEXIS 2020.

N.J.S.A. 18A:28-6 provides a relaxed tenure structure for teaching staff members who are transferred with their consent to new positions. "'Transfer' refers to the right [sic] of a school board to assign a teacher to a position within the scope of his or her certification." Carpenito, 322 N.J. Super. at 529 (emphasis supplied). Therefore, tenure laws do not prohibit a school board from transferring a teaching staff member "within the scope of his or her certification" even without their consent, but do prohibit removing the staff member completely from a position which she has certification for and is tenured in,

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[3] N.J.S.A. 18A:28-5

a. The services of all teaching staff members employed prior to the effective date of 2012...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, ... 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.

absent any of the enumerated statutory exceptions. *See* Gerdes v. Board of Educ. of the Borough of Spotswood, Middlesex County, 92 N.J.A.R. 2d (EDU) 168, aff'd Docket No. A-6460 91 (App. Div., November 15, 1993) (holding that a tenured cooperative education coordinator under an educational services certificate could not be transferred back to a teaching position under a standard instructional certificate absent any exceptions under N.J.S.A. 18A:28-5 or N.J.S.A. 18A:28-9).

Furthermore, the appellate division has held that once a teaching staff member has attained tenure in the new position in accordance with N.J.S.A. 18A:28-6, she "cannot . . . be unilaterally dismissed from that position without the hearing required by N.J.S.A. 18A: 6-10." Childs v. Union Twp. Board of Educ., 1982 S.L.D. 1456, 1459 (1982).

Since Basile has been a speech therapist for twenty years, it is established, and the Board does not dispute, that Basile has attained tenure in this position. As stated above, a speech therapist operates under the educational services certificate, not a standard instructional certificate. *See* N.J.A.C. §6A:9B-14.6. Therefore, Basile is tenured under her educational services certification and can only be transferred to other positions within that certification. Gerdes v. Board of Educ. of the Borough of Spotswood, Middlesex County, 92 N.J.A.R. 2d (EDU) 168, aff'd Docket No. A-6460 91 (App. Div., November 15, 1993); Childs v. Union Twp. Board of Educ., 1982 S.L.D. 1456, 1459 (1982). When a teaching staff member has "gone to considerable lengths to obtain her certification in the new position [and] has [attained tenure] . . . it is pure sophistry to assert that her 'transfer' is anything less than dismissal from her clearly tenured position." Childs, 1982 S.L.D. at 1460.

The facts in this case clearly demonstrate that Basile was not transferred to a position within her educational services certificate. An elementary school teacher is covered under a standard instructional certificate and Basile "has earned her right to tenure in her separately certificated position [as a speech therapist]." Childs, 1982 S.L.D. at 1461.

An additional decision examining tenure under an Educational Services Certificate is Kartan v. Bd. of Ed., North Arlington, State Board of Education (May 6, 1998), 1998 WL

34275707 (N.J. Admin.). In Kartan, a tenured guidance counselor was transferred to teach one period of math per day. This partial transfer out of his tenured guidance position was held to be a violation of his tenure rights. Once tenure is gained in a particular area, an employee may not be transferred to a position outside the scope of his or her tenure protections. A transfer from guidance counselor or speech therapist (Educational Services Certificate) to teacher (Instructional Certificate) is a blatant violation of tenure rights.

The Board's reliance on Carpenito in justifying its decision to transfer Basile and arguing that it has not violated the tenure laws by doing so is misplaced. The facts of Carpenito are veritably distinguishable from this case. In Carpenito, the teacher was transferred to a different position within his standard instructional certificate. Carpenito, 322 N.J. Super. at 526. Moreover, Carpenito was transferred because the school was forced to eliminate the social studies teacher position, and the dispute arose when the school reinstated the position a year later and did not allow Carpenito to resume the same. Id. Thus, the fact that the transfer in Carpenito was within the same certificate and arose after the position was formally eliminated make it materially different from the facts in this case, and thus of little applicability.

I **CONCLUDE** that Basile was transferred to teach full-time, which is outside the scope of her tenure protections in the educational services position of speech therapist. The Board concedes that said transfer was not done for disciplinary reasons, and was without the Basile's consent, both exceptions to the tenure statute. **I CONCLUDE** that once tenure is gained in a particular area, an employee may not be transferred to a position outside the scope of his or her tenure protections, except for disciplinary reasons or a reduction in the work force. Childs v. Union Township Bd. of Ed., 1980 S.L.D. 1134; Ayoub v. South Plainfield Bd. of Ed., 1988 S.L.D. 941; Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63.

I CONCLUDE that a transfer from Basile's position of speech therapist (Educational Services Certificate) to teacher (Instructional Certificate) is a violation of tenure rights inasmuch as the transfer did not occur "within the scope" of her certification.

Carpenito v. Board of Educ. of Borough of Rumson, Monmouth County, 322 N.J. Super.,531; Childs v. Union Township Bd. of Ed., 1980 S.L.D. 1134; Payne v. Board of Education of the Village of Ridgewood, 1976 S.L.D. 605, 610.

I **CONCLUDE** further that the Board's reliance upon Carpenito v. Board of Educ. of Borough of Rumson, Monmouth County 322 N.J. Super. 522, as justification for the transfer as Basile is "without loss of pay or benefits and leaves her essentially in the same position she was prior to the transfer" is erroneous. The Appellate Division's decision in Carpenito, clearly affirmed that it is within the Board's managerial discretion to transfer a tenured teacher; however, the same must occur "within" the scope of her certification so as not to violate the tenure statute, which did not occur in the within matter as the Board sought to transfer Basile from speech therapist to school teacher. Id. at 531.

Accordingly, Basile's motion for summary decision is **GRANTED**, and the Board's motion for summary decision is **DENIED.**

ORDER

It is hereby **ORDERED** that Basile's motion for summary decision that the Board's transfer of Basile is a violation of her tenure status is **GRANTED.**

It is hereby **ORDERED** that the Board is to reinstate Basile to her tenured position as Speech Therapist.

It is hereby **ORDERED** that the Board'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, 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 21, 2018
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: June 21, 2018

Date Mailed to Parties:

lr

The following exhibits were admitted into evidence by consent:

1. Job Description – Speech Language Pathologist (Exhibit J-1)
2. Job Description – Elementary/Middle School Teacher (Exhibit J-2)
3. Petitioner's educational certificates and endorsements:
4. Elementary School Teacher, issued October 1982 (Exhibit J-3
5. Teacher of the Deaf and Hard of Hearing, issued August 1980 (Exhibit J-4)
6. Reading Specialist, issued September 1991 (Exhibit J-5)
7. Teacher of the Handicapped, issued December 1980 (Exhibit J-6)
8. Teacher of Reading, issued October 1983 (Exhibit J-7)
9. Speech Language Specialist Equivalent, issued June 21, 2012 (Exhibit J-8)

OAL DKT. NO. EDU 6316-18
AGENCY DKT. NO. 79-4/18

A.R., on behalf of minor, A.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record, settlement agreement, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner observes that Susan Kryszczak signed the settlement agreement on behalf of the Board. The settlement agreement was not signed by the Board's attorney, who is the Board's duly authorized representative in litigation, nor does the file contain a copy of the Board's resolution approving the settlement and designating Susan Kryszczak to sign the agreement on its behalf. Therefore, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Stipulation of Settlement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 7/26/18
Date of Mailing: 7/26/18



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6316-18

AGENCY DKT. NO. 79-4/18

A.R. ON BEHALF OF MINOR CHILD A.H.,

Petitioner,

v.

TOWNSHIP OF DEPTFORD BOARD OF EDUCATION, GLOUCESTER COUNTY,

Respondent.

A.R., petitioner, pro se

Albert K. Marmero, Esq., for respondent (Grace, Marmero & Associates, LLP, attorneys)

Record Closed: June 11, 2018 Decided: June 14, 2018

BEFORE **MARY ANN BOGAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 3, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 14, 2018
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: 6-19-18

Date Mailed to Parties: 6-19-18

MAB/cb

This Agreement is the entire, final and only binding agreement between A.R. and the Board.

The Parties warrant that they have not assigned, transferred or conveyed to anyone else any right to assert a claim against any other Party which would otherwise be released hereunder.

This General Release is made for the benefit of each of the Parties and all who succeed to their rights and responsibilities.

This General Release is not to be construed as an admission of any violation of any federal, state or local statute, ordinance or regulation by any Party.

The provisions of this Release are severable. If any provision or the scope of any provision is found to be unenforceable or is modified by a court of competent jurisdiction, the other provisions or the affected provisions as so modified shall remain fully valid and enforceable.

This General Release may be executed in separated counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one in the same instrument. It is not necessary for the Parties to execute the same counterpart of this General Release in order for this General Release to become effective.

This General Release may be executed by email, facsimile and or electronic signature.

This General Release shall be governed by, and enforced in accordance with, the laws of the State of New Jersey, without regard to the application of the principles of conflicts of laws.

In Witness Whereof, the Parties have caused this instrument to be executed and delivered as indicated below.

Dated: 6/8/18

Print Name: Anita Rothmiller

Dated: 6/5/2018

Print Name: Susan Kryszczak
Board of Education for the Township of Deptford

226-18

ERIKA HACKETT,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY	:	
RESPONDENT.	:	

SYNOPSIS

The petitioner contended that the respondent Board acted in an arbitrary, capricious or unreasonable manner when it eliminated her position as Supervisor of Science (K-7) in a reduction in force (RIF), and subsequently approved the new positions of Supervisor of Science (K-12) and Supervisor of STEM-Focused Learning (K-12). Petitioner possesses standard certificates with endorsements as: Elementary School Teacher, Grades K-6; Middle School Teacher with Subject Matter Specialization: Science, Grades 5-8; and Supervisor. Petitioner, who was tenured in the eliminated position of Supervisor of Science (K-7), was reassigned to a teaching position for the 2017-2018 school year at a reduced salary. Petitioner subsequently filed the within appeal, arguing that she should have been transferred to the position of Supervisor of Science (K-12), which includes responsibility for management of the science curriculum and instructors at the high school level.

The ALJ found, *inter alia*, that: in response to a budget shortfall resulting from reduced State aid during the 2016-2017 school year, the Board instituted a RIF which consolidated certain supervisory positions; at the same time, the Board sought to upgrade its curriculum and staff qualifications; the resulting reorganization eliminated 26 staff positions, including petitioner's position as Supervisor of Science (K-7); boards of education have broad discretion to implement a RIF; the issue herein is whether the Board acted arbitrarily in requiring a secondary science teaching certification for the new Supervisor of Science (K-12) and Supervisor of STEM-Focused Learning (K-12) positions; the Board's witnesses testified credibly regarding the need to revise the required certifications; the District demonstrated the need for supervisors who possessed the additional K-12 certification; and the distinction in title, knowledge and responsibilities for the new supervisory positions was plainly distinguishable from the requirements for the previous positions; accordingly, petitioner cannot assert tenure rights to the new positions; and petitioner's contention that the new K-12 requirement was not only arbitrary but malicious in its intent, is fully without merit. The ALJ concluded that the petitioner failed to meet her burden of proof, and dismissed the petition.

Upon comprehensive review, the Commissioner concurred with the ALJ's findings and analysis of the law, and adopted the Initial Decision of the OAL as the final decision in this matter, with modification to clarify the ALJ's discussion of the certificates and endorsements required for the newly established positions. Accordingly, the petition of appeal 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: 7/26/18

OAL DKT. NO. EDU 12848-17
AGENCY DKT. NO. 194-8/17

ERIKA HACKETT,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions – and respondent's reply thereto – have also been reviewed and considered. Upon such review, the Commissioner finds that the Board did not act in an arbitrary, capricious or unreasonable manner in conducting the reduction in force (RIF), and in its subsequent creation of new supervisory positions and hiring for same. Furthermore, and as thoroughly set forth in the Initial Decision, the Board has justified its need for requiring the instructional endorsements for the "Supervisor of Science (K-12)" and the "Supervisor of STEM-Focused Learning (K-12)" positions. While the Commissioner is in agreement with the Administrative Law Judge's findings and analysis of the law, the Commissioner notes that clarification of the Initial Decision is necessary with regard to the certificates and endorsements as discussed therein.[1]

N.J.A.C. 6A:9-2.1 defines "certificate" as "a legal document issued by the Board of Examiners that permits an individual to serve as a teaching staff member." There are three

[1] The Commissioner also notes that citations to the governing regulations referenced on pages 21 through 23 and on page 26 of the Initial Decision are inaccurate, and corrects them as follows: from "*N.J.A.C.* 6:11-9.3 and 9.6" to *N.J.A.C.* 6A:9B-12.3 and *N.J.A.C.* 6A:9B-12.6; from "*N.J.A.C.* 6A:9-5.5(a)" to *N.J.A.C.* 6A:9B-5.5(a); and from "*N.J.A.C.* 6A:9-5.5(b)(1)" to *N.J.A.C.* 6A:9B-5.5(b)(1).

categories of certificates: instructional, administrative, and educational services. "Endorsement" is "an authorization allowing a certificate holder to teach one or more specific subject area(s) or to serve in one or more specific teaching staff role(s)." *See N.J.A.C.* 6A:9-2.1. Each endorsement is valid for grades preschool through twelve, unless otherwise specified, *e.g.*, an elementary school teacher endorsement or a middle school with subject matter specialization endorsement.[2] A review of petitioner's instructional and administrative certificates reveal that she possesses standard certificates with the following endorsements: Elementary School Teacher in Grades K-6; Middle School Teacher with Subject Matter Specialization: Science Grades 5-8; and Supervisor. Therefore, petitioner's instructional certificates are limited to elementary and middle school, and do not qualify her to teach science subjects in high school.

The Supervisor of Science (K-12) position that was created following the RIF required – in addition to a supervisor endorsement – a science subject endorsement in any one of the following areas: Earth Science, Physical Science, Biological Science, or Physics.[3] As explained above, such instructional endorsements are valid for grades preschool through twelve. The Board's use of "secondary (K-12) certificate" and "secondary (K-12) New Jersey instructional certificate" in the job descriptions for the respective supervisory positions for science and STEM – and the parties' continued reference to the aforementioned endorsements as a "K-12 certificate" – is, therefore, unnecessary; and has further obfuscated the issue. In that regard, petitioner's insistence that the Board was ill-intentioned in requiring a "K-12 certificate" for the science supervisory positions but not for the "Supervisor of Mathematics

[2] An elementary school endorsement authorizes the holder to teach grades kindergarten through six in the subject areas enumerated in *N.J.A.C.* 6A:9B-9.3(b)(2), and "reading, writing, mathematics, and spelling, for basic-skills purposes only, in grades six through 12." A middle school with subject matter specialization allows the holder to teach in grades five through eight, and "does not permit the holder to teach the subject matter specialization in grades nine through 12." *See N.J.A.C.* 6A:9B-9.3(b)(3).

[3] Similarly, the Supervisor of STEM-Focused Learning (K-12) position required an endorsement in either Mathematics, Physics, Chemistry, Biological Science, Physical Science, and/or Technology Education.

(9-12)" position is baseless.[4] Likewise, petitioner's contention that the Supervisor of Mathematics position did not require a "subject specific certification" – but the science and STEM supervisory roles did – is inane.[5]

Notably, for the various post-RIF supervisory positions that required an endorsement in "Mathematics" or "English" or "Social Studies," an "elementary school teacher" or a "middle school with subject matter specialization" endorsement would not suffice because those supervisory positions require instructional endorsements that are valid for grades preschool through twelve. Therefore, the Board's requirements for the new supervisory positions in science – which included instructional endorsements that are valid for grades preschool through twelve – were not unique; nor were such qualification requirements arbitrary, capricious, or unreasonable.

The Board has credibly and persuasively defended its rationale for requiring supervisors to possess instructional endorsements that are valid for preschool through to the twelfth grade, and reflect appropriate knowledge of the content area. Moreover, to suggest that a teaching staff member such as petitioner – who would otherwise not be qualified to teach science classes in grades nine through twelve because she does not possess the proper endorsement –

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[4] The Board required "a standard teaching certificate in Mathematics" – as listed in the revised math supervisor job description – which means that the certificate holder must possess an endorsement in "Mathematics" in order to serve in the supervisory role. An endorsement in "Mathematics" – just like an endorsement in "Earth Science," "Physical Science," "Biological Science," or "Physics" – is valid for grades preschool through twelve. The same is true for an endorsement in "English" or "Social Studies."

[5] An endorsement in "Mathematics" authorizes the holder to "teach mathematics in all public schools" without grade restriction and without further delineating "Mathematics" into specific subject areas, *e.g.*, algebra or geometry. *See N.J.A.C.* 6A:9B-9.3(a)(4). Whereas, there is no singular "science" endorsement; an endorsement in science is subject area specific – *i.e.*, biological science, chemistry, earth science, physical science, or physics – and allows the holder to teach the sub-areas enumerated thereunder as well as "general sciences in all public schools" without grade restriction. *See N.J.A.C.* 6A:9B-9.3(a)(5). As such, when the Board deemed it necessary for the Science and STEM supervisors to possess an endorsement that is valid in grades nine through twelve, it had to set forth an appropriate list of specific subjects within the area of science in accordance with the governing regulations.

should be transferred to a supervisory position that includes management of the science curriculum and instructors at the high school level, is simply illogical.

Accordingly, the Initial Decision is adopted as the final decision in this matter – as modified herein – and the petition of appeal is hereby dismissed with prejudice.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 7/26/18

Date of Mailing: 7/26/18

[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 12848-17
AGENCY DKT. NO. 194-8/17

ERIKA HACKETT,

Petitioner,

v.

ORANGE BOARD OF EDUCATION,

Respondent.

Robert M. Schwartz, Esq., for Petitioner (Schwartz Law Group, attorneys)

Ronald C. Hunt, Esq., for Respondent (Hunt, Hamlin & Ridley, attorneys)

Record Closed: April 30, 2018 Decided: June 14, 2018

BEFORE **CAROL I. COHEN**, ALJ (Ret. on recall):

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Orange Board of Education instituted a reorganization of a number of departments in the school system, including the Science Department. As a result of the reorganization, Ms. Hackett's position as Science Supervisor, grades K-7 was eliminated and a Science Supervisor, grades K-12 was approved by the Board. Ms. Hackett did not have an endorsement to her supervisory science position for grades K-12, but had an endorsement for grades K-7. On August 16, 2017, Ms. Hackett filed a

petition claiming that the action of the Respondent in reorganizing several supervisory titles, including her former title of Supervisor of Science K-7, was arbitrary and capricious. The District filed an Answer on August 23, 2017. The matter was transferred to the Office of Administrative Law on September 1, 2017, and assigned to Judge Cohen on September 7, 2017. A pre-hearing conference was held on October 24, 2017. The matter was originally scheduled for hearings on February 8 and 9, 2018. However, due to scheduling issues the matter was heard on February 9 and 23, 2018. Summation briefs were received on April 30, 2018, at which time the record was closed.

ISSUES

By requiring a secondary teacher certification for science, did the Board act arbitrarily? If so, what relief should be granted.

TESTIMONY

For Respondent

Tina Powell

Dr. Powell testified that she is the director of mathematics and science for the Orange District. In this position she oversees the team of supervisors and coaches in mathematics and science. Her responsibilities include curriculum work, assessment work, professional development and instructional supports. Last year she also became the director of the STEM program, which includes engineering, robotics and computer science under a new program which is called the STEM Innovation Academy of the Oranges. Dr. Powell explained that in the 2016-17 school year there were two science supervisors. One supervisor was for grades K through 7 and the other for grades 8-12. There were also coaching positions, which were teaching-level positions within the department. There was a coach for science K-7. In the mathematics department there were coaches for grades 3-5,6-8, and 9-12.

Dr. Powell stated that in the spring of 2016-17 at a cabinet meeting[1] headed by the Superintendent of the district, they were notified that there was roughly a 10-million-dollar deficit in the District's budget and they should start looking to cut programs, materials, professional development and personnel. As a result, she would have to do a full reorganization of her department. In the math department she collapsed the K-2 and 3-5 into a K-4 supervisory title. Then she had a 5-8 math supervisor and a 9-12 supervisor title. This meant that she eliminated one supervisor position. In the science department, she combined two supervisor titles into one K-12. In addition, because of the new STEM program, she had to appoint a supervisor for that position with a K-12 certification. [2] Dr. Powell explained that when a supervisor had a K-4 title for mathematics, for example, that person had to minimally have a 5-8 endorsement. This was necessary because the supervisor had to know the content of the course after the fourth grade. For grades 6-8, the new job description required a secondary math credential, which is K-12, so that the supervisor would know the curriculum after 8th grade. Dr. Powell explained that the reason that the person holding the position of Supervisor would need a K-12 credentials was so that the person would be overseeing all grades up through AP chemistry, AP physics, biology, high school-level course work that would entail a deeper understanding of the content. The supervisor would be providing professional development, coaching support, direct classroom support to the teaching staff, as well as evaluating the teachers. According to Dr. Powell, all the people presently employed within the positions outlined in R-9 (2017-18) have secondary certifications. This means that they all have completed either bachelors- or graduate-level course work within their disciplines; and have successfully passed either the Praxis or comparable assessment, that would grant them the certification to be able to teach and support teachers in grades K through 12.

Once Dr. Powell began reconfiguring the department in response to the budgetary shortfall, on April 6, 2017, she emailed the HR department and asked that they have a formal conversation with the members of her department. The meeting took place on April 10 beginning at 3:15 and all the members of the science department

[1] The cabinet consist of the higher levels of administration within the district, including superintendent, deputy superintendent, business administrator, director of human resource services, and directors.
[2] See R-9.

were present. The conversation at the meeting centered around the need to consolidate positions due to the budgetary situation. Besides discussing the changes in the math department, they discussed the reconfiguration of the science department, which would eliminate the K-7 and 8-12 supervisors and replace it with a K-12 science supervisor. In addition, there would be a new position of K-12 STEM supervisor.[3] After the initial meeting, she met with Erika Hackett the same day to discuss the impact of the configuration on her and the fact that the new position would require a K-12 science certification, which she did not have at the time. Dr. Powell testified that, in order to obtain the K-12 certification, Ms. Hackett would have to sit for the appropriate Praxis and successfully pass it. Then she could have applied to the state and gotten her certification for K-12. Dr. Powell said that she checked when the Praxis was given in biological sciences. There were two windows of testing for that exam. One was offered from the period April 10-April 22, 2017 at local testing sites. The other was offered from May 8 through May 20, 2017. If Ms. Hackett had taken and passed the Praxis, she would have been eligible for the new position.[4] Dr. Powell said that she had informed Ms. Hackett of the qualifications for the new position.

Dr. Powell explained that Ms. Hackett has three standard certificates. Her standard teaching certificate K-6 means that she has gone through a formal teacher education program; she had been mentored and successfully passed her first and second year of teaching. She also has a certificate in elementary school with subject matter specialization science grades 5-8 and had a standard supervisor certificate. However, these certificates do not cover the K-12 credentials that the school was looking for. What was required for the K-12 science supervisor position was the supervisor certificate and K-12 specialization or K-12 certification in a science content. (i.e. earth physical, biological or physical sciences). The qualifications that the District was looking for in the K-12 science supervisor position included a masters' degree from an accredited college or university; a science degree and a secondary science certificate in any of the areas of science including earth, physical, biological or physics science and hold an administrator certificate with a supervisor endorsement. Dr. Powell

[3] Ms. Smiley from HR was present at this meeting.
[4] This did not guarantee that she would receive the position, but she would have been eligible to go through the district's interview process.

was asked to compare the job description for standard mathematics teaching certificate with that of science certificate. To hold a standard teaching certificate in mathematics the teacher had to successfully complete all of their provisional work. In addition, the mathematics certification in New Jersey is grades K-12. Any other mathematics title would say mathematics grades 5-8, for example. So a certificate in mathematics is a K-12 certificate. Therefore, in the job description for Supervisor of mathematics, it does not need to say K-12, since that is the normal mathematics certification. Dr. Powell went through the certification requirements for the other fields of study. She asserted that, for example, the teacher of English is a K-12 distinction according to the State of New Jersey and therefore it would be redundant to list the requirement in the job description to say Supervisor K-12. She stated that the other disciplines only identify holders of standard certificates, but the science category for supervisor and the STEM category spell out K-12. Dr. Powell claimed that all of the supervisor positions that were altered or changed or modified as a result of collapsing certain positions required a K-12 certification.

Dr. Powell identified R-3, which was an email she drafted on May 24, 2017, and which was sent to Dr. Paula Howard, her direct reporter, and to members of the superintendent's cabinet. It said that she had arranged for four interviews for the science supervisor K-12 position before the cabinet.[5] They included Erika Hackett. Ms. Hackett had indicated that she wanted to apply to the positions of principal, vice principal, STEM supervisor and science supervisor. The STEM and science supervisor interviews were scheduled for Friday, May 26 at 9:30 a.m. These interviews came after a preliminary screening to see if the candidate had the ability to proceed to complete the process.[6] All of the other candidates indicated that they were available for interviews on May 26; only Ms. Hackett stated that she was not available. Dr. Powell was advised to proceed with the interviews of the three other candidates on May 26. Mr. Benjamin

[5] Dr. Powell said that although Ms. Hackett did not have the appropriate K-12 certification, she continued the formal interview process, because she could have successfully completed the Praxis in the interim and be eligible for the position. Dr. Powell has not received notification that Ms. Hackett has successfully passed the Praxis exam.

[6] Dr. Powell advanced Ms. Hackett's interview without a preliminary screening, since she already knew Ms. Hackett and her work. The interviews of the candidates were made on May 26, because Ms. Hackett had scheduled vacation time through May 25.

Soro, who had the K-12 certification, was ultimately chosen for the position of supervisor of science for the District.

Dr. Powell testified that by the time of the interviews for the new position, Ms. Hackett had accrued roughly 50 days of absences for the school year, so it had become difficult to schedule interviews up until that point. Dr. Powell claimed that there was no intent on the part of the administration to single, target or otherwise deprive Ms. Hackett of a promotional opportunity.

Cross Examination

There was an extended discussion about certificates and endorsements. Dr. Powell said that you could have a certification in mathematics, which gives you the ability to teach any grade level K-12 or you could have a K-6 certification, which only allows you to teach K-6. If you don't have specific endorsements, you can't teach in a departmentalized setting, meaning you are mainly teaching that content throughout the course of the instructional day. Dr. Powell stated that if a person holds a standard teaching certificate in mathematics, the state defines that as a K-12 certifications. If it says certificate "mathematics in grades 5-8," that means that it is a 5-8 endorsement. It is commonly understood that a standard teaching certificate in mathematics means K-12. You have to have the teaching certificate first, then you get to qualify for a 5-8 endorsement in four different areas.

Dr. Powell testified that the new supervisors in the science department for the STEM and K-12 positions were not tenured. She also testified that as a result of budgetary constraints, she reduced the math supervisor titles from four to three. In the science department, however, she went from two supervisors, one K-7 and one K-12, to one science supervisor K-12 and one STEM supervisor K-12. Therefore, there was no reduction in the number of supervisors in the science department and no budgetary reduction. Petitioner's attorney tried to bring out that Ms. Hackett would not have had sufficient time to study for the Praxis and pass prior to the deadline for picking a new K-12 science supervisor. However, Dr. Powell would not concede this point. When asked why she moved Ms. Hackett along on the interview process for K-12 supervisor, Dr.

Powell said that she was advised to do so by HR. The reason offered by HR was that she did not know if there was some pending status in Ms. Hackett's receipt of the K-12 certification. Dr. Powell acknowledged that a standard supervisor certificate could qualify a person to supervise any grade level, depending on the hiring district. Supervisor certification is not grade or subject area specific.

Re-direct

Dr. Powell said that in districts similar to Orange a supervisor's certificate does not entitle you to supervise all grades or areas of study. You need additional content certifications. For example, to supervise high school mathematics you would need content certifications in the area of study and in the grade level, for example science K-12. Dr. Powell testified that in preparation for taking the Praxis, they offer online study guides and opportunities for candidates to get more personalized tutoring.

Belinda Smiley

Ms. Smiley testified that she is the retired administrative assistant to the superintendent for operations and human resource services. She was the administrative assistant in the Orange District for seventeen and a half years. Prior to that she held the title of director of human resources for the Irvington Board of Education. At Orange she was responsible for all human resource services duties, which included recruitment of teachers for any vacancies. She was responsible for preparing the personnel agenda for board approval, which included leaves of absences, separations, stipend positions and appointments. She also sat on the negotiating team and helped to solve grievances at the school level. Ms. Smiley identified R-11 and 12, which was information about certification from the NJ Department of Education. I t provides a definition of the types of certificates that are available for instructional staff. The types of certificates available are: CE, which means a certificate of eligibility; CEAS, which is a certificate of eligibility with advanced standing; and a provisional certificate, which is a two-year certificate, which provides the employee time to be mentored and supervised until they receive their standard certificate. The standard certificate is a permanent certificate issued to an individual who has met all requirements for state

certification by successfully completing the provisional teacher program; holds a previously issued NJ instructional certificate or an equivalent standard instructional certificate from another state and has at least two effective years of teaching that were complete with three consecutive years within the last four calendar years. She also explained endorsements. A person can have an endorsement in subject areas. Ms. Smiley explained R-12 entitled "Certificate subject area/grade levels and codes." Besides the first three columns are the certificate types, the endorsements are next. Any endorsement that does not have a grade identified is a K-12 certificate. Ms. Smiley gave an example, in mathematics the category says "middle school subject matter" and it says 5-8. Underneath that in red quotes it says "this certificate requires a co-certificate, which means that you cannot get this certificate without having another certificate. In this case it would be elementary. So the applicant would have to have K-6 certification first and then apply for their middle school endorsement of 5-8 in whatever content area they were applying. The applicant would need to take the Praxis in middle school with content area and they would have to have the right GPA. She further explained that if the endorsement is mathematics grades K-12, you are entitled to teach mathematics grades K-12. If there is a middle school endorsement 5-8, then you can teach middle grade content in grades 5-8.

Ms. Smiley spoke about the budget reduction of 10 million dollars. She said that, as soon as this was realized, the cabinet members came together on several occasions to see how they could handle the situation with the least disruption to the instructional program of the District. They wanted to make sure that they had enough teachers in the classroom. The directors were instructed to look at their departments and see where they could consolidate and how they could give up some money towards the deficit. Everyone in the district was affected. Her job was that if an affected person was tenured, that they were able to go into another tenured position, for which they had certification. She notified the interim superintendent in June that they had to cut 26 positions and at least three or four of which were supervisors. Ms. Smiley explained that under bumping rights, you cannot retain any non-tenured employee who has the same certificate as a tenured employee. Ms. Smiley reviewed R-4, which she prepared for Dr. Howard, so that she would know the staff members who were affected by the reduction in force. Ms. Smiley identified R-1, which was a resolution, which was

approved on April 26, 2017, to revise a job description for the supervisor K-7 and 8-12 into one position, supervisor of science K-12. The new supervisors were to hold a masters' degree, a science degree and a secondary K-12 certificate in certain science areas. R-2 was a resolution to approve the title and job description for the supervisor of the STEM focusing learning K-12. You had to have a masters' degree in science, mathematics or technology and have a secondary K-12 instructional certificate in the area of mathematics, physics, chemistry, biological science, physical science and/or technology education with a supervisor endorsement certificate. Ms. Smiley described attending a meeting with Dr. Powell and her staff in April of 2017. I t was a general informational meeting. Ms. Smiley explained the process that was necessary because of the budgetary constraints. Once they decided which positions would be created or which revised, they all had to be posted, after receiving Board approval. She had to meet with everyone affected and had to explain how their salaries were going to be impacted as a reduction in force could put some supervisors back into teaching positions. The department directors looked at resumes and considered internal as well as external candidates for new positions. Then they started to weed out candidates, who were not qualified. The department directors would tell Dr. Powell the names of the internal and external candidates who had applied for certain positions. They would also recommend which candidates should be interviewed. Ms. Smiley referred to R-3, which was a document from Dr. Powell, which included Ms. Hackett's name as someone who should be advanced and considered by the cabinet. Ms. Smiley said that, from the time she spoke with the group, including Ms. Hackett, until the point in time when she advanced Hackett's package to the committee, she did not know if the petitioner had taken a Praxis exam either in April or May to make her eligible for the position of K-12 science supervisor. Ms. Smiley affirmed that she was part of the cabinet that interviewed candidates and Ms. Hackett did not appear for an interview. Ms. Smiley testified that even if Ms. Hackett had the K-12 certification, it did not guarantee that she would get the supervisory position. It just made her eligible for the position. Ms. Smiley also acknowledged that everyone who were currently staff members in the science and math departments had K-12 certifications. They made this requirement because the supervisors would be supervising high school teachers and they wanted to be sure that the supervisors would be able to go in and provide support and feedback for these

teachers. Ms. Smiley said that Orange wanted to make sure that the supervisors had the content in order to supervise the teachers in those instructional areas.

Ms. Smiley identified R-7, which was a letter to Ms. Hackett informing her where she would be placed at Lincoln Avenue School effective September 1 and the salary she would be receiving. Ms. Smiley testified that when a RIF occurs, an employee is given the opportunity to come before the Board. This is called a RICE notice. Ms. Smiley stated that Ms. Hackett was given a RICE notice, but she did not choose to come before the Board. Ms. Smiley testified that in making the changes that were required, the District wanted to make sure that the teachers and supervisors were highly qualified. In addition, the supervisors should have the credentials to support the teachers. Ms. Smiley asserted that no action was taken to target or single out Ms. Hackett to deprive her of a promotional opportunity.

Cross-Examination

When questioned, Ms. Smiley did not know if an alternate date for the K-12 science interview was provided. She did say that the person who was hired for the K-12 science position had the secondary science certificate in one of the areas of science required in the job description.

Recall Belinda Smiley

Ms. Smiley identified R-11, which is a document from the NJ Department of Education website regarding certification and endorsements. Under the category of "Teachers" it provides an overview of the types of certificates that are issued. According to Ms. Smiley, the term "standard" means that the certificate is a permanent one and the person has met the requirements. Standards certificates have no expiration date. She referenced R-12, which she said was from the website and showed the requirements for each of the certificate categories. She explained that the endorsement signifies the type of certificate that is being held. It has to do with the actual instruction of the certificate. She said that, if the certificate does not have a grade limitation or identification, it means that the certificate or the endorsement is a K-

12 certificate. Ms. Smiley pointed out that, if a certificate says Preschool through grade 3, that means that the person who holds the certificate cannot teach above grade three. If the certificate says elementary school teacher in grade K-6, then the person cannot teach above sixth grade, with that particular endorsement.

Ms. Smiley explained that, as a result of the reorganization, she had to look at those employees and positions that were going to be impacted and determine if they had seniority rights or tenure rights to make sure that they were moved into appropriate reassigned positions. There were 26 positions that were reduced; some of which involved people who were being transferred. She tried to give the transfer people the opportunity to see where they wanted to go within the system. In addition, if they were moving from an administrative position to a teaching post, she talked to them about how their salary would be impacted.

Ms. Smiley testified that Ms. Hackett was first hired by the District as a para professional; then she became a teacher. She got her supervisor certificate in June 2014. Ms. Smiley said that there is no test to become a supervisor. You take certain prerequisite courses in order to have a supervisor certificate issued. Ms. Smiley explained the requirement for the new science position in the District. She said that a K-12 certificate, along with the supervisor certificate or endorsement was required. When questioned, Ms. Smiley said that the terms certificate and endorsement were interchangeable and that endorsement was what was listed on R-5 (the list of Ms. Hackett's certificates) Ms. Smiley said that she met with Ms. Hackett's whole department in April and subsequently with the petitioner individually, when the RICE notices were sent out. Ms. Smiley said that, in order for Ms. Hackett to be considered for the new position, she would have been required to have a K-12 endorsement in one of the sciences. In order to get the endorsement, she would have to have taken the Praxis exam in a particular area of science. Ms. Smiley said that she did not know whether Ms. Hackett had taken the Praxis exam, at the time she was scheduled for an interview with the school cabinet.

Ms. Smiley was questioned about the mathematics certificate, which says "standard." She was asked how one would know that that was a K-12 certificate. Ms.

Smiley said that, if there is no special designation, like 5-8 or K-6 (grade specific certificate area), then it is a "standard" K-12 certificate.

Cross-Examination on Recall

Ms. Smiley testified that, when Ms. Hackett was hired as a Science Supervisor, the State told the District that the certificate she held, Principal, did not fit her assignment. She received the supervisor endorsement in June 2014, so that would really be her start date and the date that she would begin accruing tenure in the position as supervisor. However, Ms. Hackett was able to get paid as a supervisor from the date when she assumed the duties of a supervisor in 2012. Ms. Smiley said that, when the reorganization occurred in 2017, Ms. Hackett was tenured as a K-7 science supervisor. According to Ms. Smiley, Ms. Hackett was tenured as a K-7 supervisor, not a "supervisor" generally. Ms. Smiley said that at the initial meeting with staff, she did not discuss the certification requirements for the new positions. She did not tell Ms. Hackett at that meeting that she would not be qualified for the new science positions. Ms. Smiley acknowledged that the man who was hired to supervise K-2 science was not tenured. She also stated that the new positon of K-12 science was an endorsement of the K-12 content in science. Ms. Smiley said that, when she had the individual meeting with the petitioner, she did not recall what areas she discussed with Ms. Hackett. However, she did recall discussing with Ms. Hackett, where she would go, if she did not qualify for the supervisor title and what the salary guide would be. Because she would be working ten months per year, her salary would be cut by 1/6 and her salary would be frozen until the teacher guide caught up with what she was earning. Ms. Smiley said that at the point she met to discuss this with Ms. Hackett, the petitioner was not being considered for the K-12 supervisor position. Ms. Smiley said that she had two individual meetings with Ms. Hackett. At the time of the meetings, Ms. Hackett was the only tenured supervisor of science in the district. Mr. Sharif, who became the K-12 science supervisor, was not tenured at the time he was offered the STEM supervisor position. Ms. Smiley said that she did not tell Ms. Hackett that, if she would have taken and passed the PRAXIS, she would have gotten one of the two K-12 science supervisory positions. Ms. Smiley testified that, after the reorganization of the mathematics department, one out of the three supervisors was tenured. Ms. Smiley said that with the

elimination of one supervisor in the math department, the District saved approximately $100,000. Since there was a new STEM position in the science department, there was no financial impact on the budget shortfall. Ms. Smiley stated that, as a result of the reorganization approximately twenty-six positions were eliminated.

Ms. Smiley was asked about the PRAXIS. She acknowledged that, in order to be considered for the new position, Ms. Hackett had to take the test between April and the beginning of June 2017. She did not know how much of a lead time you had to have in order to take the test or what was the application process. Ms. Smiley said that Ms. Hackett was absent from school from about the middle of May until the middle of June. It was one of the reasons why it was difficult to schedule an interview with her.

Re-direct

In response to questions, Ms. Smiley stated that, if there was another reorganization and there was a K-7 supervisor's position, then Ms. Hackett would have tenure rights for that position. However, with the present reorganization of K-12 supervisor of science, the petitioner would be supervising teachers who were teaching physics, AP chemistry, biology, earth science, etc. in the high school grades. She did not have a certificate to do this. That would be the same for the STEM program. Ms. Smiley was asked what the cabinet looked for when they were interviewing people for the new positions. She said that they looked at the person's knowledge, skills and ability to supervise teachers, who are teaching that instructional subject. They would also like to know whether the candidate had experience in the grade level that they would be teaching and their administrative experience. Ms. Smiley said that the cabinet was definitely looking at the high school experience, because that was the area in which they wanted to expand the AP courses. Also, the teachers need guidance in co-teaching in these areas, so they were looking for experience on the secondary level. Ms. Hackett stated that, once the reorganization was approved, it became public record. In addition, Ms. Hackett had notice because she met with Ms. Smiley about the RICE notice and signed off on it. However, she did not appear before the Board for a RICE hearing.

Re-cross

Ms. Smiley acknowledged that of the three candidates being considered for the science positions, Ms. Hackett was the only one who had tenure as a supervisor. Further, the person who got the position was from another district and therefore, untenured.

Re-Direct

Ms. Smiley testified that school districts have the authority to modify or change the credentials required to hold teaching positions in grades and grade levels.

For Petitioner

Erika Hackett

Ms. Hackett testified that she began as a para-professional in the District and then became a teacher there in 2006. Then she became a coach, until she became a supervisor in 2012. As a coach she would help teachers with instruction in the classroom and taught teaching practices. She obtained a Principal's certificate and was appointed as a Supervisor in 2012. She got her supervisor's certificate in 2014. Her director, when she was a supervisor, was Dr. Powell. Dr. Powell provided her with a professional improvement plan during the course of the 2016-17 school year. Ms. Hackett objected to the PIP. One of the objections was that Dr. Powell said that she had written Ms. Hackett up three times. However, Ms. Hackett only received two write ups. In addition, Ms. Hackett said that Dr. Powell wrote her up for something that she had very little to do with and was based on hearsay. In addition, she said that she was written up for not following through with job activities. However, Ms. Hackett said that Powell prohibited her from reaching out to vendors, which she needed to contact, in order to complete the assignment. Ms. Hackett claimed that in the first meeting she had with Ms. Smiley, it was not individualized as to whose position would be affected by the reorganization. She was absent for the second meeting in May, where the department

learned about what people would be specifically affected. Ms. Hackett testified that she had a week of vacation in May. Then she got very ill on vacation, with a bacteria/ infection in her lung and kidney and was out another week. She was back to school in the early part of June. She said that she was in and out of the emergency room every other day. By the time she got back to school, the Supervisor positions had been filled. She said that she had received an email saying that she was scheduled to be interviewed on May 26, but she could not make the interview because she was sick. She said that she emailed Dr. Powell and her secretary to inform her that she was sick and to ask to be rescheduled, but she never heard back.

Cross-Examination

Ms. Hackett testified that after she was appointed to her supervisory position, Ms. Smiley realized that she did not have the proper documentation to hold the position. She had to take two additional courses, in order to get the proper certification. She said that with the resubmissions, it took her two years to get the supervisory certification.

Ms. Hackett said that she never attended the Board meeting in which the resolution for reorganization was discussed and passed. She said that she did not speak to her Union representative about the effects of the reorganization. She said that in April there was a departmental meeting, in which they discussed that the department was going to be involved in a RIF. However, she was not told at that time what individuals would be involved. When questioned about the PIP she received from Dr. Powell, Ms. Hackett said that she thought that it pointed out things that the Director thought she should have done, that she did not think had been done. Ms. Hackett said that, as a supervisor, she had never given a teacher a PIP. What she would do was to recommend to the principal that a person might need a PIP or the Principal would feel that the person needed a PIP and she would sit down with the teacher and the principal to do an evaluation. Ms. Hackett said that she grieved the PIP that she received from Dr. Powell. She said that it was discovered that Dr. Powell could not put her on a PIP without having evaluated her. Therefore, Dr. Powell took the scheduled PIP off the table, evaluated her, and then gave her a new PIP, with two deficiencies. It was discovered that one of the deficiencies was an error on Dr. Powell's secretary's part and

that was withdrawn, leaving one deficiency. Ms. Hackett said that the first year that Dr. Powell was employed by the District, she worked very closely with her. However, she felt that at some point Dr. Powell developed a personal animus toward her, which led to the PIP. Ms. Hatchett said that after April 26 (possibly the first week of May and before she went on vacation), she became aware that the reorganization could affect her, because the new position required a K-12 certification.

ARGUMENTS OF THE PARTIES

Ms. Hackett's Argument

Ms. Hackett argued that, when the Orange Board of Education reorganized in the spring of 2017, the supervisory titles for the most part required a standard teaching certificate, with the exception of the science position, which required a secondary science certificate, and the STEM position, which was the supervisor of science, math, and technology. Only these two positions required a secondary certificate. All the other supervisory titles only required a standard certificate. At the time of the reorganization, Ms. Hackett held only an elementary instructional certificate and a 5-8 elementary certification with subject-area specialization in science. It was the petitioner's position that this was the District's way of moving her out of her position to make her unqualified for the science or STEM positions. She would be qualified for either position but for the requirement that the holder of either position have a secondary science certificate. The petitioner argued that this change on the District's part was arbitrary, given the fact that other supervisory positions only required a standard teaching certificate. As a result of the reorganization, Ms. Hackett was the only tenured supervisor staff member to lose her supervisor position.

Ms. Hackett pointed out that tenure is a "statutory right imposed upon a teacher's contractual employment status." Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1961.) Dismissals resulting from a reduction in force or a reorganization must be made on the basis of seniority according to the standards established by the Commissioner and approved by the State Board of Education. N.J.S.A. 18A:28-10; N.J.A.C. 5A:32-5.1. A tenured staff member continues to be entitled to retention as against a non-

tenured staff member regardless of seniority rights. Capodilupo v. W. Orange Bd. of Educ., 218 N.J. Super. 510, 514 (1987). Further, the petitioner pointed out that, in Smith v. Board of Education of the City of Orange, EDU 11566-09, Initial Decision (August 4, 2011), http://njlaw.rutgers.edu/collections/oal/, Judge Bass concluded that the additional certification requirements imposed by the Board could not serve to defeat the clear tenure entitlements of the petitioner.[7] The petitioner also argued that, although the local boards have broad discretion to establish certification requirements for certain positions, boards could not exercise their authority in a manner that was "anomalous, arbitrary or irrational." Dennery v. Bd. of Educ. of Passaic Cnty Reg'l Sch. Dist., 131 N.J. 626, 638 (1983). Ms. Hackett argued that neither the STEM Supervisor position nor the K-12 Science Supervisor position require anything of the supervisor that the Petitioner had not performed as a K-7 supervisor. Neither position requires the supervisor to teach. Further, she argued that Ms. Smiley's testimony, that the the scope of the supervisory certificate should match the scope of the position, was insufficient to explain how or why the instructional certificates held by the Petitioner would impair her ability to supervise school staff in the K-12 program. Absent a showing that an additional certification is necessary to perform the duties of the new position, the Board cannot sidestep an educator's tenure rights. Lisa v. Bd. of Educ. of Washington, 97 N.J.A.R.2d (EDU) 478. Ms. Hackett asserted that no explanation was given as to why a K-12 certificate was required for the science supervisor title, but no such requirement was made for the mathematics supervisor title. She argued that the "clear nexus" needed to be shown between the certification requirements and the ability to effectively perform the job was never established. Ms. Hackett's supervisor endorsement was generic and authorized the holder to supervise any subject area and any grade. Absent a showing that an additional certification is necessary to perform the duties of the position, the District cannot side step an educator's tenure rights by imposing requirements that are not necessary for the position.

[7] In that matter petitioners who had accrued tenure as supervisors, had a tenure entitlement to the assistant director titles that the Board had created and to which it had appointed non-tenured staff members.

Orange Board of Education's Argument

The District asserted that the District offered a sound and rational basis for the steps it took in response to the fiscal crisis caused by the loss of ten million dollars in State aid. The District argued that Ms. Hackett was not discriminated against or deprived of a promotional opportunity anymore than anyone else in the District. Rather than maintaining one elementary school science supervisor and one high school science supervisor with restricted K-7and 8-12 endorsements and one science coach 5-7, the District was better served by consolidating the positions and creating two K-12 supervisor positions; one for the Orange High School and one for the newly created STEM School. The District's design in starting the STEM program, upgrading the credentials of their staff, and responding to the fiscal crisis affected everyone, not just Ms. Hackett. Twenty-Six District employees were eliminated and others enjoyed "bumping" rights and displaced less-senior employees. They argued that there was a basic misunderstanding on the part of the petitioner about what the term "standard certificate" means. When the District upgraded all the different disciplines, they all needed the K-12 certification and the persons who took the positions have the K-12 certification. The fact that they are identified as a "standard certificate" is misleading, because all the the occupants of the supervisory positions have the K-12 certification. Ms. Hackett was not singled out. In addition, the petitioner had the opportunity to take certain exams (PRAXIS), that would have given her the K-12 certification, but she did not take the necessary exam. In sum, the District's actions in response to the fiscal crisis and in an attempt to upgrade the qualifications for new positions was neither "arbitrary nor capricious."

The District asserted that Boards of Education have broad discretion to implement a Reduction in Force if done for proper reasons, such as economy or because of reduction in the number of pupils enrolled, the effectuation on force is entirely within the authority and discretion of the board. Carpenito v. Bd. of Educ. of Borough of Rumson, Monmouth Cnty, 322 N.J. Super. 530 (App. Div. 1999). The District asserted that the petitioner presented no proof on which to base her assertion that the District's action was motivated by bad faith and otherwise arbitrary and capricious. The District argued that in fact, the implementation of a RIF is a drastic and

painstaking measure that is not entered into lightly and only after consideration of all alternatives. N.J.S.A. 18A:28-9 allows a Board of Education to reduce the number of teaching staff, whenever in the judgment of the board, it is advisable to abolish any such positons for reasons of economy . . . or for other good cause. The Board asserted that they presented substantial evidence to show the undisputed fact that there was a fiscal crisis in the District. While the elimination of Ms. Hackett's position did not solve the crisis, it was taken in good faith as a cost-saving measure. In addition, they argued that Dr. Powell and Ms. Smiley made every effort to meet with Ms. Hackett and explain the changes in her department. However, they were not required to investigate whether an appropriate Praxis exam was scheduled at a time that was convenient for the Petitioner. In addition, the District pointed out that the Petitioner failed to meet to discuss her position with the Board after the RICE notices were sent out and prior to any interviews or hiring of the new science supervisors. The credible evidence presented clearly demonstrates that the measures implemented were not directed at a single administrator or motivated by bad faith.

The Respondent argued that there was no proof of personal animus toward Ms. Hackett and there was no showing that Dr. Powell was trying to circumvent the Petitioner's tenure rights. The only evidence offered by Ms. Hackett was that, years earlier, Hackett received an unfavorable evaluation by Dr. Powell.[8] When questioned as to her basis for a belief of personal animus by Dr. Powell, Ms. Hackett stated that she "had no idea." There was basically no evidence showing personal animus. On the other side of the ledger, there was substantial credible evidence to show that the reorganization was District-wide and in response to exigent circumstances.

The District asserted that it is mindful that following a RIF, an employee may claim tenure rights in a new position based on tenure in the abolished position when the newly created position is "substantially identical" to the abolished one. See Dennery, 131 N.J. at 639. However, the District pointed out that a position is not substantially identical because there may be a mere overlap of duties. Id. at 640. If the new position requires additional duties or different responsibilities, then the positions are not

[8] This evaluation was grieved and partially overturned.

substantially similar. Id. at 641. The District posited that the qualifications and focus of the curriculum of the K-7 supervisor and the responsibility for subject content are significantly different. The K-12 science supervisor is required to have a secondary (K-12) endorsement to ensure their ability to monitor and guide instruction in elementary-grade level, high school-grade level, as well as advance placement courses. In addition, the nature and scope of the job is different. The old job descriptions stated as its goal to meet or exceed the "State Core Curriculum Content Standard." The newly created title states that its goal is to meet and exceed the "Next Generation Science Standards." In addition, the STEM supervisor's job description is even more specific and shows an even greater distinction than its predecessor. The District pointed to the testimony of Dr. Powell, who described the new duties of the supervisors. The Director testified that the new supervisors for K-12 would have to oversee elementary grades through AP chemistry, AP physics, biology. The high school-level courses would require a deep understanding of content. The supervisor would have the responsibility of overseeing the work of all grade-level science teachers, K-12, in the entire District. The newly created position would call for a significantly broader and in-depth knowledge of subject content, more that the previous science supervisors. Thus, there is a distinction in title, knowledge, and responsibility—not merely "overlapping." Therefore, the petitioner cannot assert tenure rights to either the K-12 or STEM positions.

FINDINGS OF FACT

The following Facts were Stipulated by the Parties:

1. Petitioner began her employment with the Respondent in or about 2004 as a teacher assistant.
2. Subsequently, in or about 2005 Petitioner was promoted to the title of teacher of science.
3. In or about 2012 Petitioner was promoted to the title of supervisor of science, K-7.
4. The supervisor position to which Petitioner was assigned required the holder of the position to have a teacher of science certification and a supervisor certification. **Exhibit 10**.

5. Petitioner has an elementary teacher of science K-5 certificate, as well as a middle school teacher of science certificate and a supervisor certificate.
6. Effective July 1, 2017, Respondent abolished the position of supervisor of science, K-7 and the position of supervisor of science, 8-12.
7. In lieu of the supervisor of science, K-7 and supervisor of science, grades 8-12, the Respondent created the title of supervisor science, K-12.
8. The job description for the newly created title of supervisor of science, K-12, attached hereto as **Exhibit 1** requires the holder of the position to possess Master's degree from an accredited college or university, and have a "*Science degree and secondary (k-12) certificate in any of the following areas of Science: Earth, Physical, Biological, or Physics Science and hold a New Jersey administrative certificate with a supervisor endorsement (N.J.A.C. 6:11-9.3 and 9.6)*"
9. The job description for the title of supervisor of mathematics, 9-12, attached hereto as **Exhibit 2** requires the holder of the position to possess a Master's degree from an accredited college or university, and have a New Jersey Administrative Certificate with a supervisor endorsement (N.J.A.C. 6:11-9.3 and 9.6) and *"hold a standard teaching certification in Mathematics."*
10. The job description for the title of supervisor of language arts literacy (8-12) and middle and high school media specialists, attached hereto as **Exhibit 3** requires the holder of the position to possess a Master's degree from an accredited college or university, hold a *New Jersey Administrative Certificate with a supervisor endorsement (N.J.A.C. 6:11-9.3 and 9.6) [and] "hold a standard teacher of English certificate."*
11. The job description for the title of supervisor of bilingual/ESL and World Languages attached hereto as **Exhibit 4** requires the holder of the position to possess a Master's degree from an accredited college or university, hold a New Jersey Administrative Certificate with a supervisor endorsement (N.J.A.C. 6:11-9.3 and 9.6) and *"hold a*

standard teaching certificate in Bilingual, ESL, or in the content World Language to be taught."

12. The job description for the title of supervisor of social studies, grades 5-12 and technology coordinators attached hereto as **Exhibit 5** requires the holder of the position to possess a Master's degree from an accredited college or university, hold a New Jersey Administrative Certificate with a supervisor endorsement (N.J.A.C. 6:11-9.3 and 9.6) and *"hold a standard teaching certificate in Social Studies."*

13. The job description for the title of supervisor of career and technical education and health/physical education K-7 attached hereto as **Exhibit 6** requires the holder of the position to possess a Master's degree from an accredited college or university, hold a New Jersey Administrative Certificate with a supervisor endorsement (N.J.A.C. 6:11-9.3 and 9.6) and *"hold a standard teaching certificate in one of the CTE areas and/or Health and Physical Education.*

14. The job description for the title of supervisor of special services attached hereto as **Exhibit 7** requires the holder of the position to possess a Master's degree from an accredited college or university in education, psychology, guidance, special education or related field, hold a New Jersey Administrative Certificate with a supervisor endorsement (N.J.A.C. 6:11-9.3 and 9.6) and *"hold an educational support and/or teaching certificate.*

15. The job description for the title of supervisor of STEM-focused learning K-12 attached hereto as **Exhibit 8** requires the holder of the position to possess a Master's degree from an accredited college or university in science, mathematics or technology, hold a New Jersey Administrative Certificate with a supervisor endorsement (N.J.A.C. 6:11-9.3 and 9.6) and *"hold a degree and a secondary (K-12) New Jersey instructional certificate in the area of Mathematics, Physics, Chemistry, Biological Science, Physical Science and/or Technology Education."*

16. The job description for the title of visual and performing arts attached hereto as **Exhibit 9** requires the holder of the position to possess a

Master's degree from an accredited college or university, hold a New Jersey Administrative Certificate with a supervisor endorsement (N.J.A.C. 6:11-9.3 and 9.6) and *"hold a standard teaching certificate in Music and/or Art."*

17. The staff member currently serving as the supervisor of science K-12, Benjamin Suro, was hired to serve in this capacity for the 2017-2018 school term. Mr. Suro was not employed by the Respondent before the current school year.

Based on the testimony presented and the exhibits submitted I make the following **FINDINGS OF FACT**:

1. During the 2016-17 school year, the District learned of a budget shortfall of approximately ten million dollars ($10,000,000) it expected to receive in State Aid.

2. In response to this shortfall, the District called on each department to come up with a reorganization plan that would reduce its budget.

3. The District instituted a Reduction in Force (RIF) consolidating certain supervisory positions and eliminating certain extra curricular activities. In addition to instituting a RIF, the District also sought to upgrade its curriculum and staff qualifications.

4. As a result of the reorganization 26 staff positions were eliminated.

5. The science department proposed eliminating the Supervisor of Science, K-7, as well as the Supervisor of Science 8-12 and replacing it with the single position of Supervisor of Science K-12. In addition, they proposed a position of a STEM Supervisor, grades K-12, for a new program that the District had instituted.

6. These new positions required the holders to possess a Master's degree and have a Science degree and Secondary (K-12) certificate in one of the areas of science including: Earth, Physical, Biological or Physics and hold a New Jersey Administrative Certificate with a Supervisor endorsement.

7. The rationale for modifying the job description was to ensure that the staffs' qualifications were one "notch" above whatever grade level they were assigned, to guarantee that staff not only understood where the instruction was,

but where the content was going. The new Science supervisors would be overseeing grades up through AP Chemistry, AP Physics, and Biology and would need to be well versed in the content of the High School Sciences to properly monitor and supervise their teaching staff.

8. On April 10, 2017 Ms. Belinda Smiley, Administrative Assistant to the Superintendent for Operations and Human Resources Services, along with Dr. Powell met with members of the staff to give an overview of the implementation of a RIF. Powell explained to her staff that the K-2 Supervisor of Math position was being eliminated as well as K-7 and 8-12 for Science. Ms. Hackett was present at this meeting.

9. The new Science Supervisor positions were presented to the Board and approved on April 26, 2017.

10. After passage of the resolution, Ms. Smiley scheduled RICE Hearings before the Board for those affected by the RIF, including Ms. Hackett.

11. Ms. Hackett did not respond to the RICE notice; nor did she appear at the Board meeting.

12. Ms. Hackett did not have the secondary certificate required. Instead she had a K-7 endorsement.

13. Although Ms. Hackett did not have the proper certificate, Tina Powell, the Director of Mathematics and Science, K-12, scheduled Ms. Hackett for an interview for the new K-12 science supervisor position on May 26, 2017, before the District's cabinet, which was made up of the Superintendent and high-level administrators. These District officials were charged with interviewing and deciding what candidates should be offered the new positions. Dr. Powell did not know at the time, if Ms. Hackett's had obtained the specific certification required.

14. Ms. Hackett did not appear at the scheduled time, because she was out sick.

15. Ms. Hackett was never rescheduled for an interview for that position nor did she make any attempt to get a new interview date.

16. Although the Praxis examination, that Ms. Hackett would have needed to obtain the K-12 certification, was given in April and May of 2017, she made no attempt to take the exam to make herself eligible for the position.

17. Ms. Hackett could have interviewed and been considered for the K-12 supervisory position after taking the exam and awaiting results.

18. As of the date of the hearing, Ms. Hackett had still not taken the necessary PRAXIS.

19. On June 8, 2017, the Petitioner was advised that she was to be reassigned to a teaching position for the 2017-18 school term at a salary of $78,280.00. This was a reduction of $15,560.00 from her salary in the 2016-17 school year. The reduction was based on pro-rated 10 months, rather than 12 month's salary.

20. Ms. Hackett's salary was also frozen to the 2020-21 school term, until the salary guide caught up with the $78,280.00 salary.

21. After the reorganization, the District employed a non-tenured staff member in the title of Supervisor of Science, K-12.

22. The District also employed a Supervisor of STEM, K-12, who also was not tenured.

ANALYSIS OF THE LAW

The tenure of education personnel is authorized by the Education Tenure Act, N.J.S.A. 18A:28-1 to -18. Tenure is a status in a particular position created by statute, not the agreement of the parties. Therefore, it is a "'statutory right imposed upon a teacher's contractual employment' [that] may not be forfeited or waived." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 77 (1982) (quoting Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962), cert. denied, 371 U.S. 956 (1963), and citing Red Bank Educ. Ass'n v. Red Bank Bd. of Educ., 78 N.J. 122, 141 (1978)). Tenure was designed to protect employees "from dismissal 'for unfounded, flimsy or political reasons.'" Wright v. Bd. of Educ. of E. Orange, 99 N.J. 112, 118 (1985).

The petitioner has correctly stated that dismissals resulting from a reduction or reorganization must be made on the basis of seniority according to standards established by the Commissioner and approved by the State Board of Education. N.J.S.A. 18A:28-10; N.J.A.C. 6A:32-5.1. In addition, the rights of tenured staff members are more expansive. She cites Smith for the proposition that additional certification

requirements imposed by the Board could not serve to defeat clear tenure entitlements. However, the petitioner has failed to point out the distinction between that case and the present matter. N.J.A.C. 6A:9-5.5(a) provides that "[e]ach district board of education shall assign position titles to teaching staff members that are recognized in these rules." In the Smith case the Orange Board of Education created position titles that were not recognized under the rules. Under those circumstances, it was incumbent on the district, prior to appointing a candidate, to submit to the county superintendent a written request for permission to use the proposed title, which would include a detailed job description. N.J.A.C. 6A:9-5.5(b)(1). The county superintendent would then determine whether to approve of the position. The District did not follow this procedure and Judge Bass found that this was a violation. In the present case the Supervisory positions were already in place and it was a matter of revising the certification from supervisor K-7 to supervisor K-12.

Boards of Education have broad discretion to implement a Reduction in Force (RIF), "if done for proper reasons, such as economy or because of a reduction in the number of pupil enrolled, the effectuation of force is entirely within the authority and discretion of the board". Carpenito, 322 N.J. Super. 530. In addition, as Judge Bass pointed out, it is well established that local boards may establish additional certification requirements for a particular supervisory position, but those requirements must have a clear nexus to effective performance of the job. Kendrick v. Bd. of Educ. of S. River, EDU 10331-96, Initial Decision (December 18, 1997), aff'd, Comm'r (February 2, 1998), http://njlaw.rutgers.edu/collections/oal/.

There was extensive testimony by both Dr. Powell and Ms. Smiley regarding the reasons why the District had determined to require a K-12 certification, instead of maintaining one elementary school science supervisor and one high school science supervisor with restricted K-7 and 8-12 certifications and one science coach grades 5-8. The new K-12 supervisor would be required to supervised teachers who would be teaching subject matter from kindergarten up through advance placement science courses in both the High School and new STEM program. While some supervisory skills are necessary for both a supervisor of K-7 and K-12, mastery of subject matter on the high school level is essential to supervise teachers who will be teaching biology,

physics, earth science, and advance placement science courses. In addition, the STEM supervisor position required the K-12 certification, in order to effectuate the educational standards and focus of the program, which was: "to supervise members of the teaching staff to ensure that all teachers provide students with the necessary skills such to effectively engage learners, support their unique needs, increase school achievement, and adequately prepare students for college and careers." I **FIND** Dr. Powell's and Ms. Smiley's testimony, on the need to revise the required certification, to be credible. 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, 749 (9th Cir. 1963), cert. denied sub. nom., Palermo v. U.S., 377 U.S. 953 (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. It is entirely logical and reasonable that the person who was going to supervise teachers in these subjects would himself have the appropriate level of knowledge in those areas. While a supervisor endorsement is generic and authorizes the holder to supervise any subject matter and any grade level, additional certifications may be necessary to perform the duties of the particular position. In this case, I **FIND** that the District has demonstrated the need for the additional certification of K-12. The distinction in title, knowledge, and responsibility was not merely "overlapping," but plainly distinguishable from the previous positions. Therefore, the petitioner cannot assert tenure rights to the new positions. Baldini v. Bd. of Tr. of the Sussex Charter Sch., EDU 20523-15, Initial Decision (September 12, 2017), http://njlaw.rutgers.edu/collections/oal/.

The petitioner has also argued that the K-12 designation was not only arbitrary, but also done with malicious intent. There was extensive testimony as to why the reorganization, which resulted in the reduction of twenty-six positions, was necessary. While the combining of K-7 and 8-12 certifications only resulted in the reduction of one position,[9] there was an attempt to deal with the fiscal crisis, which was not disputed by the petitioner. There has been no showing that this whole reorganization was done simply to deprive Ms. Hackett of her supervisory position. In addition, the allegation that the reorganization of the science department was done out of some animus toward Ms. Hackett was not substantiated by the petitioner. While there was some allusion to the fact that Dr. Powell had given the petitioner a PIP (Personal Improvement Plan) in the past, Ms. Hackett was unable to show a connection between that PIP and the reorganization of the K-12 program. In fact, there was testimony that, despite the fact that Ms. Hackett did not appear to have the proper certification for the new position, Dr. Powell advanced her to the next level of interviewing before the Cabinet, because the petitioner might have taken and passed the PRAXIS without the District's knowledge. While Ms. Hackett testified that she was sick at the time of the Cabinet interview and was not offered an alternate date for the interview, it was also clear that Ms. Hackett took no initiative in trying to reschedule the interview, nor did she attempt to take the PRAXIS to qualify for the position, up until the present time. In addition, there was no clear explanation as to why she did not ask to speak to the Board after she received the RICE notice. The petitioner tried to make it the District's responsibility to reschedule the interview and move her application forward. In addition, she claimed that she did not have sufficient time to study for the PRAXIS and had health issues that impeded her ability to move forward with the application process. However, that does not explain why she still has not attempted to take the PRAXIS to make herself eligible for other supervisory positions. Despite the fact that the petitioner is an educated person and had Union representation available to explain her tenure rights and the RIF process, she claimed ignorance of how she could have asserted her rights at the time of the reorganization in 2017.

[9] Because of the addition of the STEM program, an additional supervisor had to be appointed.

CONCLUSION

Based on the **FINDING OF FACTS** and reasoning outlined in the **ARGUMENTS** and **ANALYSIS OF THE LAW** above, I **CONCLUDE** that the Petitioner has failed to meet her burden and her Petition is dismissed.

ORDER

It is hereby **ORDERED** that the Petitioner's application for relief is **DENIED** and her 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.

6/14/18
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ (Ret. on recall)

Date Received at Agency: June 14, 2018

Date Mailed to Parties: June 14, 2018
db

APPENDIX

WITNESSES

For Petitioner:

Erika Hackett

For Orange Board of Education

Dr. Tina Powell
Belinda Smiley

EXHIBITS

For Petitioner:

P-1	Job description for the newly created title of supervisor of science, K-12
P-2	Job description for the title of supervisor of mathematics, 9-12
P-3	Job description for the title of supervisor of language arts literacy (8-12) and middle and high school media specialists
P-4	Job description for the title of supervisor of bilingual/ESL and World Languages
P-5	Job description for the title of supervisor of social studies, grades 5-12 and technology coordinators
P-6	Job description for the title of supervisor of career and technical education and health/ physical education K-7
P-7	Job description for the title of supervisor of special services

P-8 Job description for the title of supervisor of stem-focused learning K-12

P-9 Job description for the title of visual and performing arts

P-10 Copy of the New Jersey State Board of Examiners Supervisor Certificate of Erika L. Hackett

For Respondent:

R-1 Resolution F17-026 Approving the Revision of Job Descriptions Supervisor of Science (K-7) AND (8-12 TO Supervisor of Science (K-12) Date April 26, 2017

R-2 Resolution F17-024 Approving the Title and Job Description for Supervisor of STEM-FOCUSED Learning (K-12) Dated April 26, 2017

R-3 Email for Dr. Powell announcing candidates for interview for Supervisor of Science K-12 and STEM Supervisor K-12 dated May 24, 2017

R-4 Memo-2017-2018 Staff RIFs List dated June 13, 2017

R-5 List of all Certifications held by Petitioner according to NJ Department of Education as of February 2018

R-6 (a-e) List of Certifications held by Supervisors in various disciplines hired for 2017-2018 school year pursuant to new credential according to NJ Department of Education as of February 2018

R-7 Letter to Petitioner from Dr. Howard, Deputy Superintendent recommending her appointment to the position of Science Teacher dated June 8, 2017

R-8 Letter to Petitioner from Dr. Howard advising Petitioner that the Board approved her appointment as Science Teacher at Lincoln Avenue School dated June 16, 2017

R-9 Illustration by Dr. Powell

R-10 Illustration by Dr. Powell

R-11 Department of Education document detailing a list and definitions of types of certification issued by the Department of Education

R-12 Department of Education document citing types of certificates issued by the Department by subject area and grade level

R-13 2015-2016 Roster of Supervisors for the Orange School District, listed by name, subject supervised and grade level

R-14-32 Job Descriptions for each Supervisory position in the District for the 2015-2016 School year; qualifications required, nature and scope of positions

R-33 2016-2017 Roster of Supervisors for the Orange School District listed by name, subject supervised and grade level

R-34-53 Job Descriptions for each Supervisory position in the District for the 2016-2017 school year; qualifications required, nature and scope of positions

227-18

MOHAMMAD AHAD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW UNIT, AND STATE-OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a school bus driver – appealed the Department's determination to suspend his school bus endorsement pursuant to *N.J.S.A.* 18A:39-26 *et seq.* after an incident in which a sleeping student, B.O., remained on the bus following her drop off point at the Dale Avenue School. Petitioner did not complete a visual inspection of the bus prior to leaving the drop off point, and was unaware of the student's presence until he was contacted by a school administrator who requested that he inspect the bus after discovering that B.O. was not in school. Petitioner contended that because he was still driving when the student was discovered, B.O. was never left alone on the bus. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; on September 8, 2017, petitioner picked up B.O. for transport to the Dale Avenue School; petitioner failed to complete a visual inspection of the bus prior to leaving the drop off point at Dale Avenue School; B.O. remained on the bus, sleeping, beyond her drop off point, and was not discovered until a school administrator telephoned petitioner to request that he inspect the bus; a visual inspection of the school bus at the end of the transportation route is required under *N.J.S.A.* 18A:39-28; it is undisputed that petitioner left a student on his bus after dropping all other students off at school; pursuant to *N.J.S.A.* 18A:39-29, a school bus driver found to have left a pupil on the school bus at the end of a route shall have his school bus endorsement suspended for six months for the first offense. Accordingly, the ALJ granted respondent's motion for summary decision, denied petitioner's cross motion for summary decision, and dismissed the appeal with prejudice.

Upon full review and consideration of the record, Commissioner concurred with the findings and determinations of the ALJ. Accordingly, the petition was dismissed and the respondent was directed to notify the Motor Vehicle Commission of its obligation to suspend petitioner's school bus endorsement pursuant to *N.J.S.A.* 18A:39-26 *et seq.*, and to notify petitioner's employer that he is ineligible for the period of suspension for continued employment as a school bus driver.

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: 7/26/18

227-18

OAL DKT. NO. EDU 18146-17
AGENCY DKT. NO. 228-9/17

MOHAMMAD AHAD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW UNIT, AND STATE-OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge that the Office of Criminal History Review Unit (CHRU) is entitled to summary decision. Accordingly, CHRU's motion for summary decision is granted, petitioner's cross-motion for summary decision is denied, and the petition of appeal is hereby dismissed with prejudice. CHRU is directed to notify the Motor Vehicle Commission of its obligation to suspend petitioner's school bus endorsement for the mandatory six-month period pursuant to *N.J.S.A.* 18A:39-29, and to notify petitioner's employer that he is ineligible for the period of suspension for continued employment as a school bus driver.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/26/18
Date of Mailing: 7/26/18

* 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 18146-17
AGENCY REF. NO. 228-9/17

MOHAMMAD AHAD,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,
CRIMINAL HISTORY REVIEW UNIT and
STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON, PASSAIC COUNTY,

Respondents.

Gary R. Matano, Esq., for Petitioner

James M. Esposito, Deputy Attorney General, for Respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorneys)

Robert E. Murray, Esq. for Respondent State-Operated School District of the City of Paterson, Passaic County

Record Closed: June 14, 2018 Decided: June 28, 2018

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges the suspension of his "S" endorsement on his driver's license.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on December 12, 2017, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A prehearing conference was held on January 29, 2018, and a prehearing order was entered on February 2, 2018.

Respondent, State-Operated School District of the City of Paterson, filed a motion to dismiss petitioner's appeal for failure to supply discovery. Said motion was filed on April 13, 2018. Petitioner filed a response thereto on April 22, 2018. Said motion was held in abeyance pending the outcome of a subsequent motion for summary decision filed by respondent New Jersey Department of Education, Criminal History Review Unit (CHRU).

Respondent, New Jersey Department of Education, Criminal History Review Unit, filed a motion for summary decision on May 15, 2018. Petitioner filed his response in opposition to the motion and a cross-motion for summary decision on June 3, 2018. Respondent, New Jersey Department of Education, Criminal History Review Unit, filed its sur-reply on June 13, 2018. Respondent State-Operated School District of the City of Paterson filed a letter dated June 4, 2018, in support of respondent's New Jersey Department of Education, Criminal History Review Unit motion for summary decision.

FACTUAL DISCUSSION

The following **FACTS** are not in dispute:

1. Petitioner is a school bus driver.
2. On September 8, 2017, petitioner picked up student B.O. while on his transportation route.
3. Petitioner completed his transportation route when he dropped off the students at the Dale Avenue School.
4. Petitioner did not complete a visual inspection of the bus prior to leaving the drop off point.
5. B.O. was left on the bus.
6. A school administrator, after discovering that B.O. was not in school, contacted petitioner and requested he inspect his bus.
7. Petitioner, upon inspecting his bus, found B.O. sleeping on the bus.
8. Petitioner returned to the school and dropped of B.O.
9. B.O. was not left alone on the bus, although petitioner was unaware of her presence until he inspected the bus at the request of the school administrator.

LEGAL ANALYSIS AND CONCLUSION

Standard for Summary Decision

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of

the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted).

It is not disputed that petitioner is a school bus driver. It is also undisputed that on September 8, 2017, petitioner left a child on his bus after dropping all other students off at school. There are no issues as to material fact and the matter is ripe for summary decision.

The School Bus Safety Act

The School Bus Safety Act imposes an affirmative duty on school bus driver to visually inspect the school bus upon completion of every route to ensure that no child has been left on the school bus.

N.J.S.A. 18A:39-28 states in pertinent part:

> A school bus driver shall visually inspect the school bus to which he is assigned at the end of the transportation route to determine that no pupil has been left on the bus.

N.J.S.A. 18A:39-29 states part:

> In the event that, after notice and opportunity to be heard, a school bus driver is found to have left a pupil on the school bus at the end of his route, his school bus endorsement shall be:
>
> a. suspended for six months, for a first offense; or
> b. permanently revoked, for a second offense.

N.J.A.C. 6A:3-12.1 states in pertinent part:

> (a) Where a school bus driver has been notified by the Department's Criminal History Review Unit that a determination has been made that suspension or revocation, as the case may be, of the driver's school bus endorsement

> is warranted pursuant to N.J.S.A. 18A:39-28 et seq., because a child was left on the school bus to which the driver was assigned notwithstanding the driver's obligation to conduct a visual inspection at the end of the transportation route to assure that no pupil is left on the bus, the driver may contest such determination through the filing of a petition of appeal according to the procedures set forth in N.J.A.C. 6A:3-1.
>
> 1. Such petition shall be filed within 10 business days of the date of the Department's written notice to petitioner of such determination.
> 2. In addition to the service requirements of N.J.A.C. 6A:3-1.3(a) and (j), such petition shall additionally be served on the Department c/o Manager, Criminal History Review Unit, New Jersey Department of Education, PO Box 500, Trenton, New Jersey 08625-0500.
>
> (b) The following aspects of the Department's determination may be contested:
>
> 1. That a pupil was left on the bus at the end of the driver's route;
> 2. That the incident in question was the driver's second offense;
> 3. That the pupil was harmed as a result of foreseeable danger; and
> 4. That the driver acted with gross negligence.

It is clear that CHRU has determined that petitioner's school bus endorsement should be suspended pursuant to N.J.S.A. 18A:39-28. It is also clear that petitioner appealed that determination as the matter is presently before the undersigned. All that remains to be determined is whether or not petitioner left a student on his bus at the end of his route. That fact is not in dispute. Accordingly the determination by CHRU should be affirmed.

There is no assertion by CHRU that this constitutes a second offense, or that B.O. was harmed, or that petitioner acted with gross negligence.

Petitioner's asserts that the critical issue is what constitutes "left on the bus." Frankly, this assertion is without merit. Left on the bus means exactly that. B.O. was

not discovered until a school administrator telephoned petitioner to request he do what he was supposed to do at the end of his route: inspect the bus.

> A court's task in statutory interpretation is to determine and effectuate the New Jersey Legislature's intent. In carrying out that important role, a court looks first to the plain language of the statute, seeking further guidance only to the extent that the Legislature's intent cannot be derived from the words that it has chosen. A court will, in that effort, read the words selected by the Legislature in accordance with their ordinary meaning, unless the Legislature has used technical terms, or terms of art, which are construed in accordance with those meanings.
>
> [See Bosland v. Warnock Dodge, 197 N.J. 543 (2009).]

Based upon the foregoing I **CONCLUDE** that respondent's, New Jersey Department of Education, Criminal History Review Unit, motion for summary decision be granted and that petitioner's cross-motion for summary decision be denied.

ORDER

It is hereby **ORDERED** as follows:

1. Respondent's, New Jersey Department of Education, Criminal History Review Unit, motion for summary decision is **GRANTED**; and,
2. Petitioner's cross-motion for summary decision is **DENIED**; and
3. Petitioner's appeal is **DISMISSED WITH PREJUDICE**.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, 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 28, 2018
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

APPENDIX

List of Moving Papers

For Petitioner:

Letter brief in opposition to Motion for Summary Decision and in support of Petitioner's Cross-Motion for Summary Decision

For Respondent New Jersey Department of Education, Criminal History Review Unit:

Notice of Motion for Summary Decision

Brief in support of Motion for Summary Decision

Certficiation of James M. Esposito, DAG, with Exhibits A and B

Reply brief to Petitioner's brief

For Respondent State-Operated School District of the City of Paterson:

Letter in support of Respondent New Jersey Department of Education, Criminal History Review Unit Motion for Summary Decision

228-18LM

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

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

LAMONT O. REPOLLET, ED.D.
Commissioner

July 27, 2018

Sabino Valdes, *pro se*
P.O. Box 463
Paramus, New Jersey 07653

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

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 Sabino Valdes' Motion for Reconsideration and Clarification of the Commissioner's July 13, 2018 decision, denying Mr. Valdes' sixth motion to reopen the above-captioned matter.[1]

Based on my review of the present motion and the arguments set forth therein,[2] and pursuant to the reasons explained in the Commissioner's January 11, 2018, March 20, 2018 and May 17, 2018 decisions, Mr. Valdes' Motion for Reconsideration and Clarification is denied – without need for further adjudication – as he has not established any of the bases set forth in *N.J.A.C.* 6A:3-1.15(b)(2), and has further failed to demonstrate good cause to reopen this matter.[3]

---

[1] The procedural history of this matter has been fully set forth in the January 11, 2018 and March 30, 2018 decisions, and is incorporated herein by reference.

[2] The Commissioner has also reviewed all other submissions by Mr. Valdes in connection with this matter, and clarifies that no ex parte proceeding was conducted by the Commissioner in reaching his decision.

[3] The Commissioner notes that while Mr. Valdes filed his sixth motion seeking to reopen the final decision rendered in this matter by the State Board of Education and to dismiss the tenure charges filed against him almost eighteen years ago on "new" allegations and arguments – presumably in an effort to disguise his attempts to repeatedly adjudicate the same underlying issues – Mr. Valdes' sixth motion to reopen failed to establish good cause, nor did he file these actions with reasonable time or diligence; and therefore, was properly denied following the Commissioner's thorough review of *all* submissions related thereto. The Commissioner further notes that the January 11, 2018, March 20, 2018 and May 17, 2018 decisions were referenced in the July 13, 2018 decision, and once again herein, as they comprehensively address the legal bases for the Commissioner's consideration of a request to reopen or reconsider a matter such as the sixth motion to reopen, and the present motion for reconsideration and clarification.

Accordingly, the motion for reconsideration is hereby DISMISSED.[4]

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner of Education

c: County Superintendent
State Law Library

LOR/SLP/ATA

VIA REGULAR MAIL

[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).

229-18R

Y.Y., ON BEHALF OF MINOR CHILDREN, W.Y. AND D.Y.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

The Commissioner remanded this matter to the OAL for a hearing on the merits in April 2017. *Pro se* petitioner appealed the determination of the respondent Board that her children, W.Y. and D.Y., are not entitled to a free public education in North Arlington schools. Petitioner contended, *inter alia*, that she has separate residences in North Arlington, Bergen County, and in Kearny, Hudson County, but is legally domiciled in North Arlington. The respondent Board of Education of North Arlington argued that Y.Y. is not legally domiciled within the school district, but instead is domiciled at the family residence in the Township of Kearny.

The ALJ found, *inter alia*, that: *N.J.S.A.* 18A:38-1(a) and *N.J.A.C.* 6A:22.3.1(a) set forth the right of a student to a free public education; pursuant to the statute and regulations, public schools are free to persons between the ages of five and twenty who are domiciled within the school district; parents bear the burden of establishing domicile by a preponderance of the evidence; school districts have the authority to dis-enroll students who are not domiciled within their district; although petitioner furnished a volume of papers indicating her residence/domicile, the important factor for determination in this case is where, in actuality, the children were living; petitioner asserted that she is separated from her husband, and that the children spend most of the week with her in North Arlington, but spend weekends with her husband in Kearny; witnesses on behalf of the Board testified credibly to many dates in which Y.Y. and/or her husband left the Kearny address and escorted her children to school in Bergen County; petitioner withheld permission for the Board to visit her North Arlington residence in order to verify her claim of domicile; a review of petitioner's testimony is replete with explanations for why she and the children must spend significant time at the Kearny residence; and petitioner's claims of domicile in North Arlington were not corroborated by any witness testimony on her behalf. The ALJ concluded that Y.Y.'s children were never domiciled in North Arlington and remained domiciled in Kearny from September 2014 forward. Accordingly, the ALJ ordered petitioner to reimburse tuition paid by the respondent Board to Bergen County Technical School on behalf of W.Y., and noted that an application for reimbursement of tuition due to North Arlington for D.Y.'s attendance can be submitted to the ALJ.

Upon review, the Commissioner found no basis in the record to disturb the ALJ's credibility determinations, and concurred with the findings and conclusions in the Initial Decision. The Commissioner noted that the ALJ demonstrated no bias against petitioner, nor did he ignore petitioner's submissions and testimony in this matter. Finally, the Commissioner determined that the present record lacks information required to calculate the amount of tuition owed to the Board. Accordingly, the matter was remanded to the OAL for calculation of tuition due, and supplementation of the record as warranted.

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

Issued: July 26,2018

229-18R

OAL DKT. NO. EDU 05241-17
(EDU 09260-16 ON REMAND)
AGENCY DKT. NO. 149-5/16

Y.Y., ON BEHALF OF MINOR CHILDREN, W.Y. AND D.Y,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,	:	
RESPONDENT.	:	

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

In this matter on remand, petitioner challenges the Board's residency determination that the minor children are not domiciled in North Arlington, but rather live in their father's home in Kearny. Following a hearing on the merits, the Administrative Law Judge (ALJ) found that the petitioner and her minor children were not domiciled in North Arlington, and therefore, the Board is entitled to tuition for the period of time they were ineligible to attend school in the District.

In her exceptions, petitioner argues that the Initial Decision was based on fraudulent evidence and false testimony. Specifically, petitioner challenges the factual accuracy of testimony from Anita Gilmore and Carla Gomes, witnesses for the Board. Petitioner also alleges that the Board's counsel committed fraud and colluded with the above witnesses to falsify evidence and testimony. Petitioner maintains that the investigators illegally searched her

driver's license and motor vehicle information in order to conduct surveillance. Petitioner further disputes the findings of the surveillance, giving explanations as to why she or her car were at the Kearny address on some of the dates in question. With respect to the surveillance video, petitioner challenged the authentication of the video, alleging that it was falsified, and maintains that her motion to suppress the video was improperly denied.

Petitioner contends that the ALJ erred in finding that she was not domiciled in North Arlington simply because she was seen at the Kearny address performing acts of ownership. Petitioner maintains that she jointly owns the Kearny property and has a right to use it even if she is not domiciled there. She submitted a variety of documents to establish her residency in North Arlington, which she alleges the ALJ ignored. Further, petitioner's son D.Y. was removed from the District in September 2015, and was homeschooled by petitioner and her husband at the Kearny address until he began attending Kearny Middle School in September 2016. As such, petitioner argues that the ALJ failed to consider that this is another aspect of why she spent time in Kearny. Petitioner also takes exception with the ALJ's statement that more important than the documentation submitted by petitioner is where her children actually live. Petitioner contends that W.Y. lived in North Arlington, as demonstrated by his college applications and drivers learning permit. With respect to D.Y., petitioner maintains that he was living in North Arlington and only began spending more time in Kearny after the Board removed him from school.

Petitioner alleges that the ALJ was biased in his Initial Decision. She questions why the ALJ referred to her third floor apartment in North Arlington as an "attic" apartment. Further, she contends that the ALJ unfairly held it against her that she did not have anyone else testify on her behalf, and that she did not allow the Board to visit her home.

Finally, petitioner argues that, pursuant to *N.J.A.C.* 6A:22-6.2(a), the District may only seek tuition for up to one year of the minor children's ineligible attendance. As the petition was filed on May 23, 2016, the tuition assessment cannot go beyond May 2015. Additionally, the ALJ incorrectly ordered tuition payments to Kearny rather than the Board.

In its exceptions, the Board argues that the ALJ correctly found that petitioner failed to demonstrate that the minor children are domiciled in North Arlington, and therefore are not eligible to attend school in the District. However, the Board points out that the ALJ ordered tuition for W.Y. to be paid to the Township of Kearny rather than the North Arlington Board of Education. Further, the Board contends that the total to be reimbursed for W.Y.'s attendance at Bergen County Technical School (Bergen Tech) is $34,334.40 for the 2014-15, 2015-16, 2016-17 and 2017-18 school years. With respect to D.Y., the Board contends that tuition is owed for 159 days of the 2014-15 school year and for 11 days of the 2015-16 school year, in the total amount of $10,329.92. The Board suggests that this matter be remanded for the submission of proofs as to the issue of tuition.

In reply to petitioner's exceptions, the Board argues that petitioner's conspiracy theories and credibility arguments should be disregarded. The Board does not dispute that petitioner has a right to use her Kearny property, but emphasizes that she cannot arbitrarily designate North Arlington as her domicile without objective proofs. Further, even if petitioner is domiciled in North Arlington, the ALJ appropriately found that her sons remained domiciled in Kearny with their father. The Board points out that petitioner's own testimony established that the North Arlington apartment is small, and the ALJ's reference to petitioner's living space as an "attic apartment" cannot be construed as bias against her. Further, contrary to petitioner's arguments, the Board maintains that the ALJ acknowledged the documentary proofs that

petitioner submitted, but properly discounted them as they only demonstrate that she owns the North Arlington property – not that she is actually domiciled there. Instead, the evidence submitted by the Board at the hearing established that petitioner and her minor children spent significant amounts of time in Kearny. Finally, with respect to petitioner's argument regarding the limit on tuition reimbursement up to one year, the Board contends that petitioner filed her appeal on October 6, 2015, and not May 23, 2016.

In reply to the Board's exceptions, petitioner argues that the Board's counsel submitted "falsely calculated and unsubstantiated claims" regarding the minor children's attendance and tuition. (Petitioner's reply at 1) Petitioner alleges that counsel knows that the tuition calculation cannot begin before May 2015, but seeks to recoup tuition for the entire 2014-2015 school year.

Upon review, the Commissioner concurs with the ALJ's finding that petitioner failed to sustain her burden of establishing that she and her children were domiciled in North Arlington from the 2014-2015 school year to the present. The Commissioner further concurs with the ALJ's conclusion that the minor children were, therefore, not entitled to a free public education in the District's schools during that time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in North Arlington. However, the Commissioner notes that pursuant to *N.J.A.C.* 6A:22-6.2(a), the Commissioner may only assess tuition for the period during which the hearing was 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." As the Board issued its final notice of ineligibility on May 4, 2016, the tuition assessment is limited to the period from May 4, 2015 to

the present. The Commissioner agrees with the parties that any tuition assessed is due to the Board of Education of North Arlington, and not the Township of Kearny.

The ALJ found that not enough evidence was presented with respect to tuition due to the Board for D.Y.'s attendance. As such, the present record lacks the information required for the Commissioner to calculate the amount of tuition owed to the Board for D.Y.'s ineligible attendance, specifically the number of days D.Y. attended school in North Arlington from May 4, 2015 to the end of the 2014-15 school year, and in the 2015-16 school year.* Additionally, the Commissioner requires the information regarding the daily cost per pupil (based on 1/180 of the total annual per pupil cost) so that an exact amount of tuition owed may be computed.

With respect to W.Y., the ALJ ordered that petitioner reimburse the Board for any tuition payments it made to Bergen Tech on W.Y.'s behalf. However, further information is required on the exact amount of tuition owed to the Board for W.Y.'s attendance at Bergen Tech from May 4, 2015 through the 2017-18 school year.

The Commissioner does not find petitioner's exceptions to be persuasive. Petitioner did not meet her burden of demonstrating that she and her children are domiciled in North Arlington. Instead, there is sufficient evidence in the record – including the September 2015 surveillance that showed petitioner leave the Kearny address with W.Y., followed by a man leaving with D.Y. and dropping him off at school in North Arlington; the October 2016 surveillance that showed petitioner leaving the Kearny address with W.Y. and dropping him off at Bergen Tech; and the surveillance conducted over several dates in May and June 2017 that showed petitioner leaving the Kearny address on four occasions and driving W.Y. to Bergen Tech – to support the ALJ's finding that although petitioner may have established a

* It appears as though D.Y. did not attend school in North Arlington for the 2016-17 and 2017-18 school years.

domicile for herself in North Arlington, the minor children remained domiciled in Kearny with their father.

Many of petitioner's exceptions involve assertions regarding false or inaccurate testimony, or collusion to submit false testimony and evidence. The Commissioner notes that the ALJ had the opportunity to assess the credibility of the various witnesses who appeared before him and make findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. [*N.J.S.A.* 52:14B-10(c)].

As such, the Commissioner finds no basis in the record to disturb the ALJ's credibility assessments. The ALJ did not demonstrate bias against petitioner or ignore the documents she submitted and the explanations she provided as to why she and her children spent time at the Kearny address. Instead, he found the testimony of other witnesses to be more credible and appropriately placed more weight on that evidence.

Accordingly, this matter is remanded to the OAL for calculation of tuition due to the Board, and supplementation of the record as warranted.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/26/18

Date of Mailing: 7/27/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

Y.Y. ON BEHALF OF MINOR CHILDREN W.Y. AND D.Y.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,

Respondent.

OAL DKT. NO. EDU 05241-17

AGENCY DKT. NO. 149-5/16

ON REMAND

Y.Y. ON BEHALF OF MINOR CHILDREN W.Y. AND D.Y.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,

Respondent.

OAL DKT. NO. EDU 09260-16

AGENCY DKT. NO. 149-5/16

Y.Y. parent of D.Y. and W.Y. petitioner, pro se

Jennifer M. Hermann, Esq., for respondent, Borough of North Arlington Board of Education (Methfessel & Werbel, attorneys)

William C. Soukas, Esq. for respondent, Board of Education of the Vocational Schools, Bergen County (Nowell, P.A., attorney)

Timothy D. Cedrone, Esq. for respondent, Town of Kearny (Apruzzese, McDermott, Masetro & Murphy, attorneys)

Record Closed: September 6, 2017 Decided: May 8, 2018

BEFORE **JEFFREY A. GERSON**, ALJ t/a:

STATEMENT OF THE CASE

This is a residency contest. Y.Y. contends that she and her two children are domiciled in the Borough of North Arlington, Bergen County. The Borough of North Arlington contends that Y.Y. and her children are not domiciled in North Arlington, but are domiciled in Kearny, New Jersey, Hudson County.

This is the remanded matter of EDU 09260-16 which was remanded to the Office of Administrative Law after the Commissioner in a decision dated April 17, 2017 determined that there were questions of fact to be resolved at a full hearing.

Upon remand, the matter was reassigned to the undersigned on or about April 25, 2017.

The case was heard to conclusion on July 7, 2017.

Subsequent to the hearing on July 7, 2017, petitioner filed a Motion to Suppress Evidence and made additional requests attempting to prevent the submission of video tapes captured by a security system monitored by a neighbor in Kearny.

Both sides submitted closing briefs on or about August 28, 2017. Subsequent submissions responding to the closing briefs were received on or about September 6, 2017. On that date, the record closed.

TESTIMONY

Five witnesses on behalf of the respondent testified at the hearing. Y.Y. testified on her own behalf.

The first witness to testify was Anthony Scala, a Detective employed by the North Arlington Police Department. Part of his assignment as a detective for the Borough includes investigating juvenile matters and conducting residency checks at the request of the Board of Education. Scala investigated this matter on two dates, September 16 & 17, 2015. On September 16, 2015, Scala went to Y.Y.'s North Arlington address at about 6:30 a.m. and stayed until about 7:30 a.m. During that time, he did not observe Y.Y. or her children leave the residence. Upon further investigation, Scala discovered that D.Y., Y.Y.'s younger child had arrived at school in North Arlington.

On September 17, 2015, Detective Scala observed Y.Y. and her older son leave the Kearny address and travel to an unknown location. which Detective Scala was unaware. He subsequently observed the younger son leave the Kearny address and drive away with an elderly man who dropped D.Y. off at a school in North Arlington.

Other than some conversations with Y.Y., that was the extent of Detective Scala's investigation.

The next witness to testify was Harry Melber, an Investigator employed by Check Em Out Investigations. Melber conducts residency investigations on behalf of his employer.

He testified that on or about October 13, 2016, he conducted surveillance at the North Arlington address, but did not see either of petitioner's two vehicles. He then proceeded to the Kearny address and saw both of petitioner's vehicles parked there. He continued his surveillance on that morning and saw Y.Y. and W.Y. exit the Kearny address and enter Y.Y.'s vehicle. He followed them to Bergen County Technical School in Hackensack where W.Y. was dropped off.

Melber conducted no further investigation until May 30, 2017 and which time he observed Y.Y.'s vehicle parked at her Kearny residence at approximately 6:00 a.m. On

June 1, 2017, Melber conducting further surveillance of petitioner's residence in Kearny observed her car there and also saw Y.Y. and W.Y. exit the home, enter her car and travel to Bergen Tech.

On several dates in June, Melber conducted surveillance at the Kearny address and observed Y.Y.'s vehicle parked there.

On June 7th, June 16th and June, 19th, Melber saw Y.Y. leave with her son, W.Y. and travel to Bergen Tech.

The next witness to testify was Carla Gomes, a Process Server for Simply Status. Gomes testified that she attempted to serve process on Y.Y. at her Kearny address and saw Y.Y.'s husband and younger son at the residence, both of whom indicated that Y.Y. was not there. Gomes then proceeded to the North Arlington address, apparently had some conversations with unnamed people in the vicinity of the North Arlington residence of Y.Y., but really offered nothing of significant evidential value to the case.

The next witness to testify was Kathleen Morano, the school's Business Administrator/Board Secretary for the North Arlington Board of Education.

According to Morano, she learned of the possibility of a residency problem with respect to Y.Y. from an employee in her office who also was a part-time employee in Kearny. After learning from her employee that a Kearny resident was attending the Bergen County Academy program although they were not residents of Bergen County, she notified the Superintendent of Schools of North Arlington, who, according to Morano, was apparently already familiar with the possibility that a Kearny resident was contending that she was domiciled in North Arlington.

More importantly, Morano confirmed that Y.Y. attended a Board meeting with an attorney in anticipation of a disenrollment hearing for her children. Documentation was submitted by Y.Y. at the meeting and there was some questions about a PSE&G bill and Y.Y. was given a second meeting to attend, at which point she would have been able to clarify the PSE&G bills and present any further testimony or documentation that

she desired to submit. That meeting was conducted in May of 2016, but as a result of some delays, Y.Y. left prior to the full meeting being conducted. At that meeting, both Y.Y.'s children were dis-enrolled as can be seen from documentation forwarded to Y.Y. after that meeting.

The next witness to testify was Anita Gilmore, Y.Y.'s neighbor in Kearny.

In July, 2015, Ms. Gilmore's granddaughter was visiting her when she told Ms. Gilmore that Y.Y.'s son was a student in her class in a North Arlington Elementary School. It was this conversation that Ms. Gilmore had with her granddaughter that led Ms. Gilmore to initiate an investigation into Y.Y.'s residency. Ms. Gilmore, having lived in Kearny in excess of 40 years, advised Board member Stanley Titterington of the possibility that Y.Y. was in violation of residency requirements.

It was apparent during the cross examination of Ms. Gilmore that to describe the relationship between her and Y.Y. as contentious would be complimentary. There is an extensive history of discord with complaints filed in Municipal Court, Superior Court and in Federal Court. The relationship between Ms. Gilmore and Y.Y. would cause any factfinder to be somewhat reluctant to trust the testimony that emanated from these witnesses when referring to each other. However, there is little in Ms. Gilmore's testimony that must be examined from a credibility standpoint since there is little debate that Y.Y. was her neighbor and the relationship between the two was dysfunctional. Ms. Gilmore, in the recent past, had significant upheavals in her family which she conceded may have had some deleterious effect on her ability to recall details. She did however confirm that a security system that she has protecting her property captured many days which Y.Y. was at the Kearny location, performed some functions of ownership (gardening) and was seen coming and going in the morning and afternoons at the residence. Attached hereto as Exhibit 1 is a depiction of what is reflected in videos prepared by respondent. Having viewed the videos, I concur with the recitation as depicted in Exhibit 1.

Ms. Gilmore went on to testify to several aspects of this matter that actually concern themselves with the relationship between her and Y.Y. Since the only issue to

be resolved herein is whether or not Y.Y. and/or her family were domiciled in North Arlington, little weight was given to this portion of her testimony.

The last witness to testify was Y.Y. By way of background, Y.Y. came to this country from China in 1998. The 30 year difference in her age and that of her husband did not prevent them from marrying and subsequently purchasing the Kearny residence in 2001. They lived together until October 2013 when Y.Y. moved to a home in North Arlington on Church Street. According to her testimony, her older son, W.Y., remained with her husband while her younger son stayed with her in North Arlington.

Y.Y.'s testimony with respect to why she moved out of the Kearny residence in October 2013 was as follows:

> A. And when did you move out of that house:
>
> Q. October of?
>
> A. 2013
>
> Q. And when you moved out, what – what was the point of moving out?
>
> A. Well, you know, my husband and I, we are thirty years ago difference. And so, actually, at some point we have a very different desire of life. And so, I wanted to do something, more activities outside. Because my husband, he has ALS, also called Lou Gehrig's Disease. So, he's limited – limited.
>
> Q. So, am I right in saying that in October of 2013 you separated?
>
> A. Yes. Yes.
>
> Q. And when you separated, where did your sons go.
>
> A. Well, the –
>
> Q. At that point, they were eight and twelve.
>
> A. Yes. My older one stayed most time with my husband. And, then my younger one stayed most time with me. But also they visit the Kearny very often. Because they play piano. So the Kearny has the room and the piano.
>
> Q. They have a piano at that address?
>
> A. Yes.
>
> Q. How often did you sleep at the Kearny address after October of 2013?

A. Well, I have to say, before this residency issue arise – arisen. And I sleep probably less than one day or two day a week at most. But since this residency issue occurred, I probably spend a little bit more time just because there are various issues and also my husband, his health deteriorated a little bit more than before. Yes. Well, and also a little background about my husband and me. I feel – I feel like, you know, even we have different desire of life at this point, but I -- I do care about him, his well-being. And he's a very decent person. So actually, when I came to this country, I was on my own. And actually, my husband, we met just several months after I came to this country. And we married afterwards. And he supported me unconditionally.

Q. When was that?

A. 1998. So I went to Business School. Do my own things.

Q. And then the two of you bought the Kearny property in 2001?

A. Yes.

Q. Did he buy it or did you both buy it?

A. Well, we – we both kind of did it. Because he back then, work as a Professor at NJT in Rutgers. And that I work full-time at a pharmaceutical company.

Q. You did?

A. I did.

Q. Okay.

A. So, you know, I feel like – And also, since we're onto the topic, because of my husband's condition, his doctor said that he only have about three years to live. So, (crying) I do think I should take care of him for the rest of his life.

Q. Okay. So, you spend time at Kearny taking care of your husband. But you have address in North Arlington. Do you stay there at all?

A. I – I do, Your Honor. And because a lot of times, you know, my – There are school days, actually, most of the time my husband – Actually, my older son and I, we go back to North Arlington after, you know, things get calmed down in Kearny. My son actually – I teach him Chinese. So we mar – We have the TV's, the Chinese cable TV. So we watch some TV. And I train him about, you know, the pronunciation, the reading, talking.

Q. Now, you do that in Kearny?

A. In North Arlington.

Q. North Arlington.

A. -- has the Chinese cable. And also – Actually, my husband and I, we have a slight different view of approaching the education. So, when – with my young – older son, we talk about things more before, you know, beyond he discuss with his father. And also, you know – So then, --

Q. How old is your husband?

A. He's 79.

Q. Okay. You did mention that when you decided to move out of the Kearny address in October of 2013, your older son stayed in Kearny with your husband?

A. Yes.

Q. Okay. And he's – How – did he get to go to Bergen County Technical?

A. Well, that's the time he – he wasn't at the Bergen Tech at that time. He wasn't –

Q. Okay. When – When did he start there?

A. September, 2014.

Q. September of 2014. That's when you had already moved to North Arlington.

A. Yes.

Q. And you had purchased the property in North Arlington.

A. Yes. And –

Q. Okay.

A. For my son, he – he takes a bus, go to the Bergen Tech.

Q. Take a bus from?

A. North Arlington, in front of the library in the high school. And sometime, if he happens to stay at the Kearny, I drive him to the Bergen Tech School.

Q. Okay. How many bedrooms is the Kearny, third floor Kearny apartment?

A. You mean the North Arlington.

Q. I'm sorry. North Arlington.

A. Two

Q. Two?

A. Yeah.

Q. How many bathrooms?

A. One.

> Q. Would you say that's a little small for the three of you? Two boys and you?
>
> A. well, it is a little. Well, I think it's adequate. Because there's the two – It's actually a king size bed for the two boys. And – And now there was a bed for me in separate room. But since my younger son was kicked out of school in 2015, he spends a lot of time in Kearny, sleeping in Kearny. So it's a – you know, but actually, my younger son, he has a friend from North Arlington. During the summer time, he goes to his friend's house in North Arlington or his friends come to our house in North Arlington. And we had a barbeque. So, we have a – you know, there's also a little place in the basement they can play.

In January 2014, Y.Y. registered her younger son in North Arlington providing them with the address of Union Place where she had been living since October 2013. Her older son, having remained in Kearny, subsequently graduated from the middle school in June 2014. Prior to his graduation from Kearny Middle School, Y.Y. in June 2014 completed the purchase of 33 Union Place with a co-owner, a relative from China. It was a three family home into which they moved in October 2014. In September 2014, W.Y., Y.Y.'s older son, started attending Bergen County Technical High School in Bergen County.

The North Arlington property which Y.Y. purchased was a 3 family home, the third floor of which was a relatively small attic apartment with two bedrooms and one bathroom. Though, according to Y.Y., she intended to occupy one of the two larger rental units either on the first or second floor, she apparently never had the opportunity to do so.

Y.Y. went on to testify to all of the indicia that would normally be evidence of domicile, including her license, her voting registration, many bills, and assorted other indicators of at the very least her residency in North Arlington.

Y.Y. did not dispute that she does in fact spend a considerable amount of time at the Kearny residence, but attributes that for the most part to her husband's health conditions. She in fact had become a health aide and bills an insurance company for her nursing/medical attention accorded to her husband. She testified that she and her

two children eat dinner, for the most part, on a regular basis each night at the Kearny residence. But then, she, most of the time, returns to the North Arlington residence.

THE LAW

N.J.S.A. 18A:38-1(a) and N.J.A.C. 6A:22.3.1(a) sets forth the right of a student to a free public education, which in pertinent parts states:

> Public schools shall be free to the following persons over five and under twenty years of age:
>
> a. Any person who is domiciled within the school district[.]

Consideration in proving 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 registration, licenses, permits, financial account information, utility bills, delivery receipts, and other evidence of personal attachment to a particular location;
> 3. Court orders, State agency agreements; and other evidence of court or agency placements or directives;
> 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.

> (a) 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 a person seeking to enroll a student.
>
> . . .
>
> (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 of documentation, or a particular subset of documents, without regard to other evidence presented.

Parents have the burden of establishing domicile in the school district by a preponderance of the evidence. Y.E. ex rel. E.E. v. State-Operated Sch. Dist. of the City of Newark, No. A-6009-06T3, 2008 WL 2492258, at *9 (App. Div. 2008). A student is a resident of a school district if his parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1). The regulation further provides:

> 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.

Thus, the parameters of the law are for the most part clear with respect to what parents and students are entitled to based on their domiciliary.

Though parents and children can have several different residences, according to the law, there can only be one domicile. In order for a residence to qualify as a domicile

> There must be
>
> 1 in actual and physical picking of an abode;

2. The subjects intention to make his home more permanently or at least indefinitely; and
3. His intention to abandon his old domicile

K.L. and K.L. o/b/o minor child, M.L. v. Board of Education of the Borough of Kinnelon, Morris County 2008 WL2026047, at 5.

The evaluation of the facts of the case determined the distinction between residence and domicile. Where a person has more than one residence, some of the factors to be evaluated are:

> The physical characteristics of each place, the time spent and things done in each place, the other person found there, the person's mental attitude toward each place, and whether there is or is not an intention when absent to return. Mercadante v. the City of Paterson, 111 N.J. Super 35, 39-40 (Ch. Div. 1970) aff'd, 58 N.J. 112 (1971).

School Districts have the authority to dis-enroll students who are not domiciled in their district. N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-4.3. Procedures to remove a child are proceeded by the issuance of a Notice of Ineligibility, N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-4.2, -4.3.

The notices in this matter were appropriately provided to Y.Y. and she did in fact attend several Board meetings. The first one she attended with an attorney, the next two apparently on her own. Nonetheless, there is little doubt that Y.Y. had more than an adequate opportunity to address the Board and she did in fact present them with significant paper documentation though, at her last appearance, she left before the final dis-enrollment meeting.

DISCUSSION

Despite the antagonistic, argumentative and disagreeable relationship between Y.Y. and her neighbor, Ms. Gilmore, the facts in this matter are not is dispute, but the interpretation of those facts is. In other words, there is little doubt that Y.Y. and her

children had at least two residences, the one in Kearny and the one in North Arlington, but the issue of which one was their domicile is the only issue to be resolved.

Though most of the statutory indicia of residence/domicile are met by Y.Y.'s ownership of the property in North Arlington accompanied by her driver's license address, her voter registration and other paper indicia of residence/domicile, more important than all of the periphery paper submitted by Y.Y. is where, in actuality, her two children were living.

The witnesses in this matter on behalf of the respondent testified to many dates in which Y.Y. and/or her husband left the Kearny address and escorted her children either to Bergen County Tech or in D.Y.'s case, prior to his dis-enrollment, attendance at middle school in North Arlington.

This foundation of testimony requires that Y.Y. bear the burden of refuting the allegation that her domicile is Kearny rather than North Arlington. But even this assertion needs some clarification.

Y.Y. contends that she separated from her husband, and after a short period of time renting space in North Arlington, subsequently moved to a three family home in North Arlington in October 2014. Her joint ownership and residency of the third floor attic apartment in this three family house would undoubtedly account for the bills being in her name. Obviously, the deed will also contain her name. None of these facts, however, illuminate the question of where her children were actually domiciled. Though the law indicates that the domicile of the children usually follows the domicile of the parent, when two parents are involved, the domicile can be either location.

Y.Y.'s assertion that she is domiciled in North Arlington is quite evidently no more than pretexual contentions. Though she testified that the children stay with her for most of the week before going to their father on weekends, there is no evidence from the respondent's witnesses that would corroborate that assertion, nor has Y.Y. presented any evidence, other than her oral testimony, that her children live with her during the week. At the first Board meeting which Y.Y. attended with an attorney, the Board sort permission to visit the North Arlington residence claimed by Y.Y. to be her domicile. I

suspect that if Y.Y. considered the residence adequate for her and her two sons to occupy, she would have acceded to this request. Y.Y. and her attorney, however, essentially refused the request seeking the Board to provide them with a definition of "domicile", a request which is a legal conclusion which apparently was not met resulted in Y.Y. withholding permission to the Board to visit her residence.

A review of Y.Y.'s testimony is replete with explanation after explanation for why she and the children must spend significant time at the Kearny residence. Be it piano, the internet access, or the need for her nursing skills for her husband it is apparent that much more time was spent in Kearny than in North Arlington. It strikes the undersigned as quite unlikely that the whole family would eat dinners together on a regular basis and then have Y.Y. transport either one or both of her children back to the North Arlington residence in order to sleep there.

There was a disturbing lack of corroboration of contentions made by Y.Y. that she and her sons/son resided in North Arlington. Testimony from **ANYONE** supporting Y.Y.'s testimony was glaringly absent and quite suspect.

Y.Y.'s motive for separating from her husband was, according to her, to recapture some of her social life and recapture some of her independence. The disparity in their ages and the health difficulties being confronted by her husband apparently led her to establish a secondary residence. And though an analysis of the facts in this matter might lead to the conclusion that Y.Y. has in fact established a domicile for herself in North Arlington, there is absolutely no evidence that her two children ever left their domicile with their father in Kearny. Thus, the domiciliary of the children follow that of the parent. In this case, as a result of an evaluation of the evidence, there is little doubt that the children were never domiciled in North Arlington, but remained with their father in Kearny.

CONCLUSION

Y.Y.'s children were never domiciled in North Arlington and remained domiciliary of Kearny during the crucial time from September 2014 through the present. Any payments made to Bergen County Technical High School on behalf of W.Y. after that

date, are to be reimbursed by Y.Y. to the Township of Kearny. Not enough evidence was presented with respect to tuition due to Kearny for D.Y.'s attendance. If no agreement between the parties can be reached on what, if anything is owed for D.Y.'s attendance, an application to the undersigned for reimbursement can be submitted.

ORDER

Having determined that domicile in this matter is in Kearny, petitioner is **ORDERED** to reimburse tuition paid by respondent to Bergen County Technical School on behalf of W.Y.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 8, 2018

DATE

JEFFREY A. GERSON, ALJ/Ret., on recall)

Date Received at Agency: May 8, 2018

Date Mailed to Parties:

sej

APPENDIX

WITNESSES:

For Petitioner

Y.Y., petitioner

For Respondent

Anthony Scala

Harry Melber

Carla Gomes

Kathleen Marano

Anitra Gilmore

EXHIBITS:

For Petitioner:

P-1 Ms. Y.'s North Arlington Deed

P-2 Ms. Y.'s Property Tax Bill

P-3 Ms. Y.'s Certificate of Occupancy

P-4 Photos of North Arlington Residence

P-5 Ms. Y.'s PSE&G Gas Bill

P-6 Ms. Y.'s Verizon Bill

P-7 Communications with Verizon

P-8 Ms. Y.'s Grand Jury Subpoena

P-9 Ms. Y.'s Voter Registration

P-10 Ms. Y.'s HHA License

P-11 Ms. Y.'s W-2 Statement

P-12 Ms. Y.'s Financial Statement

P-13 Kearny Tax Bill

P-14 U.S. Census 2000 Data

P-15 OAL Initial Decision

P-16 North Arlington Enrollment Requirement

P-17 ACLU Letter to NJ Superintendents

P-18 Ms. Y.'s Letter to Methfessel

P-19 North Arlington Police Department
P-20 Ms. Y.'s Appeal
P-21 A Letter from Ms. Y.
P-22 Ms. Gilmore's ADT Alarm Contract
P-23 Camera Direction
P-24 Ms. Y.'s Civil Action
P-25 5/23/14 Police Report
P-26 2011 Police Report
P-27 Ms. Y.'s Response to Bergen Tech
P-28 Certified Attendance
P-29 Notice of Illegal Trespass
P-30 Subpoena
P-31 Subpoena
P-32 Subpoena
P-33 Court Opinion
P-34 Communications Between Schools
P-35 Notice of Appeal
P-36 Ms. Y.'s Home Healthcare Bills

For Respondent:

R-1 Ms. Y.'s Petition
R-5 6/18/15 Kearny Police Report
R-6 Notice of Final Ineligibility
R-7 7/26/16 Kearny Incident Report
R-8 10/13/16 Surveillance Log
R-9 Ms. Y.'s Car Registration
R-10 Photos of Y.'s at Kearny Residence
R-11 Detective Scala's Report
R-12 Ms. Y.'s 10/8/15 Letter to School
R-13 Dr. Stringham's 11/2/15 Letter
R-18 Ms. Y.'s Proof of Residency Package
R-19 Documents Submitted for Enrollment
R-20 Documents
R-21 Ms. Y.'s Amended Complaint

R-22 Certificate of Occupancy

R-23 Verizon Records

R-24 Pictures of North Arlington Rooms

R-25 May, 2014 Police Report

R-26 2011 Police Report

R-27 2017 Investigative Summary

R-29 Ms. Y.'s 2/1/17 Letter

R-30 Notice of Motion

R-32 North Arlington Tuition Rates

R-34 Document

R-35 Flash Drive

R.M., ON BEHALF OF MINOR CHILDREN, J.P. AND J.P.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the residency determination of the respondent Board that her minor children are not entitled to a free public education in the Union Township School District. Petitioner asserted that she and her children live with extended family in Union. The Board contended that the results of a residency investigation showed that the children are domiciled out-of-district. Accordingly, the Board sought tuition reimbursement for both children for the entire 2017-2018 school year. The matter was transmitted to the Office of Administrative Law as a contested case, and a hearing was held on June 20, 2018.

The ALJ found, *inter alia,* that: the issue herein is whether petitioner's minor children are eligible to attend Union Township school free of charge, in accordance with *N.J.S.A.* 18A:38-1; petitioner and her two children – aged 8 and 12 – reside, for financial reasons, with R.M.'s sister, N.E., in a three bedroom home in Union; R.M. had previously resided with the father of her children until he left the country a year ago, after which R.M. could no longer afford the rent; petitioner works as a nurse's aide; petitioner's brother-in-law, E.W., helped care for R.M.'s children at his apartment in Irvington when she worked and was unable to take them to school; the arrangement with E.W. ended in March 2017, and thereafter the children stayed in Union every night; R.M. would not be able to provide for her children without the care of the extended family unit in her sister N.E.'s home in Union; despite the results of the Board's residency investigation, R.M. and her sisters, N.E. and B.M, testified credibly that R.M. and her two children moved into N.E.'s home in Union after experiencing hard times when R.M.'s husband left the country. The ALJ concluded that it is clear from the documentary and testimonial evidence that R.M. and her children have been domiciled within the Union school district continuously since before the beginning of the 2017-2018 school year, and are therefore entitled to attend the Board's public schools free of charge.

Upon review of the record in this matter, 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.

August 9, 2018

OAL DKT. NO. EDU 04411-18
AGENCY DKT. NO. 56-3/18

R.M., ON BEHALF OF MINOR CHILDREN, J.P. AND J.P.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Board. Petitioner did not file a reply.

In its exceptions, the Board urges the Commissioner to reject the Initial Decision, which found that petitioner and the minor children were domiciled in Union Township and were therefore entitled to attend school in Union Township free of charge. The Board argues that the Administrative Law Judge (ALJ) discounted the evidence submitted by the Board's investigator, who – between October 2017 and June 2018 – conducted surveillance fifty-eight times on the Union Township address, where petitioner claims she lives with her sister, and the Irvington address where her brother-in-law lives. The Board notes that the investigator did not observe petitioner or her children leave the Union Township home in the morning or return from school in the afternoon, except for a few occasions when petitioner's car would drive up in the afternoon, a child would run into the house and back out to the car, which would then drive away. The investigator did, however, observe petitioner's car parked at the Irvington address on ten dates, from October 2017 to January 2018, but not after. The Board maintains that petitioner did not submit any evidence besides her testimony and that of her sisters, which the Board argues is self-serving. As such, the Board

contends that in light of the evidence, petitioner did not meet her burden of demonstrating that she lives in Union Township.

Upon review, the Commissioner notes that the ALJ had the opportunity to assess the credibility of the various witnesses who appeared before her and make findings of fact based upon their testimony, and the ALJ found the testimony of petitioner and her sisters to be credible. Despite evidence submitted by the Board, the ALJ found the testimony and explanation by the witnesses concerning their living situation and whereabouts on the dates in question to be credible. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.
> [*N.J.S.A.* 52:14B-10(c)].

The Commissioner finds no basis in the record to disturb the ALJ's credibility assessments. As such, the Commissioner concurs with the ALJ that petitioner is domiciled in Union Township and therefore the minor children are entitled to attend school in the District free of charge.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/09/18
Date of Mailing: 8/09/18

* 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 04411-18
AGENCY DKT. NO. 56-3/18

R.M. ON BEHALF OF MINOR CHILDREN J.P. AND J.P.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION,

Respondent.

R.M., pro se petitioner

Stephen J. Christiano, Esq. for respondent Board of Education of the Township of Union (Sciarrilo, Cornell, Merlino, McKeever & Osborne, LLC)

Record Closed: June 20, 2018 Decided: June 25, 2018

BEFORE: **JOANN LASALA CANDIDO**, ALAJ

STATEMENT OF THE CASE

Petitioner R.M., the mother of the minor children J.P. and J.P., appeals the determination of the Union Township Board of Education (the "Board"/respondent) that R.M. does not reside within the Union Township school district with family members and

that tuition reimbursement is required. The Board alleges that the minor children were not residing at the address provided by the petitioner but rather were residing elsewhere and seeks repayment of tuition.

PROCEDURAL HISTORY

On February 21, 2018, the Board notified R.M. that the children were ineligible to continue to attend school within the district and they were not domiciled in Union for the 2017-2018 school year. The petitioner filed a timely notice of appeal after receiving a Notice of Residency Hearing Determination on or about March 13, 2018. The Board filed an answer on March 26, 2018. On March 28, 2018, 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 June 20, 2018, and the record closed on that date.

FINDINGS OF FACT

Based on the credible testimonial and documentary evidence, I **FIND** the following as **FACTS** in this matter:

1. At the start of the 2017-2018 school year, as well as previous school years, J.P. and J.P. were enrolled in Union township school district. R.M. and her two children ages twelve and eight reside with her sister, N.E. in Union in a three-bedroom home for the past year. R.M. previously resided with the father of her children until a year ago when he left the country and she could no longer afford the rent. R.M. is a nurse aide. J.P. attended pre-school in Irvington at R.M.'s church.

2. E.W., brother-in-law to R.M. resides in Irvington and helped care for her two children as well as her sister's child A.W. at his apartment when she worked and was unable to take them to school. This arrangement ended

in March when her sister began to have issues with E.W. Thereafter the children have been staying in Union every night.

3. R.M. would not be able to provide for her children without the care and concern of the close family unit in her sister's home in Union.

4. Union Township school district Investigator Dan Hodge investigated the District's non-residency claim after eight-year-old J.P. asked his teacher how to spell Irvington when she inquired where he came from. He observed the Union address on many occasions from October 11, 2017 through June 2018. He had never seen R.M.'s car parked in front of the Union address but did observe her dropping off students and then leaving the house with the child/children after a few minutes and then proceed to Irvington. Hodge did not observe the children leaving the Union address in the morning.

5. Despite Hodge's conclusion, I find as a fact that J.P. and J.P. were domiciled with their mother during the 2017-2018 school year. I find her testimony to be credible and in corroboration with her sisters' testimony.

6. R.M. and her two children are Union Township residents.

7. Non-resident student tuition rate for the 2017-2018 school year commencing in October is $13,689.00 for J.P. (the 6th grader) and $13,356.00 for J.P. (the 2nd grader)

Petitioner bears the burden to prove that her children were domiciled in the Township of Union for the 2017-2018 school year and not with the brother-in-law in Irvington. Failure to sustain that burden leaves in place and effect the findings of Board at its hearing regarding domicile.

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

Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J 238, 250 (1955). The domicile of an unemancipated child is that of his or her parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001). Mercadante v. City of Paterson, 111 N.J. Super 35, 39 (Ch. Div. 1970), aff'd, 58 N.J 112 (1971). A person may have more than one residence but only one domicile, which is that place that the person regards as his or her true and permanent home. Board of Educ. of Middle, Cape May County v. K.K., 93 N.J.A.R. 2d (EDU) 461.

The Board asserts that it is entitled to be reimbursed for tuition for the period of J.P. and J.P..'s ineligible enrollment in its school because the children are residing in Irvington.

I found the testimony of R.M and her sisters N.E. and B.M., to be credible, that R.M. and her children moved into her sister's home in Union after experiencing hard times when her husband left the country. N.E. confirmed that her sisters and the children live with her and she helps both sisters as much as she can. It is clear from the documentary and testimonial evidence that R.M. and her children have been domiciled within the district continuously since before the beginning of the 2017-2018 school year. I therefore **CONCLUDE** that since J.P. and J.P. are domiciled within the Union Township school district, since before the September 2017 start of the school year, they are entitled to attend the Union Township public schools free of charge.

DECISION AND ORDER

Based on the foregoing, it is **ORDERED** that the determination denying domicile (residence) eligibility to the minor children be and hereby is **REVERSED**. The children are entitled to a free public education in Union Township.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 25, 2018
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: June 25, 2018

Date Mailed to Parties:

ljb

APPENDIX

LIST OF EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Investigation Report of Dan Hodge

R-2 Updated Investigation Report

R-3 Tuition calculation for the 2017-2018 school year for A.W. and D.W.

R-4 Tuition calculation for the 2017-2018 school year for J.P. and J.P

R-5 Vehicle Registration October 2017

R-6 Form Request for an investigation

234-18

B.M., ON BEHALF OF MINOR CHILDREN, D.W. AND A.W.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the residency determination of the respondent Board that her minor children are not entitled to a free public education in the Union Township School District. Petitioner asserted that she and her children live with extended family in Union. The Board contended that the results of a residency investigation showed that the children are domiciled out-of-district, with their father, in Irvington. Accordingly, the Board sought tuition reimbursement for both children for the entire 2017-2018 school year. The matter was transmitted to the Office of Administrative Law as a contested case, and a hearing was held on June 20, 2018.

The ALJ found, *inter alia,* that: the issue herein is whether petitioner's minor children are eligible to attend Union Township school free of charge, in accordance with *N.J.S.A.* 18A:38-1; petitioner and her two children – aged 10 and 18 – reside, for financial reasons, with B.M.'s sister, N.E., in a three bedroom home in Union; petitioner works the night shift – from 11 pm to 7 am – as a nurse's aide; the father of the children, who resides in Irvington, helped care for ten-year-old A.W. at his apartment when B.M. was not be able to take her to school in the morning; this situation existed because B.M. worked a second job as a morning baby sitter until the job ended in March of 2018; thereafter, the children stayed in Union every night; despite the results of the Board's residency investigation, B.M. and her sister, N.E., testified credibly that B.M. and her two children moved into N.E.'s home in Union after experiencing hard times when B.M. and her husband separated. The ALJ concluded that it is clear from the documentary and testimonial evidence that B.M. and her children have been domiciled within the Union school district since the beginning of the 2017-2018 school year, and are therefore entitled to attend the Board's public schools free of charge.

Upon review of the record in this matter, 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.

August 9, 2018

OAL DKT. NO. EDU 04439-18
AGENCY DKT. NO. 57-3/18

B.M., ON BEHALF OF MINOR CHILDREN, D.W. AND A.W.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Board. Petitioner did not file a reply.

In its exceptions, the Board urges the Commissioner to reject the Initial Decision, which found that petitioner and the minor children were domiciled in Union Township and were therefore entitled to attend school in Union Township free of charge. The Board argues that the Administrative Law Judge (ALJ) discounted the evidence submitted by the Board's investigator, who – between October 2017 and June 2018 – conducted surveillance fifty-eight times on the Union Township address, where petitioner claims she lives with her sister, and the Irvington address, where the children's father lives. The Board notes that the investigator did not observe petitioner or her children leave the Union Township home in the morning or return from school in the afternoon, except for a few occasions when petitioner's car would drive up in the afternoon, a child would run into the house and back out to the car, which would then drive away. The investigator did, however, observe petitioner's car parked at the Irvington address on fifteen dates from October 2017 to January 2018, but not after. The Board maintains that petitioner did not submit any evidence besides

her testimony and that of her sisters, which the Board argues is self-serving. As such, the Board contends that in light of the evidence, petitioner did not meet her burden of demonstrating that she lives in Union Township.

Upon review, the Commissioner notes that the ALJ had the opportunity to assess the credibility of the various witnesses who appeared before her and make findings of fact based upon their testimony, and the ALJ found the testimony of petitioner and her sisters to be credible. Despite evidence submitted by the Board, the ALJ found the testimony and explanation by the witnesses concerning their living situation and whereabouts on the dates in question to be credible. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.
> [*N.J.S.A.* 52:14B-10(c)].

The Commissioner finds no basis in the record to disturb the ALJ's credibility assessments. As such, the Commissioner concurs with the ALJ that petitioner is domiciled in Union Township and therefore the minor children are entitled to attend school in the District free of charge.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/09/18
Date of Mailing: 8/09/18

* 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 04439-18
AGENCY DKT. NO. 57-3/18

B.M. ON BEHALF OF MINOR CHILDREN D.W. AND A.W.,
Petitioners
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION
Respondent.

B.M., pro se petitioner

Stephen J. Christiano, Esq. for respondent, Board of Education of the Township of Union (Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC)

Record Closed: June 20, 2018 Decided: June 25, 2018

BEFORE **JOANN LASALA CANDIDO,** ALAJ:

STATEMENT OF THE CASE

Petitioner B.M., the mother of the minor children D.W. and A.W., appeals the determination of the Union Township Board of Education (the "Board"/respondent) that B.M. does not reside within the Union Township school district with family members and

that tuition reimbursement is required. The Board alleges that the minor children were not residing at the address provided by the petitioner but rather were residing in Irvington and seeks repayment of tuition.

PROCEDURAL HISTORY

On February 21, 2018, the Board notified B.M. that the children were ineligible to continue to attend school within the district and they were not domiciled in Union for the 2017-2018 school year beginning October 11, 2017. The petitioner filed a timely notice of appeal after receiving a Notice of Residency Hearing Determination on or about March 13, 2018. The Board filed an answer on March 26, 2018. On March 28, 2018, 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 June 20, 2018, and the record closed on that date.

FINDINGS OF FACT

Based on the credible testimonial and documentary evidence, I **FIND** the following as **FACTS** in this matter:

1. At the start of the 2017-2018 school year, D.W. and A.W. were enrolled in Union township school district.

2. B.M. and her two children ages ten and eighteen reside with her sister, N.E. in Union in a three-bedroom home for economic reasons. B.M. is a nurse aide in Ridgewood and works evenings on the 11:00 p.m. to 7:00 a.m. shift.

3. The father of A.W., E.W. resides in Irvington and helped care for A.W. at his apartment when B.M. would not be able to take her to school in the

morning. Her eighteen-year-old son did not need to go there since he can care for himself. This was only when B.M. had a morning baby-sitting job in West Orange that ended in March 2018. Thereafter the children have been staying in Union every night.

4. B.M. would not be able to provide for her children without the care and concern of the close family unit in her sister's home in Union.

5. Union Township school district Investigator Dan Hodge investigated the District's non-residency claim. He observed the Union address on many occasions from October 11, 2017 through June 2018. He had never seen B.M.'s car parked in front of the Union address but did observe it in Irvington. He observed A.W. walk into the Union address home after school and then exit the home with a back pack ten minutes later and proceed to Irvington. He witnessed this three or four times. Hodge did not observe the children leaving the Union address in the morning. The auto registration that reflects an Irvington address was dated 10-18-2017. I **FIND** B.M. credible that she did not move to that address and Motor Vehicle confirmed to her the registration had been changed to reflect the Union address when she chose not to move with her husband in October 2017.

6. Despite Hodge's conclusion, I find as a fact that D.W. and A.W. were domiciled with their mother during the 2017-2018 school year. The evidence shows that A.W. would stay a few nights per week with her father, typically on weekdays while B.M. worked the midnight shift until that visitation ended in March 2018. Hodge's evidence is merely consistent with the situation where A.W. spent time with her father while her mother was working two jobs.

7. B.M. and her two children are Union Township residents.

8. Non-resident student tuition rate for the 2017-2018 school year commencing in October is $13,356.00 for A.W. and $13,887.00 for D.W.

Petitioner bears the burden to prove that her children were domiciled in the Township of Union for the 2017-2018 school year and not with the father in Irvington. Failure to sustain that burden leaves in place and effect the findings of Board at its hearing regarding domicile.

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

Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J 238, 250 (1955). The domicile of an unemancipated child is that of his or her parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001). Mercadante v. City of Paterson,111 N.J. Super 35, 39 (Ch. Div. 1970), aff'd, 58 N.J 112 (1971). A person may have more than one residence but only one domicile, which is that place that the person regards as his or her true and permanent home. Board of Educ. of Middle, Cape May County v. K.K., 93 N.J.A.R. 2d (EDU) 461.

The Board asserts that it is entitled to be reimbursed for tuition for the period of D.W. and A.W.'s ineligible enrollment in its school because the children are residing in Irvington.

I found the testimony of B.M and her sister N.E., to be credible, that B.M. and her children moved into her sister's home in Union after experiencing hard times when separating from her husband. N.E. confirmed that her sister and the children live with her and she helps B.M. as much as she can. It is clear from the documentary and testimonial evidence that B.M. and her children have been domiciled within the district continuously since the beginning of the 2017-2018 school year. I therefore **CONCLUDE** that since A.W. and D.W. are domiciled within the Union Township school district, since September 2017, they are entitled to attend the Union Township public schools free of charge.

DECISION AND ORDER

Based on the foregoing, it is **ORDERED** that the determination denying domicile (residence) eligibility to the minor children be and hereby is **REVERSED**. The children are entitled to a free public education in Union Township.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 25, 2018
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: June 25, 2018

Date Mailed to Parties:

ljb

APPENDIX

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Investigation Report of Dan Hodge

R-2 Updated Investigation Report

R-3 Tuition calculation for the 2017-2018 school year

R-4 Vehicle Registration October 2017

R-5 Request for an investigation

R-6 Reason for investigation 9-28-17

DEANA FRAYNE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY, ISRAEL SOTO, AND KELLY WYSOCZANSKI,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner contended that the respondent Board violated her tenure rights under *N.J.S.A.* 18A:28-5 when her position was terminated in June 2015. Petitioner stated that she understood that she was tenured in the respondent's school district – based on time served in a tenure-track position – when she was presented with a proposed settlement agreement on June 24, 2015 that stated she was not a tenured employee; petitioner refused to sign the settlement, and was terminated thereafter. This case was originally filed in the Superior Court on June 20, 2016, after which the Board moved for a change of venue. The case was forwarded to the Commissioner of Education and filed on December 14, 2016. The Board filed a motion for summary decision, contending that the case was untimely filed; alternatively, the Board argued that petitioner did not work in any tenurable position for the requisite three years and one day, and therefore has no claim to tenure.

The ALJ found, *inter alia,* that: there are no material facts in dispute here, and the matter is ripe for summary decision; where a Board informs a teacher that she is being terminated without the Board invoking the statutory process for removing tenure, the Board is – by its very conduct – telling the teacher that it does not recognize that the teacher has tenure protection, and that it can therefore terminate her without utilizing the tenure removal process; once a teacher is adequately aware that the Board has taken such a position – contrary to any claim or belief that the teacher may have had regarding her tenure status – the teacher has knowledge that the Board is acting contrary to her understanding of her legal status; such knowledge constitutes notice for the purpose of triggering the 90 day limitation period for the filing of an appeal of the Board's determination; in the instant case, petitioner was well aware by July 20, 2015 – at the very latest – that the Board had terminated her as a non-tenured employee; petitioner failed to file her appeal within 90 days as required under *N.J.A.C.* 6A:3-1.3(i); petitioner's filing of a complaint in Superior Court did not act to toll the 90 day filing period; and given the undisputed material facts in this case, no application of the doctrine of equitable estoppel is warranted. Accordingly, the ALJ granted the Board's motion for summary decision, and dismissed the petition.

Upon review, and finding the petitioner's exceptions to be unpersuasive, the Commissioner concurred with the ALJ that the petition was filed outside of the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i), and that the doctrine of equitable estoppel is not applicable to this case. 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.

August 9, 2018

OAL DKT. NO. EDU 19081-16
AGENCY DKT. NO. 316-12/16

DEANA FRAYNE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY, ISRAEL SOTO, AND KELLY WYSOCZANSKI,	:	DECISION
RESPONDENTS.	:	

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

In this matter, petitioner alleges that the Board violated her tenure rights when she was terminated in 2015. The Administrative Law Judge (ALJ) concluded that the petition is barred by the 90-day filing period, set forth in *N.J.A.C.* 6A:3-1.3(i). Specifically, petitioner was presented with a proposed settlement agreement on June 24, 2015, which stated that she was not a tenured employee. After refusing to sign the agreement, she was notified of her termination on June 25, 2015. Thereafter, on July 20, 2015, the Board officially adopted a resolution terminating petitioner. Approximately one year later, on June 20, 2016, petitioner initiated an action in the Superior Court against the Board, which was transferred to the Commissioner and filed on December 14, 2016.

In her exceptions, petitioner argues that the ALJ erred in finding that the petition is barred by the 90-day limitation period. Petitioner contends that, contrary to the Board's assertion,

there is no documentation that demonstrates that she was aware that she was not a tenured employee before June 25, 2015 – when she was notified of her termination after being presented with a settlement agreement indicating that she was not tenured. Petitioner argues that although she refused to sign the agreement with the Board, she did not believe she had a right to a tenure appeal based on the Board's failure to acknowledge her as tenured. However, petitioner points out that the Board later certified that it never advised her that she was not tenured, effectively contradicting its position that petitioner was on notice as of June 24, 2015 of her non-tenured status. Petitioner argues that this matter is not time-barred due to the doctrine of equitable estoppel because petitioner relied on the Board's misrepresentation that she never achieved tenure.

In reply, the Board argues that petitioner incorrectly stated the Board's position. Instead, the Board maintains that it argued that petitioner knew as of July 20, 2015 – the date the Board voted to terminate petitioner – that she was not tenured, thus starting the 90-day limitation period. It was the ALJ who found that petitioner was on notice of her non-tenured status by June 25, 2015, when she was notified of her termination. The Board points out that petitioner filed her civil suit long after the expiration of the 90-day period following either date. In response to petitioner's argument regarding the lack of a single document stating that petitioner is not tenured, the Board argues that there is no statutory requirement that a teaching staff member be notified in writing that she does not have tenure in order to trigger the 90-day limitation period. As such, the ALJ properly found that the Board effectively informed petitioner that she did not have tenure through its conduct in terminating her without initiating tenure proceedings.

Upon review, the Commissioner concurs with the ALJ that the instant petition is appropriately dismissed because it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). The Commissioner does not find petitioner's exceptions to be persuasive.

The Commissioner agrees with the ALJ that petitioner was aware by July 20, 2015 – at the very latest – that the Board had terminated her without filing tenure charges, and thus treated her as a teacher who does not have tenure protection. The Commissioner is also in accord with the ALJ that the doctrine of equitable estoppel is not applicable to this matter. Finally, the Commissioner agrees with the ALJ that the filing of a complaint in Superior Court does not toll the 90-day filing period, even though the filing of the complaint occurred nearly a year after petitioner was terminated, well after the 90-day period. As such, according to *N.J.A.C.* 6A:3-1.3(i), petitioner had 90 days from July 20, 2015 to file a petition of appeal, and failed to do so until this matter was transferred to the Commissioner by the Superior Court and opened on December 14, 2016.

Accordingly, the Initial Decision is adopted as the final decision in this matter, for the reasons stated therein. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 8/09/18

Date of Mailing: 8/09/18

* 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 19081-16
AGENCY DKT. NO. 316-12/16

DEANA FRAYNE,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY, ISRAEL SOTO AND KELLY WYSOCZANSKI,
Respondents.

Samuel J. Halpern, Esq., for petitioner

Erick L. Harrison, Esq., for respondents (Methfessel & Werbel, attorneys)

Record Closed: June 12, 2018 Decided: June 26, 2018

BEFORE **JEFF S. MASIN**, ALJ (Ret., on recall):

Deana Frayne filed a petition with the Commissioner of Education on December 14, 2016. In her petition, Ms. Frayne contended that the Highland Park Board of Education violated her tenure rights under N.J.S.A. 18A:28-5, when the Board terminated her position in 2015. The Commissioner of Education transferred the contested case to the New Jersey Office of Administrative Law (OAL) on December 19, 2016. On September 27, 2017, the respondents moved for summary decision, seeking dismissal of the petition under N.J.A.C. 1:1-12.5. On January 9, 2018, counsel for Ms.

Frayne advised the administrative judge assigned to the case, Hon. Leslie Celentano, that he delayed in responding due to family medical issues, and that he would shortly be seeking some discovery. On May 12, 2018, counsel advised Judge Celentano that he had received answers to discovery requests which he was still reviewing. He also supplied an affidavit from Ms. Frayne in opposition to the motion for summary decision. Subsequent to receipt of this letter, counsel filed several other letters with Judge Celentano concerning the issues respecting the motion. Due to Judge Celentano's crowded calendar, the motion was transferred to this administrative law judge, sitting on recall, for purposes of disposition of the motion.

Before proceeding to a consideration of the merits of the motion, some history. According to Ms. Frayne's affidavit, she was terminated on June 24, 2015. The documents submitted by respondents' counsel indicate that prior to that date, the Board had concerns about Ms. Frayne's attendance and other actions that it believed violated Board policy. On June 20, 2016, Ms. Frayne filed a Complaint in the Superior Court of New Jersey, Middlesex County-Law Division, in which she made allegations against the Board of Education and several of its employees.[1] She contended that the Board acted against her in violation of her tenure rights, her constitutionally protected property rights, her civil rights, in violation of the New Jersey Conscientious Employee Protection Act (CEPA), The New Jersey Civil Rights Act, her contractual rights, and in willful and wanton disregard of her rights. She sought reinstatement to her position, compensatory and punitive damages, back pay, and various other relief. The Board filed an answer to the Complaint on September 8, 2016. It then moved for a change of venue. On November 18, 2018, Hon. Travis L. Francis, A.J.S.C., signed an Order transferring the case to the Commissioner of Education. The Order stated that the matter was transferred "for a determination as to whether plaintiff earned tenure and, tenure, for all due process claims as directly relevant to plaintiff's tenured status." The Order stayed the Superior Court proceedings "pending the Commissioner's determination of plaintiff's tenure status." Following Judge Francis's Order, counsel for Ms. Frayne sent a copy of

[1] The Superior Court Complaint was filed on her behalf by prior counsel. On May 12, 2017, Hon. Arthur Bergman, J.S.C., signed an Order granting prior counsel's motion to be relieved. Her current counsel noted in his letter to Judge Celentano of January 9, 2018, that he was in the process of reviewing the file he had obtained from prior counsel.

the Order and the Superior Court file to the Commissioner on December 12, 2016. It was received and filed by the Office of Controversies and Disputes on December 14, 2016.

The Board moves for summary decision on two bases. Summary decision may be granted where the record before the forum establishes that the material facts relevant to the disputed issue are not in genuine dispute, and those facts, when viewed in light of the applicable law and standard of proof, with all reasonable inferences given to the party opposing the motion, demonstrate that no reasonable finder of fact could find in favor of the party opposing the motion. N.J.A.C. 1:1-12.5; Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). The first ground for the is that the petitioner filed her complaint with the Commissioner more than ninety days following the date upon which the Board acted in terminating her position. Her petition was therefore out-of-time and in violation of the applicable statute of limitations. Alternatively, the Board contends that Ms. Frayne did not work in any tenurable position for the requisite three years and one day and therefore has no claim to tenure.

The Board's first position is based upon the requirements of N.J.A.C. 6A:3-1.3 (a) and (l). This regulation states that "(a) to initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws, (l) [t]he petitioner 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 district Board of Education . . . ." This regulatory period of limitation has been approved by the New Jersey Supreme Court as a means of providing "a measure of repose, an essential element in the proper and efficient administration of the school laws." Kaprow v. Berkeley Township Bd. Of Educ., 131 N.J. 572, 582 (1993). The limitation period is jurisdictional, meaning that if it is violated the Commissioner has no jurisdiction to determine the merits of the petition, with extremely limited exceptions for matters of constitutional significance or of widespread public interest. The regulation has been widely applied for many years. The ninety-day period begins to run as of the date when the "plaintiff learns, or reasonably should learn, the existence of that state of facts which equate in law with a cause of action." Kaprow, at 587.

In her affidavit, the petitioner advises that she believed that she had tenure, given her employment with respondent for three years and one day in a tenure-track position. However, on June 24, 2015, she was presented with a proposed "Agreement and Mutual Release" by the Board. This document stated that she was "not a tenured employee of the Board pursuant to the requirements for obtaining same as set forth in the 'Teacher Effectiveness and Accountability for the Children of New Jersey' Act.'" She refused to sign the Release and was terminated "the next day", that is, June 25, 2015. While the documents presented by the Board indicate that the Board's official actions to terminate Frayne occurred somewhat after June 24 and 25, it is clear enough that at least by June 24 the Board had told its employee it did not accept that she was tenured.[2] Thus, by her own admission, it is clear that at the very latest, Ms. Frayne knew as of June 24, 2015, that the Board denied that she had attained tenure and that as of June 25, when she claims to have been terminated, that the Board had not only advised in writing of its position that she did not have tenure, but then officially acted in a manner wholly inconsistent with any tenure that she might claim to have in the District. She was thus clearly on notice as of June 24-25 that she and the Board had different understandings as to her right to any tenure protection. Given this, the ninety-day period in which she could file a petition with the Commissioner seeking to have the issue of her tenure status determined by the Commissioner certainly ran from, at the latest, June 25, 2015, or to be generous, from July 20, when the Board adopted a resolution terminating her. As noted, the first reference of the controversy to the Commissioner was made when the Board's counsel forwarded Judge Francis's Order and the Superior Court file on December 12, 2016, asking that the matter be filed and assigned a case number and a briefing schedule. This date is, of course, long after the expiration of the ninety days that followed after June 25, 2015, or July 20, 2015. Indeed, it is almost exactly seventeen to eighteen months after these dates and fourteen to fifteen months after the expiration of the ninety-day filing deadline. In fact, the Superior Court civil suit in which Ms. Frayne first sought a determination of her right to the

[2] The Board sent Ms. Frayne a Rice notice on July 13, 2015, advising that it would consider a personnel matter involving her at its meeting on July 20, 2015. Minutes of the July 20 meeting include a motion to accept the recommendation of the Superintendent to rescind the Board's prior action with respect to Frayne's employment contract for the 2015-16 school year and to terminate her, effective August 23, 2015.

position as a supposedly tenured employee was filed on June 20, 2016, nearly one year after she claims to have been terminated, and thus, were it legally significant, nearly nine months after the expiration of the ninety-day filing deadline. But the case law has long recognized that filing a challenge to Board action in a forum other than the Commissioner's, even if that filing be within ninety days, does not excuse the failure of the challenger to file with the Commissioner within the ninety-day period subsequent to the challenger being adequately noticed of the challenged Board conduct. The issue was addressed in 2009 in Semprevivo v. Board of Education of the Pinelands Regional School District, Initial Decision (December 8, 2009), adopted, Comm'r (January 15, 2010), http://njlaw.rutgers.edu/collections/oal/, where the petitioner had filed a Tort Claims notice in Superior Court and had not filed with the Commissioner within the ninety days after notice of the Board's action.

> The case law has long recognized that the fact that other proceedings may have been initiated elsewhere does not affect the 90-day time period to file with the Commissioner. In Medeiros v. Jersey City School District, 97 N.J.A.R.2d (EDU) 276, the petitioner had a claim before the worker's compensation court for an alleged work-related injury. The ALJ held that the petitioner should not have waited for his worker's compensation claim to be determined before filing a petition with the Commissioner for a violation of the school laws. Citing the opinion in Verneret v. Elizabeth Bd. of Educ., 92 N.J.A.R.2d (EDU) 191, modified in part and aff'd in part, 95 N.J.A.R.2d (EDU) 134, the ALJ held that "even if an alleged work-related injury also is the subject of a worker's compensation petition, a school law claim . . . still must be filed within 90 days." Medeiros, supra, 97 N.J.A.R.2d(EDU) at 277; see also Riely v. Hunterdon Cent. High Sch. Bd. of Educ., 173 N.J. Super. 109, 113 (App. Div. 1980) (stating that the respondent "gambled" on a favorable arbitration award and after losing in arbitration tried to seek relief with the Commissioner in an untimely manner); Bernards Township Bd. of Educ. v. Bernards Township Educ. Ass'n, 79 N.J. 311, 326 (1979) (holding that a teacher who proceeds to arbitration is not thereby relieved from compliance with the 90-day requirements of N.J.A.C. 6A:3-1.3); Hoffman v. Hillsborough Township Bd. of Educ., 96 N.J.A.R.2d (EDU) 943, 946 (stating, "[t]here is no reason why [the petitioner] could not have timely filed a petition of appeal with the Commissioner of Education even while pursuing other avenues" of relief). [Z.G. on behalf of minor child, V.G., v. Board of Education of the Township of Livingston, Essex County, EDU 5459-04, Initial Decision,

(September 20, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>].

While the filing of the Superior Court Complaint is thus legally irrelevant to the question of whether the petitioner acted within the limitations period imposed by the regulation and enforced by the long-standing case law, it is noted that to the extent the ninety-day rule is intended to provide repose for public school districts, the filing of the Superior Court action in June 2016, coming nearly one year after the termination date as described by petitioner, hardly fits with the stated purpose of the ninety-day rule. Thus, it could well be that even if a Superior Court filing within ninety days of adequate notice either satisfied the ninety-day rule or tolled its effect, the filing of the Superior Court action here could not satisfy the stated purpose of the regulation.

As noted, after Judge Francis issued his Order, the first reference of the transfer by either party to the Commissioner appears to have been made by the Board and not by Ms. Frayne. That occurred on December 12, 2012. Even were one to consider that this reference, although made by the Board, somehow constituted a filing of the petitioner's complaint about the Board's alleged wrongdoing, that complaint was made far beyond the allowable ninety-day period after Frayne had adequate notice, by her own admission, of the position of the Board, contrary to her stated understanding, that she had achieved tenure, and of the Board's action in terminating her from her position without invoking the tenure removal procedures required by statute and regulation for the removal of tenure from a tenured employee.

In his letter of May 29, counsel for Ms. Frayne states that she "acted on the representation of the Board that she was not tenured . . . . He notes that in discovery, the Board responded to an interrogatory that asked if Ms. Frayne "was ever advised in writing that she was not deemed tenured", to which the Board answered, "No", while reserving the right to amend its answer subject to "continuing discovery and investigation." Counsel claims that this answer is "inconsistent" with the June 24, 2015 proposed Settlement Agreement, wherein the first "**WHEREAS**" clause states that she "is not a tenured employee of the Board . . . ." Counsel for Frayne adds that this "inconsistency" is "critical because Frayne acted on the Board's representation that she

was not tenured." He then writes, "Inasmuch as our position that Frayne was not tenured as of her termination date is based solely upon the Board's representation to that effect as well as the veracity of the representation, Petitioner now submits there is material factual dispute as to her tenure status," and, as a result, the motion for summary decision must be denied. In response to this letter, Board counsel wrote on May 31, seeking a conference to determine if Ms. Frayne was or was not admitting that she did not have tenure. Regardless of the answer to that question, counsel iterated the Board's position that the petition was not filed in a timely fashion and had to be dismissed on that ground. In reply, Frayne's counsel wrote on June 7. He explained that she opposed the motion on the basis of

> the misrepresentation contained in the proposed settlement agreement that Frayne was not tenured as of the date of her termination . . . That addresses Point I of Respondent's motion to dismiss with respect to Frayne's alleged failure to file for a tenure hearing within 90 days. Petitioner submits that there is a factual and legal dispute as to whether the Respondent is precluded from asserting the 90 day bar under the theory of equitable estoppel or a similar doctrine.

In her affidavit of January 27, 2018, Ms. Frayne states that she had understood that she was tenured in a tenure-track position by virtue of her three years and one day employment in that position and was advised by the proposed Settlement Agreement that the Board did not agree that she was tenured. The Board then terminated her. She states

> Had the Board in fact considered me as tenured, I would have filed my request for a tenure hearing directly with the Commissioner of Education. Given the fact that it refused to acknowledge me as such, I was advised that my only recourse was to file a wrongful termination lawsuit. That is precisely what I did.

Although counsel for Ms. Frayne does not share the details of his analysis that somehow the Board's "misrepresentation" in the proposed Settlement forms the basis for invoking the equitable doctrine of estoppel, it is hard to see how such a claim could be made as a deny the Board the ability to invoke the jurisdictional bar of the ninety-day rule. In Michael E. Hirsch, et al. v. Amper Financial Services, LLC et al., N.J. (2013), Justice LaVecchia, writing for a unanimous Court, explained that

> [e]quitable estoppel has been defined as
>
> the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed . . . as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse . . . .
>
> The doctrine is designed to prevent a party's disavowal of previous conduct if such repudiation would not be responsive to the demands of justice and good conscience.
>
> [Heuer v. Heuer, 152 N.J. 226, 237 (1998) (internal quotation marks and citations omitted).]
>
> Equitable estoppel "is invoked in the interests of justice, morality and common fairness." Knorr, 178 N.J. at 178 (internal quotation marks omitted); see also Summer Cottagers' Assoc. of Cape May v. City of Cape May, 19 N.J. 493, 503-04 (1955) (noting that doctrine prevents a party "from taking a course of action that would work injustice and wrong to one who with good reason and in good faith has relied upon such conduct" (citations omitted)).
>
> To establish equitable estoppel, parties must prove that an opposing party "engaged in conduct, either intentionally or under circumstances that induced reliance, and that [they] acted or changed their position to their detriment." Knorr, 178 N.J. at 178 (citation omitted). In other words, equitable estoppel, unlike waiver, requires detrimental reliance. Ibid.

In any case where a Board informs a teacher that she is being terminated without the Board invoking the statutory process for removing tenure, the Board is, by its very conduct, telling the teacher that it does not recognize that the teacher has tenure protection and that it can therefore terminate her without utilizing the tenure removal process. Once the teacher is adequately aware that the Board takes such a position, contrary to any claim or belief that the teacher has that she has achieved tenure and therefore is protected from removal without the use of the removal process, the teacher has knowledge that the Board is acting contrary to her understanding of her legal status. That knowledge is the key to the initiation of the ninety-day period in which the teacher can invoke the Commissioner's oversight to challenge the Board's conduct and make the Board adhere to the legal process available to it to remove the tenure held by a teacher. Here, once Frayne saw the proposed Settlement Agreement, she knew that, regardless of her understanding, the Board was stating that she was not tenured. Its

official action in July merely confirmed the Board's written statement. While the Board may have been incorrect in its view of Frayne's status as tenured or not, the Board's July 20 vote constituted the action from which Frayne could have sought relief from the Commissioner. She chose instead to file a Superior Court action long after the allowable ninety days. How a case for equitable estoppel could be made out here is at best mysterious. The Board did not misrepresent anything to Frayne that caused her to change her conduct in reliance thereupon. She thought she was tenured, the Board did not, it told her so when it acted to terminate her, and she then waited for many months before starting a Superior Court action seeking to overturn her termination and uphold her tenure. That the Board might not have ever placed in writing prior to the presentation of the proposed settlement anything that denied that Frayne was tenured or on a tenure track does not detract from the fact that it specifically told her in the proposal that she was not tenured. It did not change any position, at least as far as the record here indicates. There is no indication here that application of the ninety-day rule would thwart the interests of justice and good conscience. Frayne knew, at the very latest on July 20, that the Board did not agree that she was tenured, and she could have sought relief from the Commissioner. She did not do so in a timely fashion, as demanded by the regulation, which, as noted, the significance of which the Supreme Court has strongly supported.

I **FIND** that the material facts relevant to the question of whether the ninety-day rule bars this petitioner from seeking relief are not in genuine dispute. I **FIND** that Ms. Frayne was well aware at the very latest by July 20, 2015, that the Board terminated her without invoking the process necessary to remove tenure and was treating her as one without tenure protection. I **CONCLUDE** that Ms. Frayne failed to file her petition with the Commissioner in a timely fashion, and that it was filed outside the allowable ninety days as required by N.J.A.C. 6A:3-1.3 (a) and (l). I **CONCLUDE** that the filing of a Complaint in Superior Court did not act to toll the ninety-day filing period. I **CONCLUDE** that there is no basis here for invoking the limited exceptions to the otherwise strictly enforced limitation. Further, given the undisputed material facts, I **CONCLUDE** that no application of the doctrine of equitable estoppel is warranted. Thus, I **CONCLUDE** that given the petitioner's failure to file in a timely manner, the Commissioner has no

jurisdiction to determine the merits of her claim and the Board's motion for summary decision is **GRANTED**. The contested case is **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision 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 26, 2018
DATE

JEFF S. MASIN, ALJ (Ret., on recall)

Date Received at Agency: 6-26-18

Date Mailed to Parties: 6-26-18

mph

EXHIBITS:

For petitioner:

P-1 Affidavit of Deana Frayne, January 27, 2018 with attached Exhibit A: Agreement and Mutual Release

For respondent:

R-1 Complaint Superior Court of New Jersey, Demand for Jury Trial, Designation of Trial Counsel and Demand Pursuant to Rule 1:4-8, June 20, 2016

R-2 Public Meeting, Highland Park Board of Education, May 23, 2011

R-3 Sixty-day Termination Notice, June 25, 2015

R-4 Letter to Deana Frayne from Israel Soto, Interim Superintendent, dated July 13, 2015

R-5 Public Meeting Minutes, Highland Park Board of Education, July 20, 2015

R-6 Order, Superior Court of New Jersey, November 18, 20916

R.O.G., on behalf of minor children, G.G.G AND G.O.G.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the residency determination of the respondent Board that his minor children are not entitled to a free public education in the Union Township School District. Petitioner asserted that his children live with him in Union. The Board contended that the children are domiciled out-of-district, with their mother, in Irvington. Accordingly, the Board sought tuition reimbursement for both children for the period from January 9, 2018 through the end of the school year in June 2018. The matter was transmitted to the Office of Administrative Law as a contested case, and a hearing was held on June 20, 2018.

The ALJ found, *inter alia,* that: the issue herein is whether petitioner's minor children are eligible to attend Union Township school free of charge, in accordance with *N.J.S.A.* 18A:38-1; petitioner has resided in Union since 2015, but travels frequently as a truck driver along the Washington, D.C., to Boston corridor; the mother of his children, M.V., lives in Irvington and works evenings at a nursing home; the Board's residency investigator conducted numerous morning surveillances of petitioner's Union address, but did not observe the children leaving from the home for school; surveillance was then set up at M.V.'s address in Irvington, and the children were observed leaving Irvington and proceeding to school in Union; and in support of its claim for tuition, the Board offered the credible testimony of its residency investigator. The ALJ concluded that petitioner's children were not domiciled in Union during the period from January 9, 2018 through June 2018; accordingly, petitioner was ordered to reimburse the Board for tuition in the total amount of $18,384 for the period of his children's ineligible attendance in Union Township schools.

Upon review of the record in this matter, 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.

August 9, 2018

OAL DKT. NO. EDU 5034-18
AGENCY DKT. NO. 65-3/18

R.O.G., on behalf of minor children, G.G.G AND G.O.G.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons stated in the Initial Decision – that G.G.G. and G.O.G. are not domiciled in the district, and that the Board's decision denying the ability of G.G.G. and G.O.G. to attend school in the district was not arbitrary, capricious or unreasonable. Accordingly, the petitioner shall pay the Board $18,384.00 in tuition costs for G.G.G. and G.O.G.'s ineligible enrollment in the District from January 9, 2018 through June 2018.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 8/09/18
Date of Mailing: 8/09/18

[1] The record did not include a transcript of the hearing held at the Office of Administrative Law on April 9, 2018.

[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 05034-18
AGENCY DKT. NO. 65-3/18

R.O.G. ON BEHALF OF MINOR CHILDREN G.G.G. AND G.O.G.,

Petitioners,

v.

TOWNSHIP OF UNION BOARD OF EDUCATION,

Respondent.

Lisa L. Pugliese, Esq. for petitioner (Pugliese & Salemi, LLP)

Stephen J. Christiano, Esq. for respondent (Sciarillo Cornell Merlino McKeever & Osborne, LLC)

Record Closed: June 20, 2018 Decided: June 27, 2018

BEFORE: **JOANN LASALA CANDIDO**, ALAJ

STATEMENT OF THE CASE

Petitioner R.O.G. challenges the residency determination made by respondent Township of Union Board of Education. Respondent asserts that minor children G.G.G.

and G.O.G. are not entitled to attend school in Union Township pursuant to N.J.S.A. 18A:38-1 et seq. Petitioner contends that his children reside with him in Union and not with their mother in Irvington. In support of its claim for tuition, respondent produced residency inspector John Matos, who testified in its behalf. He stated that the results of the investigation supported the finding that petitioner's children are domiciled out-of-district in Irvington with their mother, but continued to attend public schools in the district. The district is seeking the cost of tuition for both children commencing on January 9, 2018 at a total of $9,258.00 for G.G.G. and $9,126.00 for G.O.G.

Petitioner timely filed an appeal and the matter was transmitted to the Office of Administrative Law on April 9, 2018. A hearing was scheduled for June 20, 2018, on which date the record closed.

ISSUE

The issue in this matter is whether or not minor children G.G.G. and G.O.G. are eligible to attend respondent's public schools free of charge in accordance with N.J.S.A. 18A:38-1.

FINDINGS OF FACT

Based on the testimonial and documentary evidence, I **FIND** the following as **FACTS** in this matter:

1. The district is seeking tuition reimbursement as of January 2018, for G.G.G. and G.O.G. who were enrolled in the Union township school district. R.O.G. resides in Union at his brother's home since 2015. He is a truck driver and his hours fluctuate. R.O.G. travels to Washington, D.C., Boston and Philadelphia each month. The mother of his children, M.V., is employed in a nursing home from approximately 4:30 p.m. to 9:00 p.m. and she has rented an apartment in Irvington for the past five years.

2. Investigator John Matos issued a report on January 31, 2018 (R-1) and an additional report on June 15, 2018. (R-2)
3. Matos conducted numerous morning surveillances at R.O.G.'s resident beginning January 10, 2018. When the children were not observed leaving his home in the morning after approximately five days, Matos then conducted afternoon surveillances. He observed a black Acura in the afternoon picking up the children and he followed the vehicle to M.V.'s Irvington housing complex. Matos then set up morning surveillance in Irvington for two weeks and every school day between January 15 and 31, 2018, the children were observed leaving Irvington and proceeding to school in Union.
4. Matos added an addendum to the original investigation based upon R.O.G.'s statement that he drops off the children at their mother at approximately 6:00 a.m. He again observed the children leaving Irvington the first week of June leaving Irvington. The following week he observed the children in both locations.
5. The two children, G.G.G. and G.O.G. reside in Irvington, New Jersey.

LEGAL ANALYSIS

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

Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J 238, 250 (1955). The domicile of

an unemancipated child is that of his or her parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001).

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

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

In support of its claim for tuition, respondent produced residency inspector Matos, who credibly testified in its behalf.

The Board asserts that it is entitled to be reimbursed for tuition for the period of ineligible enrollment in its school, effective January 9, 2018 as a result of the surveillance of Matos observing the living in Irvington at their mother's Irvington complex. 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), which provides as follows:

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

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

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that petitioner's children were not a domiciliary in the Union School District for the months sought and that respondent is entitled to reimbursement for the costs of audited tuition in the amount of $9,258.00 for G.G.G. and $9,126.00 for G.O.G.

DECISION AND ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's determination that petitioner's two children are not residents and domiciliary in Union, New Jersey, and were not domiciled within its school district during the period of January 9, 2018 through June 2018 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 $18,384.00.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 27, 2018
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: June 27, 2018

Date Mailed to Parties: June 27, 2018

ljb

APPENDIX

LIST OF WITNESSES

For Petitioner:

M.V.

N.G.

R.O.G.

For Respondent:

John Matos

LIST OF EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Report of John Matos dated January 31, 2018

R-2 Report of John Matos dated June 15, 2018

R-3 Tuition owed

W.M., on behalf of minor child, M.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BRADLEY BEACH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Bradley Beach Board of Education's (Bradley Beach or Board) decision to deny petitioner's request to pay the out-of-district tuition for his son, M.M., to attend school at Shore Regional High School (Shore Regional). Bradley Beach does not operate its own high school. Therefore, pursuant to established send-receive relationships outlined in Board Policy 5120.1, Bradley Beach students attend either Neptune High School (Neptune) or Asbury Park High School; alternatively, the Board pays tuition for students accepted into one of the specialized academies offered at Red Bank Regional High School. Here, M.M.'s designated high school is Neptune. Petitioner contended that M.M. is gifted and talented in dance, and applied to Red Bank Regional's dance academy, but was rejected. Subsequently, petitioner enrolled M.M. at Shore Regional – a school petitioner identified as meeting the educational needs of his son because of its dance program. Petitioner argued that the Board's denial of tuition reimbursement was arbitrary, capricious and in bad faith. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts in dispute here, and the matter is ripe for summary decision; the only issue to be decided in the instant case is whether petitioner is entitled to reimbursement for the unilateral out-of-district placement of M.M. at Shore Regional, pursuant to *N.J.S.A.* 18A:38-15; Bradley Beach considered and denied petitioner's request for tuition reimbursement, and there is no evidence that the Board abused its discretion; petitioner's argument that since M.M. is gifted and talented in the area of dance, Bradley Beach is obligated to pay for him to attend an out-of-district placement is without merit; the relevant statute here is permissive, and absent an abuse of discretion, there is no obligation on the part of the Board to pay for M.M. to attend Shore Regional. The ALJ concluded that Bradley Beach did not abuse its discretion in declining to pay the out-of-district tuition for M.M., and there is no basis upon which to require the Board to pay the tuition for M.M.'s unilateral out-of-district placement. Accordingly, the Board's motion for summary decision was granted and the petitioner's cross-motion was denied. The petition was dismissed.

Upon comprehensive review of this matter – and finding petitioner's exceptions to be unpersuasive – the Commissioner concurred with the ALJ's findings and conclusions; the Initial Decision 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 8/08/18

OAL DKT. NO. EDU 11801-17
AGENCY DKT. NO. 158-7/17

W.M., on behalf of minor child, M.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BRADLEY BEACH, MONMOUTH 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, W.M., and the Bradley Beach Board of Education's (Board) reply thereto. In this matter, the petitioner alleges that the Board's decision to deny his request for tuition reimbursement under *N.J.S.A.* 18A:38-15 was arbitrary, capricious and unreasonable.

Based upon the sending-receiving relationship between the Bradley Beach School District and the Neptune School District, M.M.'s designated high school is Neptune High School.[1] Petitioner enrolled M.M. at Shore Regional High School (Shore Regional) because he contends that M.M. is gifted and talented in dance and Shore Regional has a dance program that better suits M.M. The petitioner then sought to have M.M.'s tuition payed for by the Board pursuant to *N.J.S.A.* 18A:38-15, which provides that:

[1] Bradley Beach does not operate its own high school, therefore, it has a send-receive relationship with both the Asbury Park School District and the Neptune School District. Some students from Bradley Beach attend Asbury Park High School and others attend Neptune High School. Board Policy 5120.1 outlines how the Board determines what high school its students will be assigned to attend. Additionally, the Board pays tuition for students accepted into one of the academies at Red Bank Regional High School.

> [a]ny board of education not furnishing instruction in a particular high school course of study, which any pupil resident in the district and who has completed the elementary course of study provided therein may desire to pursue, may, in its discretion, pay the tuition of such pupil for instruction in such course of study in a high school of any other district.

The Administrative Law Judge (ALJ) granted the board's motion for summary decision and recommended that the petition of appeal be dismissed. In so doing, the ALJ found that the Board did not abuse its discretion by declining to pay tuition for the petitioner's unilateral placement of M.M. out-of-district.

The petitioner's exceptions substantially reiterated the substance of his submissions at the OAL, recasting the arguments therein to support the contention that the ALJ erroneously granted summary decision in favor of the Board. Specifically, the petitioner maintains that summary decision should be granted in favor of the petitioner as there are a number of facts supported by admissible evidence that show that the Board violated the law and acted in bad faith. The petitioner also maintains that since the Board pays the tuition for certain Bradley Beach students to attend the dance program at Red Bank Regional High School (Red Bank Regional), its claim that Neptune High School has a sufficient dance program directly violates *N.J.S.A.* 18A:38-15. The Board's decision to pay for students to attend Red Bank Regional also demonstrates that the Board is acting in bad faith against M.M. Petitioner contends that if the Board acknowledges the fact that Neptune High School has a course of study in dance, and that is the reason for denying petitioner's request for tuition, then no other students who reside in the Bradley Beach should be allowed to attend a dance program out-of-district.

The petitioner also emphasizes that M.M. is gifted and talented in dance, and Shore Regional is an International Baccalaureate World School that offers a dance program which

meets the educational needs of M.M. The petitioner cites to *N.J.A.C.* 6A:9-3.1, which defines students who are gifted and talented, to demonstrate that M.M. is gifted and has a passion for dance. M.M. was not accepted into Red Bank Regional; therefore, the petitioner found a suitable high school that meets M.M.'s educational needs. The Board should be required to pay for M.M.'s tuition under *N.J.S.A.* 18A:38-15. As a result, the petitioner asserts that the ALJ erroneously granted summary decision in favor of the Board.

In reply, the Board also reiterated the positions advanced in its submissions at the OAL, maintaining that the ALJ properly granted its motion for summary decision. The ALJ correctly found that the petitioner failed to present any facts to support his claim that the Board acted in bad faith or abused its discretion in rejecting the petitioner's tuition request. The Board maintains that it is beyond question that *N.J.S.A.* 18A:38-15 is permissive, and allows a school district to pay for a student to attend school in another district if the board, in its discretion, determines to do so. Bradley Beach students may attend high school at either of its receiving districts (Neptune High School or Asbury Park High School) or Red Bank Regional; pursuant to Board Policy 5120.1, these are the only schools that the Board pays for students to attend. The Board's general policy that it will only offer instruction courtesy of these districts is a permissible exercise of the Board's discretion, and is not arbitrary, capricious, unreasonable or done in bad faith. The Board recognizes that M.M. is interested in dance, but unfortunately M.M. was not accepted into Red Bank Regional's dance academy. M.M.'s desire to pursue dance does not give the petitioner the right to unilaterally select which school district M.M. will attend at the Board's expense. Therefore, the Commissioner should adopt the Initial Decision as the final decision in this matter.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ that the Board's decision to deny the petitioner's request for tuition was not arbitrary, capricious or unreasonable. The relevant case law makes clear that local boards of education have the absolute discretion concerning whether a student will attend a program in another district at public expense. *Board of Educ. of the Upper Freehold Regional School District, Monmouth County v. Board of Educ. of the Township of Millstone, Monmouth County, et al.*, Commissioner Decision No. 224-18, decided July 26, 2018; *D.M., on behalf of minor child, A.M. v. Board of Educ. of the City of Long Branch, Monmouth County*, Commissioner Decision No. 391-00, decided November 28, 2000. Further, a board's exercise of its discretionary powers "may not be upset unless patently arbitrary, without rational basis or induced by improper motives." *Kopera v. Board of Education of West Orange*, 60 *N.J. Super.* 288 (App. Div. 1960).

Here, the petitioner has presented no evidence to suggest that the Board's decision to deny his request for tuition was arbitrary, without rational basis or induced by improper motives. In reaching its decision regarding the petitioner's request for tuition, the Board considered the dance programs furnished at Neptune High School and at Shore Regional and did not find a discernable difference.[2] The Board also took into consideration the potential negative impact that paying tuition for M.M. to attend Shore Regional would have on its send-receive relationship with the Neptune School District. Moreover, before the Board voted on the petitioner's tuition request, the petitioner was afforded an opportunity to appear before the Board and present his case. There is simply nothing in the record to suggest that the Board acted in bad faith.

[2] It is not necessary for the Commissioner to compare the dance programs furnished by Neptune High School and Shore Regional to determine whether Neptune High School furnishes a course of study in dance. The Board has discretion under *N.J.S.A.* 18A:38-15 and its decision to consider the nature and extent of the programs offered at Neptune High School and Shore Regional was not unreasonable.

The Commissioner does not agree with the petitioner's argument that the Board acted in bad faith by refusing to pay for M.M. to attend Shore Regional, while at the same time paying for other Bradley Beach students to attend the dance program at Red Bank Regional. The Board has the discretion to establish a policy whereby its students attend Neptune High School, Asbury Park High School or one of the academies at Red Bank Regional. Had M.M. been accepted into the dance program at Red Bank Regional, the Board would have exercised its discretion to pay M.M.'s tuition. Finally, the Commissioner finds that the petitioner's remaining exceptions largely reflect arguments previously raised before the ALJ and taken into account by her in determining that the Board was entitled to summary decision.

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.[3]



COMMISSIONER OF EDUCATION

Date of Decision: 8/08/18

Date of Mailing: 8/08/18

[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 GRANTING BRADLEY BEACH'S MOTION FOR SUMMARY DECISION AND DENYING PETITIONER'S MOTION FOR SUMMARY DECISON

OAL DKT. NO. EDU 11801-17
AGENCY NO. 158-7/17

W.M. ON BEHALF OF MINOR CHILD M.M.,

Petitioner,

v.

BOARD OF EDUCATION OF BRADLEY BEACH,

Respondent.

W.M., petitioner, pro se

Daniel R. Roberts, Esq., for respondent Bradley Beach Board of Education (Kenny, Gross, Kovats & Parton, attorneys)

Record Closed: May 7, 2018 Decision: June 26, 2018

BEFORE **SARAH G. CROWLEY**, ALJ:

PROCEDURAL HISTORY AND STATEMENT OF CASE

On July 20, 2017, M.M. (petitioner) filed a Verified Petition with the Commissioner of the Department of Education challenging the denial by the respondent to pay the tuition for M.M. to attend school in another district. The Director of the

Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed for hearing as a contested case on August 17, 2017. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Respondent, Board of Education of Bradley Beach (Bradley Beach or Board) filed a Motion for Summary Decision on April 20, 2018. On April 30, 2018, Bradley Beach filed Opposition and a Cross-Motion for Summary Decision. On May 7, 2018, Bradley Beach filed a response to the Cross-Motion for Summary Decision.

The sole issue in this case is whether the petitioner is entitled to reimbursement for the unilateral out-of-district placement of their son pursuant to N.J.S.A. 18A:38-15. Petitioner lives in Bradley Beach, and pursuant to a send-receive relationship, is to attend Neptune High School. Petitioner sent a letter to Bradley Beach on April 4, 2017, requesting that Bradley Beach pay M.M.'s tuition to attend Shore Regional High School. The reason stated in the letter dated April 4, 2017, from the petitioner requesting such payment was concerns about chaos at the Neptune High School. The petitioner's brief further states that Neptune High School was becoming hostile and unsafe. Bradley Beach Board of Education considered the request at its meeting on April 26, 2017, and denied the request. Bradley Beach advised in a letter dated April 27, 2017, there was no legal basis to pay for such out-of-district placement, and as such, they had denied the request. Bradley Beach further noted that there was no unique program and that a Dance program was provided at Neptune High School.

The petitioner argues that the decision was arbitrary, capricious and in bad faith, and seeks judgment in their favor as a matter of law. However, the petitioner fails to allege any facts, even if construed in their favor constitute arbitrary, capricious, unreasonable conduct on the part of Bradley Beach. The petitioner also argues that since their son is gifted and talented in the area of Dance that Bradley Beach is obligated to pay his tuition because the Shore Regional High School program is better suited to him and that he should be able to select

FACTUAL BACKGROUND AND SUMMARY

Bradley Beach is a K-8 public body organized pursuant to N.J.S.A. 18A:10-1 et seq. Pursuant to a send-receive relationship, respondent sends it high school students to either Neptune High school or Asbury Park High School. Some of their students apply to, and attend Red Bank Regional High School academies. Others go to the Monmouth County Vocations School, as well as some special education placements. The foregoing placements are paid for by Bradley Beach after review and approval by their board. M.M. applied and was denied admission to the Red Bank Regional High School. M.M. was then unilaterally placed at Shore Regional High School by his parents, who seek to have Bradley Beach pay his tuition pursuant to N.J.S.A.18A:38-1.

M.M. requested reimbursement in an email dated April 4, 2017. The stated reason for the request is that Neptune High School is chaotic. The petitioner had received approval for M.M. to attend Shore Regional on April 7, 2017. The original request was not related to a course of study which may, or may not have been offered in Bradley Beach, but rather the chaotic nature of Neptune High School. Petitioner later argues that M.M. is gifted and talented in dance and the Shore Regional High School Dance program is superior to Bradley Beach.

Bradley Beach considered the request at a April 26, 2017, Board meeting and advised the petitioner by letter dated April 27, 2017, that they would not pay for M.M.'s tuition, due to the absence of any legal basis to do so. They stated that there was nothing unique about the program and they were obligated to send and pay for their students to attend Neptune High School pursuant to a send-receive relationship. Moreover, even if the program at Neptune was superior, there is a course of study in dance at Bradley Beach, and they properly exercised their discretion in declining to pay M.M.'s tuition for an out-of-district placement.

The foregoing facts are not in dispute and I **FIND** as **FACT**.

LEGAL ANALYSIS

Summary decision is the administrative counterpart to summary judgment in the judicial arena. N.J.A.C. 1:1-12.5 provides that summary decision should be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. To defeat a summary decision motion, the adverse party must respond by affidavits setting forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary hearing. Use of the summary procedure is aimed at the swift uncovering of the merits and either their effective disposition or their advancement toward a prompt resolution by trial. Judson v. Peoples Bank & Trust Co. of Wesfield, 17 N.J. 67, 74 (1954).

The New Jersey Supreme Court encouraged trial-level courts not to refrain from granting summary judgment when the proper circumstances present themselves. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 541 (1995). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the Court clarified that when the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment. Id. at 540. Appellate courts recognize that "[a]n evidentiary hearing is mandated only when the proposed administrative action is based on disputed adjudicatory facts." Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 120 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

Respondent has filed a Motion for Summary Decision alleging that there are no factual issues in dispute and they are entitled to judgment as a matter of law. They maintain that they do have a course of study in dance, and thus, N.J.S.A. 18A:38-15 is not applicable. Moreover, Bradley Beach considered and denied the request for tuition and transportation for M.M, and as there is no evidence of an abuse of discretion. The petitioner also argues the since M.M. is gifted and talented in the area of dance, Bradley Beach is obligated to pay for him to attend an out-of-district placement. However, there is no legal or factual basis to support this argument. Moreover, since the statute is

permissive, and absent an abuse of discretion, there is no obligation on the part of respondent to pay for M.M. to attend Shore Regional High School. There are no facts alleged to support of claim of bad faith or an abuse of discretion.

The relevant statute provides as follows:

> [a]ny board of education not furnishing instruction in a particular high school course of study, which any pupil resident in the district and who has completed the elementary course of study provided therein may desire to pursue, may, in its discretion, pay the tuition of such pupil for instruction in such course of study in a high school of any other district.
>
> [N.J.S.A. 18A:38-15 (emphasis supplied).]

A similar issue was raised in the case of D.M. on behalf of minor child, A.M. v. Board of Education of Long Branch, EDU 04737-99, Initial Decision (October 16, 2000), adopted, Comm'r (November 28, 2000), aff'd, St. Bd. (July 10, 2001), http://njlaw.rutgers.edu/collections/oal/. In that case, the petitioners had unilaterally placed their son out-of-district and sought and order compelling the local board of education to pay for tuition and transportation for the petitioner to attend the visual performing arts program operated by Red Bank Regional High School. The issue was whether the District of residence must pay the tuition for students attending the Red Bank Regional School. An attorney general opinion from 1994 was reviewed which the concluded that Red Bank could accept non-residents, but the District of residence would not be required to pay unless the local board of education choose to approve such placements.

In D.M., the ALJ noted the permissive nature of the relevant statutory provision. The judge noted that the "statute makes clear that the ultimate discretion concerning whether a student will attend a program in another district at the public expense lies with the local board." The Judge further noted that the statue "may not be read to create a right for a student to have their tuition payed by a local district where there is no clear language of an intent to do so." There is no need in this case to compare the courses in

Bradley Beach to that in Shore Regional, as there is discretion on the part of Bradley Beach to decline such payment. Moreover, there is no evidence of an abuse of discretion or bad faith.

CONCLUSION

Accordingly, I **CONCLUDE** that Bradley Beach did not abuse its discretion of declining to pay the out-of-district tuition for M.M. I further **CONCLUDE** that even assuming there was no course of study in Dance Bradley Beach, the statute does not mandate such payment. I therefore **CONCLUDE** that since there is no basis to require Bradley Beach to pay the tuition for the unilateral placement of M.M. out-of-district, the petition is hereby **DISMISSED**.

ORDER

I hereby **ORDER** that the District's Motion for Summary Decision is hereby **GRANTED** and the Petition is hereby **DISMISSED**. It is further **ORDERED** that the petitioner'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, 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 26, 2018
DATE

Sarah G. Crowley
SARAH G. CROWLEY, ALJ

Date Received at Agency: June 26, 2018 (emailed)

Date Mailed to Parties: June 26, 2018 (emailed)

R.E. and S.M., on behalf of minor child, N.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In March 2018, *pro se* petitioners appealed the determination of the respondent Board that their child, N.E., is not entitled to a free public education in Union Township schools. Petitioners contend that they have lived on Balmoral Avenue in Union Township for eight years, and that their son, N.E., is met at the school bus by his mother each day; she then drives N.E. to different stores and buys him some food before they return back to the house. The Board argued that a residency investigation indicated that N.E. is not domiciled in Union Township. A hearing was held in this matter on June 20, 2018.

The ALJ found, *inter alia*, that: petitioners reside together with their child in Union; petitioners have resided in their home for eight years; N.E. attends a special needs school in Fanwood, New Jersey, pursuant to his IEP; the respondent Board provides bus transportation for N.E., however S.M. takes him to school on days when N.E. has behavioral issues in the morning; S.M. also takes her son to the store every day after he gets off the bus to allow N.E. to unwind before going home; the District's residency investigator went to petitioners' home on several dates in October 2017 to deliver registration papers, as N.E. had not been registered for the school year, but found no one home on any of the dates; on another date, the investigator observed a car leave the house after school and proceed to a McDonalds; on two occasions, the investigator was spotted by one of the petitioners; in both cases, the investigator was approached and asked why he was outside; and the Board presented no plausible explanation as to where the child and his parents may be residing, other than the Union residence. The ALJ concluded that petitioners and their son are domiciled in Union, and ordered the Board's residency determination reversed.

Upon review, the Commissioner rejected the ALJ's Initial Decision, finding, *inter alia*, that the issue of domicile cannot be resolved on the factual determinations and analysis set forth in the Initial Decision. In this matter, the ALJ appears to have shifted the burden of proof onto the Board, when in fact *N.J.S.A.* 18A:38-1(b)(2) provides that the parent carries the burden to prove by a preponderance of the evidence that the child is eligible for a free education in the school district. The ALJ failed to make credibility determinations on testimony which is not supported by the evidence in the record; further, the ALJ failed to consider and reconcile the factual discrepancies between petitioner's assertions and the result of the residency investigation. The Commissioner remanded the matter to the OAL for clarification of the facts and the legal analysis underlying the ALJ's conclusion, as well as further proceedings as necessary.

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 8/08/18

OAL DKT. NO. EDU 04252-18
AGENCY DKT. NO. 54-3/18

R.E. and S.M., on behalf of minor child, N.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Administrative Law Judge (ALJ) found that R.E. and S.M. resided in their home in Union for the past eight years, and the Board "presented no plausible explanation on where the child and his parents may be residing other than at the Union resident [sic]." The ALJ, therefore, concluded that petitioners were domiciled in Union and reversed the Board's residency determination pertaining to N.E. Upon review, the Commissioner rejects the ALJ's decision and remands the matter to the OAL for the reasons set forth herein.

As a preliminary matter, the Commissioner notes that the burden of proof in a residency appeal rests on the petitioners. *N.J.S.A.* 18A:38-1(b)(2) provides in pertinent part, [t]he parent or guardian . . . shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education. . . ." Therefore, when considering the merits of a residency appeal, the Commissioner looks to the evidence to determine whether it supports the claims of the parent or guardian. *See N.J.S.A.* 18A:38-1(b)(2). In this matter – while not explicitly stated – the ALJ

[1] The Commissioner was not provided with a transcript of the hearings at the OAL.

appears to have shifted the burden of proof onto the Board when she found that respondent "presented no plausible explanation on where the child and his parents may be residing other than at the Union residen[ce]." Although boards may typically suggest an alternative address or location pertaining to the contested residency, nothing in the statute requires a board to have knowledge of, or show, "where" the child and parents/guardians may be residing if not in the district. Once a board has reasonably determined that the parents/guardian do not reside in the district, the burden to establish domicile in an appeal of that decision is on the parents/guardian. As such, the query and subsequent findings should be centered on whether petitioners have supported their claims by a preponderance of the evidence. The Initial Decision, however, is devoid of any such information or explanation supporting the ALJ's conclusion.

The Commissioner relies on the ALJ's credibility determinations of witness testimony, and considers the factual findings and determinations of the ALJ material in rendering a final agency decision. In residency matters, where the adjudication of the issues are fact-specific, it is vital that the factual findings and legal analysis in the Initial Decision provide thorough deliberation of the evidence in the record and apply the facts of the case to the relevant laws. While ALJs are within their discretion to make factual findings and credibility determinations of witnesses pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-15.8, the agency head may reject or modify such findings of fact and credibility of lay witness testimony – as well as conclusions of law or interpretations of agency policy – if it is 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. *See N.J.S.A.* 52:14B-10(c).

In this matter, the ALJ's finding that R.E. and S.M. are domiciled in Union is not supported by sufficient, competent, and credible evidence in the record. It appears that the ALJ's

determination is primarily based on witness testimonies, but the Initial Decision does not include a discussion of said testimonies or the ALJ's findings of credibility. The ALJ further failed to address the evidence, *i.e.*, the residency investigation report and the entries therein, which raise issues of fact that were not explored or reconciled in the Initial Decision. The Commissioner, therefore, finds that the issue of domicile cannot be resolved on the factual determinations and analysis set forth in the Initial Decision.

The record before the Commissioner does not support the ALJ's conclusion, nor is it possible to establish from the record – without further proofs, examination, and clarification of the facts – that R.E. and S.M. are domiciled in Union.

Accordingly – for the reasons expressed herein – this matter is hereby remanded to the OAL for clarification of the facts and the legal analysis underlying the ALJ's conclusion, and further proceedings as necessary.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 8/08/18

Date of Mailing: 8/08/18

[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 04252-18
AGENCY DKT. NO. 54-3/18

R.E. & S.M. ON BEHALF OF N.E.,
Petitioner,
v.

TOWNSHIP OF UNION BOARD OF EDUCATION,
Respondent.

R.E. and S.M., petitioners, pro se

Stephen J. Christiano, Esq. for respondent (Sciarillo Cornell Merlino McKeever & Osborne, LLC)

Record Closed: June 20, 2018 Decided: June 27, 2018

BEFORE: **JOANN LASALA CANDIDO**, ALAJ

STATEMENT OF THE CASE

Petitioners R.E. and S.M., challenges the residency determination made by respondent Township of Union Board of Education. Respondent asserts that minor child N.E. is not entitled to attend school in Fanwood funded by Union Township Board of Education pursuant to N.J.S.A. 18A:38-1 et seq. Petitioner contends that they have

been a resident of Union for the past eight years and that N.E. is entitled to attend school in Fanwood.

Petitioner timely filed an appeal and the matter was transmitted to the Office of Administrative Law on March 9, 2018. A hearing was scheduled for June 20, 2018, on which date the record closed.

ISSUE

The issue in this matter is whether minor child N.E. is eligible to attend respondent's public schools free of charge in accordance with N.J.S.A. 18A:38-1.

FINDINGS OF FACT

After careful review of the residency appeal, respondent's answer and affirmative defenses, I **FIND** the following **FACTS**:

1. R.E. and S.M. are the parents of N.E. They reside together with their fourteen-year-old child who attends a special needs school in Fanwood, New Jersey pursuant to his IEP.
2. R.E. and S.M. have resided in their home in Union for the past eight years.
3. This district provides bus transportation to N.E. S.M. takes him to school when the child has issues in the morning with his behavior. S.M. takes that child to the store every day after he gets off the school bus to allow the child to unwind before going home.
4. District Investigator Dan Hodge went to the petitioners' home on October 3, 9 10, 11, 12 and 24, 2017, Hodge went to the home to deliver registration papers since the child was not registered for the school year. He did not find anyone home.
5. On October 24, 2017, Hodge observed a student get out of the bus and enter S.M.'s car and drive off to Route 22. At one time after school, he observed the car leave the house after school and proceed to McDonalds. Once S.M. stopped

Hodge in November 2017 asking why he was following her, the district informed Hodge to stop the investigation.

6. Hodge resumed his investigation on January 30, 2018. R.E. came out from the house and asked Hodge why he was outside. R.E. suggested Hodge come into the home and see the child sleeping. Once the police came, R.E. denied access to the officers and all parties left the home without going inside.
7. Petitioners reside in their home in Union for the past eight years. The district presented no plausible explanation on where the child and his parents may be residing other than at the Union resident.

LEGAL ANALYSIS

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

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

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

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner and shall have

the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this section.

In support of its claim for tuition, respondent produced residency inspector Dan Hodge, who testified in its behalf. He stated that the results of the investigation supported the finding that the child and his parents do not reside in Union township. The cost of tuition for the out-of-district placement is $68,004.00.

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that petitioners are domiciled at their home in Union.

DECISION AND ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's determination that petitioners and their child are not residents and domiciliary in Union, New Jersey be **REVERSED**.

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

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

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

June 27, 2018
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: June 27, 2018

Date Mailed to Parties:

ljb

APPENDIX

LIST OF WITNESSES

For Petitioner:

R.E.

S.M.

For Respondent:

Dan Hodge

LIST OF EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Investigation Report of Dan Hodge dated January 30, 2018

R-2 Investigation Report of Dan Hodge dated June 18, 2018

R-3 Yearly out-of-district tuition

OAL DKT. NO. EDU 5789-18
AGENCY DKT. NO. 66-3/18

BOARD OF EDUCATION OF THE TOWNSHIP OF MILLBURN, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
J.R., on behalf of minor child, J.R.,	:	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. According to the Agreement, the first settlement payment was due on September 15, 2018, with subsequent payments to be made on the first day of every month. These payment dates have preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms, or have agreed upon 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: 11/01/18
Date of Mailing: 11/01/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05789-18
AGENCY DKT. NO. 66-3/18

BOARD OF EDUCAITON OF THE TOWNSHIP OF MILLBURN, ESSEX COUNTY,

Petitioner,

v.

J.R. ON BEHALF OF MINOR CHILD, JR.,

Respondent.

Scott D. Zucker, Esq., (Sciarrillo, Cornell Merlino McKeever & Osborne, attorneys) for petitioner

J.R. on behalf **J.R.** respondent pro se

Record Closed: September 12, 2018 Decided: September 18, 2018

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

On April 23, 2018, 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.

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.

September 18, 2018
DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

id

SCIARRILLO CORNELL
MERLINO, MCKEEVER & OSBORNE, LLC
238 St. Paul Street
Westfield, NJ 07090
908-481-5000
FAX 908-264-2045

FACSIMILE TRANSMITTAL SHEET

TO: Honorable Ernest Bongiovanni, A.L.J.

FAX: (973) 648-6124

FROM: Scott D. Zucker, Esq.

DATE: September 12, 2018

RE: Millburn Board of Education v. J.R. o/b/o J.R.

TOTAL OF PAGES (including this cover sheet): 8

Please see the attached.

NOTICE

The information contained in this facsimile transmission (hereinafter "fax") from Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, may be confidential and privileged and exempt from disclosure under applicable law. This fax is intended only for the exclusive use of the person or entity to whom it is addressed. If you are not the intended recipient (or someone responsible for delivering this fax to the intended recipient), please be aware that any use, distribution or copying of this communication is strictly prohibited. If you have received this fax in error, please notify Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, immediately by telephone (908-481-5000) and delete or destroy this fax. Thank you.

SCIARRILLO CORNELL
MERLINO, MCKEEVER & OSBORNE, LLC
ATTORNEYS AT LAW

Email: szucker@sciarrillolaw.com

September 12, 2018

Via Facsimile
Honorable Ernest Bongiovanni, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

RE: MILLBURN BOARD OF EDUCATION v. J.R. o/b/o J.R.
OAL Docket No. EDU 05789-2018

Dear Judge Bongiovanni:

Enclosed please find a copy of the fully-executed Stipulation of Settlement Agreement and Board Resolution approving same. If this meets with Your Honor's approval, please incorporate same into a Final Order.

Thank you.

Very truly yours,
SCIARRILLO, CORNELL, MERLINO, McKEEVER & OSBORNE, LLC

Scott D. Zucker
SDZ/amm
Enclosure
cc: Cheryl Schneider, SBA/BS (via electronic mail)
Pro Se Respondent, Jane Raab (via electronic mail)

SCIARRILLO, CORNELL, MERLINO, MCKEEVER & OSBORNE, LLC
238 St. Paul Street
Westfield, N.J. 07090
(908) 481-5000
Attorneys For Petitioner
Millburn Board of Education

MILLBURN BOARD OF EDUCATION, Petitioner, -vs- J.R. o/b/o J.R., Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY DOCKET NO.: 66-3/18 OAL DOCKET NO.: EDU-5789-18

WHEREAS, J.R. ("Parent") is the Parent of J.R. ("Student") who was a student enrolled in the Millburn Township School District from September 2013 through June 2017; and

WHEREAS, a dispute arose between the Millburn Township Board of Education ("Board"/"District") and the Parent regarding the Parent and Student's domicile regarding the 2016-2017 school year; and

WHEREAS, a Board hearing was convened before the Board on December 18, 2017; and

WHEREAS, on December 18, 2017, the Board approved a resolution to assess the Parent sixteen thousand, three hundred, sixteen dollars ($16,316.00) in tuition costs; and

WHEREAS, there is a dispute between the parties regarding the Board's entitlement to an assessment of tuition due for the period of time outlined above; and

NOW THEREFORE, the parties hereby agree as follows:

1. The Parent shall pay the District ten thousand dollars ($10,000.00) in full and final settlement of any and all tuition monies that may be due and owing to the District for the Student's attendance in the District from September 2016 through June 2017. Payment of the ten thousand dollars ($10,000.00) shall be made as follows:
    a. Parent shall make a payment of six thousand dollars ($6,000.00) by September 15, 2018;
    b. Parent shall pay the remainder of the ten thousand dollars ($10,000) owed in monthly installments of two hundred, sixty-six dollars, and sixty-seven cents ($266.67) over the next fifteen (15) months.
    c. Parent shall make a payment of $266.67 on the first day of each month, beginning with October 1, 2018 and concluding with December 1, 2019.
2. Prior to Board approval of this Agreement, the Parent agrees to execute and provide the Board with a promissory note and warrant of attorney which shall allow the Board to seek enforcement of the payment provisions outlined herein in an appropriate Court of Law, and the Parent shall agree to pay the District for all reasonable attorney's fees and costs incurred by the District to collect payment in such an action.
3. The parties have entered into this Settlement Agreement to avoid the expense and inconvenience of a hearing for the assessment of tuition.
4. In consideration of the settlement of this matter, the Parent shall release the District from any and all claims, rights and liability, including but not limited to any and all claims for attorneys' fees, compensatory education, money damages, civil liability, personal injuries, or any other equitable or legal relief personally and on behalf of her daughter, J.R. through the date of the execution of this Settlement Agreement.

5. In consideration of the settlement of this matter, the District shall release the Parent from any and all claims, rights and liability including, but not limited to, any and all claims for attorneys' fees, money damages, civil liability or any other equitable or legal relief through the date of the execution of this Settlement Agreement.
6. This Agreement contains the entire Agreement and understanding between the parties and constitutes a full and final Agreement on any and all issues.
7. This Agreement shall be governed by the laws of the State of New Jersey.
8. 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 shall be construed as if it were drafted by both parties contemporaneously.
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, if any, and fully understand its requirements and limitations.
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 into a Final Order by the Honorable Ernest Bongiovanni, A.L.J.

13. This Agreement is subject to ratification by the Millburn Township Board of Education.

Jane Raab, Parent

Date: 8/13/18

ON BEHALF OF THE MILLBURN TOWNSHIP BOARD OF EDUCATION

Date: 8/27/18

Millburn Township Schools
434 MILLBURN AVENUE, MILLBURN, NJ 07041
www.millburn.org

Office of the Business Administrator
Telephone 973-376-3600 x156
FAX 973-376-2363

EXTRACT from the minutes of a regular meeting of The Board of Education of the Township of Millburn in the County of Essex, New Jersey held at the Education Center of the School District, 434 Millburn Avenue, Millburn, NJ on Monday, August 27, 2018:

B. SILENT COUNT OF BOARD MEMBERS

Present:	Berylin Bosselman	Philip Choong	Kate Foss
	David Leibowitz	Oyin Owolabi	Jennifer Woodhouse
Absent:	Emily Jaffe	Louie Shen	Alex Zaltsman

M. BOARD ACTION ITEMS (Roll Call Votes)

3. Business Agenda Items

Ms. Foss moved and Mr. Leibowitz seconded approval of the Business Agenda Items M. 3. a. thru M. 3. p.in consent agenda format. The Board unanimously approved by voice vote, 6 to 0.

Mr. Choong moved and Ms. Woodhouse seconded approval of the following Business Agenda Items in consent agenda format:

n. Resolve to approve a settlement agreement with the parents of student #15745 regarding the assessment of tuition payments for the 2017-18 school year

The items passed by the following roll call vote:

Yes:	Berylin Bosselman	Philip Choong	Kate Foss
	David Leibowitz	Oyin Owolabi	Jennifer Woodhouse
Absent:	Emily Jaffe	Louie Shen	Alex Zaltsman

I certify that this is a true and accurate copy of an approval by the Millburn Township Board of Education at its Public Meeting of Monday, August 27, 2018, and reflected in said minutes.

Cheryl Schneider
Business Administrator / Board Secretary

OAL DKT. NO. EDU 13233-18
AGENCY DKT. NO. 220-8/18

T.L.L., on behalf of minor child, T.A.L.,	
PETITIONER,	COMMISSIONER OF EDUCATION
V.	DECISION ON
BOARD OF EDUCATION OF THE BOROUGH OF EATONTOWN, 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 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: 11/01/18
Date of Mailing: 11/01/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 13233-18
AGENCY DKT. NO. 220-8/18

T.L.L., ON BEHALF OF
MINOR CHILD, T.A.L.,
Petitioner,
v.
BOARD OF EDUCATION TO THE
BOROUGH OF EATONTOWN,
MONMOUTH COUNTY[1]
Respondent.

T.L.L., on behalf of minor child, T.A.L., petitioner, pro se

Dennis A. Collins, Esq., for respondent (Collins, Vella and Casello, attorneys)

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

---

[1] This matter was incorrectly captioned as Mercer County.

STATEMENT OF THE CASE

Petitioner, T.L.L., parent of minor child, T.A.L., challenges respondent's, Eatontown Board of Education's (Board), HIB investigation and seeks to expunge T.A.L.'s disciplinary record. She also seeks other relief including, out of district placement as a result of bullying which is alleged to have occurred when T.A.L. was enrolled at the Eatontown Memorial Middle School (Eatontown Memorial).[2]

PROCEDURAL HISTORY

Petitioner filed a petition dated August 25, 2018, seeking emergent relief which was received by the Department of Education, Office of Controversies & Disputes on August 31, 2018. By letter dated September 4, 2018, the Office of Controversies & Disputes advised petitioner that if she wished to proceed on an emergent basis she must file a motion accompanied by a memorandum addressing the standard for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982.)

On September 6, 2018, petitioner filed an amended petition[3]. Thereafter, the matter was transmitted to the Office of Administrative Law on September 12, 2018, for a hearing as a contested case. N.J.S.A. 54:14B-1 to -15 and N.J.S.A. 14F-1 to -13.

The matter was heard on September 19, 2018. The record remained open until September 20, 2018, to allow the petitioner to submit an updated letter from T.A.L.'s therapist and to allow the Board to submit confirmation of the parties' agreement that the Board would expunge T.A.L.'s disciplinary records (as identified on page 14 of petitioner's August 25, 2018 petition). The Board was also to provide legal authority for its position that it is not responsible for providing/financing the out of district placement

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[2] The transmittal from the Department of Education, describes the nature of the case as "[p]etitioning parent challenges the Board's HIB investigation and seeks to expunge her son's disciplinary record." In her amended petition and original petition, petitioner makes clear that she seeks additional relief.

[3] The September 6, 2018, amended petition is treated as a motion for emergent relief.

or for the educational, extracurricular, and therapeutic services requested by petitioner. The record closed on September 20, 2018.

FACTUAL DISCUSSION

The following is a summary of the relevant facts alleged by petitioner. T.A.L. was a student at Eatontown Memorial from 2016 until February 2018. He had a Section 504 Accommodation Plan which provided a variety of accommodations including, but not limited to, making lessons brief, providing copies of notes, receiving Basic Skills for Math and ELA, and assisting with organizational skills.[4] During seventh and eighth grades T.A.L. was harassed, bullied, and intimidated by more than thirteen peers/classmates. T.A.L. was also bullied, intimidated, and retaliated against by Principal Jay Medlin. Superintendent Scott McCue, Principal Medlin, Director of Special Education, Debbie Nappi, and Guidance Counselor Ellyn Rosati-Breese acted with bias and refused to acknowledge that T.A.L. had been bullied.

T.A.L.'s last day in Eatontown Memorial was February 13, 2017. By letter dated February 23, 2017, petitioner advised that she was withdrawing her son from Eatontown Memorial due to the bullying against him. Petitioner testified she and T.A.L. were concerned about his safety and wellbeing if he were to continue his education at Monmouth Regional High School (Monmouth Regional) with the same group of students who had bullied him in middle school. As a result, T.A.L. is being homeschooled by petitioner and another individual.[5] Due to the acts alleged, petitioner seeks the following emergent relief:

---

[4] The most recent Section 504 Accommodation Plan appears to be the result on an initial meeting date of October 24, 2016, and continuing meeting date of September 18, 2017. It lists ADD, Attention Deficit Disorder and Asthma as the "disabling conditions."

[5] At hearing, the parties acknowledged that T.A.L. is not currently registered at Monmouth Regional. Petitioner contends that in January 2018, she attempted to/registered T.A.L. for Monmouth Regional but was subsequently advised that his enrollment was withdrawn because he had withdrawn from Eatontown Memorial.

1. [TAL's] school records will not be forwarded to high school until after NJ Department of Education/ NJ Office of Administrative Law final decision.

2. [TAL's] disciplinary record (please see details under resolution[6]) to be expunged completely, for [TAL] to receive special out-of-district tuition (including but not limited to tuition, transportation, books, uniforms, etc.) for the entire 4 years of high school (2018-2022) of petitioner's choice at the Eatontown Public School's expense.
3. [TAL] to receive one-on-one tutoring 2-3 times a week in math and language arts by a private tutor of petitioner's choice for a maximum of 4 years to closed[sic] educational gaps due to bullying at districts expense.

4. Eatontown Public School to pay for extracurricular activities twice a week for [TAL] to aide [sic] with the effects of bullying such as art, music (singing/instruments) and/or acting lessons at the petitioner's choice for four years.

5. Eatontown Public School to pay for [T.A.L.'s] social and emotional therapy at petitioner's choice for 4 years.

6. Remove the NJ Anti-Bullying Bill of Rights Act and the Eatontown Board of Education Policy 5512- Harassment, Intimidation and Bullying Letter dated for May 23, 2017 accusing [T.A.L.] of bullying by school officials.[7]

7. Remove 2nd Board Members Decision date [sic] June 26, 2017 from [T.A.L.'s] school records as bullies and school officials lied on [T.A.L.][8].

8. Released [sic] [TAL's] entire school records to petitioner/mother, Ms. Lloyd.

9. For Scott T. McCue, Superintendent, Jay A Medlin, Principal Debra Nappi, Director of Special Education/Anti-Bullying Coordinator and Ellyn Rosati- Breese to be reprimand [sic] for failing to protect [TAL] as they all were well aware he was being bullied. All four school officials were bias [sic] and

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[6] Referring to page 14, paragraph 2, of petitioner's August 25, 2018, petition.

[7] The Board denied that school officials accused T.A.L. of bullying.

[8] The hearing dates for this decision are listed as June 12, 2017, and June 26, 2017. The decision was adopted July 24, 2017.

caused the bullying to worsen. Ms. Lloyd is requesting the termination of all four school. [sic].

10. For Pete Siino, Board Member of Ring Leader [E.S.] (Bully) and Shellie Miller of [K.M] (Bully) to be removed as board members.[9]

LEGAL ANALYSIS AND CONCLUSIONS

I. Issues Resolved

At hearing, the parties agreed that the Board would expunge T.A.L.'s disciplinary record (as identified on page fourteen of the August 25, 2018, petition and consisting of sixteen different disciplines (a-p) ranging from January 17, 2017, to May 26, 2017).[10] The Board's agreement to expunge these disciplinary records thus resolves petitioner's request for relief in item number one as the referenced disciplinary records which petitioner contends were "falsified and exaggerated" will no longer be a part of T.A.L'.s school records. Similarly, the parties' agreement to expunge the referenced disciplinary records also resolves that portion of item number two which seeks expungement.[11] At hearing, the Board also agreed to produce, by September 28, 2018, a Bates stamped copy of T.A.L.'s school records thereby resolving the relief sought in item number eight. As result of the parties' above referenced agreement, petitioner's request for emergent relief is now limited to items numbered two through seven, and nine and ten of the August 25, 2018 Petition.

---

[9] Petitioner alleges the sons of board members Siino and Miller are a part of the group of peers/classmates responsible for bullying T.A.L. Petitioner claims that Siino and Miller were present at the hearing on February 13, 2017 (see August 25, 2017 Petition page 7, paragraph #28.)

[10] The Board provided a September 20, 2018, letter confirming the agreed upon expungement. The letter has been marked and entered into evidence as R-3.

[11] The remaining portion of the relief sought in item number two seeks out of district placement.

II. Emergent Issues

The moving party in an application for emergent relief must meet the standards that are embodied in N.J.A.C. 1:1-12.6 and Crowe v. DeGioia, 90 N.J. 126, 132–34 (1982). Emergent 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.

To obtain emergent relief, petitioner must satisfy all four prongs of the Crowe test.

"Irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132–33. In addition, the irreparable-harm standard contemplates that the harm be both substantial and immediate. Subcarrier Communications v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). The threshold standard for irreparable harm in the area of education is showing that once something is lost, it cannot be regained. M.L. o/b/o S.L. v. BOE of the Township of Ewing, EDU 4949-04, Emergent Relief (June 15, 2009). Since money damages are not available in education cases, and compensatory education is the only relief available, the analysis to be used is that if compensatory education, provided at a later date, cannot remedy the situation, then the harm is irreparable. Howell Township Board of Education v. A.I and J.I. o/b/o S.I., EDU 5433-12, Emergent Relief (May 2, 2012).

A. Request for Out of District Placement and Educational, Extracurricular, and Therapeutic Services

The relief sought in items numbered two through five relates to petitioner's request for out of district placement and supplemental educational, extracurricular, and therapeutic services. Petitioner is unable to satisfy the irreparable harm prong of the Crowe test, for this category of requested relief. Petitioner advised that T.A.L. is currently being home schooled by herself and another individual. She argued that T.A.L. would suffer harm if he were to continue his education at Monmouth Regional alongside the students she believed to be responsible for his bullying. In addition to her arguments, petitioner seeks to rely on the recommendation of Taharka Sankara, MSW, LCSW, LCADC. In a December 6, 2017, letter, Mr. Sankara noted that T.A.L. had been enrolled in counseling services since October 2017. He opined:

> It appears that current school dynamics creates a violative and hostile environment that substantially disrupts and interferes with [TAL's] learning process. It is the recommendation of this clinician, that student be accommodated within a different school setting that can better support his academic and social-emotional development. (P-2.)

On September 20, 2018, petitioner produced an updated letter from Mr. Sankara in which he opined:

> It appears that social emotional stressors occurring with educational setting, continue to adversely impact academic functioning and peer relationships. It seems that past school dynamics created a violative and hostile environment which substantially disrupted [TAL's] learning process. It is clinically determined to be contraindicated for a child to continue attending a school with other harassing students, without adequate intervention. Continued exposure to the stress encountered by proximity to identified perpetrators of bullying, has clear potential to increase risk of further intimidation and/or traumatization.
>
> It is my clinical recommendation, that in any possible way, this student be accommodated within a different school setting that

> can better support his academic and social- emotional developmental needs. (P-3.)[12]

The recommendation of Mr. Sankara amounts to a net opinion as it does not explain how he arrived at his recommendation or upon what information his recommendation is based. Further, as Mr. Sankara did not testify, the Board had no opportunity to cross-examine or otherwise question him regarding the basis of his recommendation and/or his qualifications to render same. As a result, the opinion does not rise to the level of competent evidence sufficient to support petitioner's claim of irreparable harm. Moreover, T.A.L. is currently being home schooled and is therefore no longer attending school with the peers whom petitioner contends are responsible for his bullying. Thus, he is not at risk of substantial or immediate harm.

Further, to the extent that petitioner contends T.A.L. is losing out on certain educational opportunities by being home schooled, compensatory education could be provided at a later date, thus the alleged harm is not irreparable.

To the extent that petitioner also seeks the Board to pay for supplemental educational, extracurricular, and therapeutic services, petitioner has failed to provide any competent evidence to support her claim that T.A.L. is in need of these services. Petitioner provided evidence only that T.A.L. was in counseling from October 2017, through July 2018. She presented no evidence of T.A.L. ever engaging in any of the other supplemental services requested. Nor were these services listed as a part of his last 504 plan. Petitioner simply argued that T.A.L. experienced educational and extracurricular gaps resulting from missed school time in seventh and eighth grades.

Petitioner is also unable to establish that her legal right underlying this claim is settled or that she has a likelihood of prevailing on the merits. Aside from not being enrolled in the Eatontown school district since February 2018, the Board notes that it is a kindergarten through eighth grade district and as such, is not responsible for providing services to high school students who reside in Eatontown. Rather, the Board contends that as a resident of

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[12] Sankara's September 20, 2018, letter has been marked and entered into evidence as P-3.

Eatontown, T.A.L.'s assigned local high school is Monmouth Regional. The Board notes that Monmouth Regional operates under the authority of N.J.S.A. 18 A:13-1 et seq. and is a separate body with its own school board, superintendent, and budget... Id. As such, the Board argues that it is not responsible for providing the services or the funding for the relief petitioner seeks.

Finally, petitioner presented no competent evidence that a balancing of the equities lies in her favor. As petitioner is unable to satisfy any of the prongs of the Crowe test, she is not entitled to the emergent relief she seeks.

B. Removal of May 23, 2017 HIB allegation letter and June 26, 2017 Decision of the Board

In items number six and seven of the petition, petitioner seeks the removal of the May 23, 2017, "NJ Anti-Bullying Bill of Rights Act and the Eatontown Board of Education Policy 5512- Harassment, Intimidation and Bullying Letter" (HIB) letter and the June 26, 2017 Decision of the Board. The May 23, 2017, letter of Debbie Nappi, Supervisor Special Service Anti-Bullying Coordinator advised petitioner that it has been reported that [TAL] "may have committed an act of harassment, intimidation or bullying. A written report was submitted to me on February 16, 2017, and the allegations will be investigated by our school's Anti-Bullying Specialist, Ms. Ellyn Rosati." (P-1). The "June 26, 2017" decision represented the Board's decision on five separate HIB allegations that were heard on June 12 and 26, 2017.[13] The decision was adopted by the Board on July 24, 2017.

Petitioner is unable to establish irreparable harm as to this category of requested relief. Both records have been in T.A.L.'s file for more than one year. Further, as T.A.L. is being home schooled and the Board has represented that there has been no request from Monmouth Regional or any other high school for T.A.L.'s file, there is no immediate harm to petitioner if these records were to remain in his file.

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[13] The HIB allegations included incidents dated: February 15, 2017; February 27, 2017; March 16, 2017, May 4, 2017; and May 18, 2017

Additionally, petitioner is unable to establish that her legal right underlying this claim is settled or that she has a likelihood of prevailing on the merits because she failed to avail herself of the proper procedure for challenging these records and she is out of time to file an appeal of the Board's action underlying these records.

If petitioner wished to remove the two records from T.A.L.'s file because she believed them to be inaccurate, there is a process for challenging the records. N.J.A.C. 6A:32-7.7 (School records, right of appeal for parents and adult students), provides that to request a change in a record a parent shall notify in writing the chief school administrator of the specific issues relating to the student record. Petitioner provided no evidence of such written notice, or any other attempt to invoke the process outlined in N.J.A.C. 6A:32-7.7.

Further, petitioner is out of time to appeal the actions underlying the records she seeks to have removed. N.J.A.C. 6A:3-1.3 (Filing and service of petition of appeal) provides, in pertinent part, that petitioner shall file a petition no later than the ninetieth day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing. N.J.A.C. 6A:3-1.3(i).

The action underlying the two records which petitioner seeks to have removed from T.A.L.'s file was taken more than one year ago. The letter from Nappi was issued on May 23, 2017, and the decision resulting from the Board's June 26, 2017, hearing was adopted on July 24. 2017, thus petitioner is well beyond the ninety-day appeal period set forth in the regulations. Petitioner argued she is not a lawyer and was not aware of the time limitations. However, the May 23, 2017, letter clearly explained that she had a right to request a hearing before the Board and that, "[t]he Board's decision may be appealed to the Commissioner of Education, in accordance with N.J.A.C. 6A:3, Controversies and Disputes, no later than ninety days after issuance of the Board of Education's decision." (P-1).

Finally, petitioner presented no competent evidence that a balancing of the equities lies in her favor. As petitioner is unable to satisfy any of the prongs of the Crowe test, she is not entitled to the emergent relief she seeks.

C. Discipline of School Officials/Employees and Removal of Board Members

In item number nine, petitioner seeks the reprimand and termination of Superintendent McCue, Principal Medlin, Director of Special Education Nappi and Guidance Counselor Rosati-Breese. In item number ten, petitioner requests the removal of Eatontown Board of Education members Pete Siino and Shellie Miller.

Petitioner provides no evidence that she or T.A.L. will suffer irreparable harm if these school official/employees are not terminated and the school board members are not removed. T.A.L. is no longer attending Eatontown Memorial and as noted earlier, the Eatontown Board of Education is a kindergarten to eighth grade district with no relationship to Monmouth Regional.

Moreover, petitioner provides no legal authority for the relief she seeks. The school officials/employees that petitioner seeks to have terminated have contractual and statutory due process rights in connection with disciplinary action brought by their employer.[14] Similarly, there are statutory provisions governing the removal of elected/appointed school board members. As a result, petitioner is not entitled to the relief she seeks, and this tribunal is without authority to grant same. For these reasons, petitioner is unable to establish that the legal authority underlying her claim is settled or that she has a likelihood of prevailing on the merits.

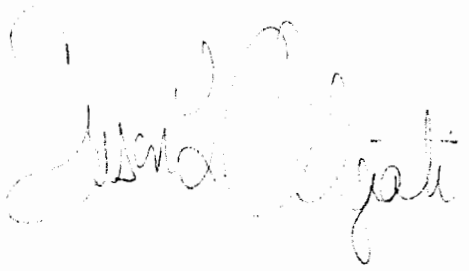
Finally, petitioner presented no competent evidence that a balancing of the equities lies in her favor. As petitioner is unable to satisfy any of the prongs of the Crowe test, she is not entitled to the emergent relief she seeks.

For the reasons set forth above, I **CONCLUDE** that petitioner is not entitled to the emergent relief she seeks.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that petitioner's request for emergency 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 **COMMISIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.



September 21, 2018

DATE

SUSAN L. OLGIATI, ALJ

SLO/vj

APPENDIX

EXHIBITS

Joint

J-1 Decision of the Borough of Eatontown Board of Education, adopted July 24, 2017

For petitioner:

P-1 May 23, 2017, letter from Debbie Nappi to T.L.L. re: HIB allegation based on written report submitted February 16, 2017.

P-2 December 6, 2017, letter from Tahara Sankara, MSW, LCSW, LCADC

P-3 Section 504 Accommodation Plan

P-4 September 20, 2018, letter from Tahara Sankara, MSW, LCSW, LCADC

For respondent:

R-1 October 2, 2017, Determination, United States Department of Education, Office of Civil Rights.

R-2 Decision of the Borough of Eatontown Board of Education, hearing date February 13, 2017.

R-3 September 20, 2018, letter from Dennis Collins, Esq. confirming parties agreement to redact T.A.L's disciplinary record.

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

SYNOPSIS

The petitioner – a school social worker employed in the respondent Board's school district prior to a Reduction in Force (RIF) – contended that the Board acted improperly and in violation of her tenure and seniority rights when it failed to recall petitioner to employment following the resignation of another social worker. Petitioner sought reinstatement and back pay. The Board contended that there was no vacancy resulting from the resignation as it had exercised its managerial prerogative to maintain the remaining number of social worker positions following the resignation. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; the issue presented in this case is whether a Board may reduce its ranks via attrition without formalizing that reduction through a Board resolution; after the RIF in June 2017, the district reduced its social workers further by attrition, from seven social workers to six; the District has not hired any additional social workers since the resignation in October 2017, and all social workers currently employed by the District are more senior than petitioner; the actions of the Board in this matter were compliant with the statutes and regulations governing reductions in force; *N.J.S.A.* 18A:28-9 clearly sets forth that it is the prerogative of the Board to effectuate economies via a reduction in force; the statute also allows for a Board to select not to replace a resigning employee, thus reducing its ranks by attrition; despite the fact that there was a "vacancy", the Board was within its rights in deciding not to fill the position; further, the petitioner would not be entitled to the position even if the Board failed to formally abolish the position because the Board – by not seeking or intending to fill the vacancy – essentially abolished the additional social worker position. The ALJ concluded that the petitioner's arguments were without merit, and dismissed the petition.

Upon comprehensive review, the Commissioner concurred with the ALJ's findings and conclusions as thoroughly set forth in the Initial Decision. Accordingly, the recommended decision of the OAL was adopted as the final decision in this matter, and the petition of appeal 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.

November 2, 2018

342-18

OAL DKT. NO. EDU 14057-17
AGENCY DKT. NO. 177-8/17

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

The record of this matter, along with the Initial Decision of the Office of Administrative Law ("OAL"), have been reviewed. Petitioner's exceptions, and respondent's reply thereto, were also reviewed by the Commissioner. This dispute concerns whether petitioner's tenure rights were violated when the Board did not recall petitioner to employment in a school social worker position following another social worker's resignation from said position. Petitioner, who was subject to a reduction in force (RIF) and placed on a recall list pursuant to *N.J.S.A.* 18A:28-9 and *N.J.S.A.* 18A:28-11, argues that the Board violated her tenure rights when it did not recall her to employment as a social worker because said resignation left a vacancy. The Board contends that there was no vacancy resulting from the resignation because it exercised its managerial prerogative by maintaining the remaining number of social worker positions following the resignation.

The Administrative Law Judge ("ALJ") determined that a board of education may choose not to replace a resigning employee and thus reduce its workforce through attrition. The ALJ found that while there was a "vacancy," the Board was within its rights in deciding not to fill the position, noting that petitioner would not be entitled to the positon even if the Board failed to formally abolish the position because the Board – by not seeking or intending to fill the vacancy – essentially abolished the additional social worker position.

While reflecting her obvious disagreement with the findings and conclusions contained within the Initial Decision, petitioner's "exceptions" are unpersuasive. Petitioner filed correspondence with the Commissioner stating in relevant part that "the ALJ incorrectly concluded that [r]espondent did not violate [petitioner's] recall rights when it failed to recall her to employment in the school social worker position left vacant by the resignation. . . ." In support of her argument, petitioner attached copies of briefs submitted to the OAL during the proceedings below, which arguments were thoroughly addressed in the Initial Decision. In reply, respondent argues that petitioner failed to comply with requirements of *N.J.A.C.* 1:1-18.4, and for this reason alone the Initial Decision should be adopted. Respondent further argues that the ALJ accurately described the issues presented, and appropriately interpreted and applied the tenure statutes.

Upon comprehensive review, the Commissioner is in accord with the ALJ's determinations as thoroughly set forth in the Initial Decision. The facts in this matter, the evidence in support thereof, and the relevant law establish that the Board's managerial prerogative allows it to reassign and transfer actively employed staff members following an employee's resignation; more importantly, the Board is not obligated to recall a RIF'ed employee – nor is that employee entitled – to a vacant position that the Board has no intention of filling nor has taken any action to fill or otherwise abolish.

Accordingly, the recommended decision of the OAL is hereby adopted as the final decision in this matter, and the petition of appeal is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 11/02/18

Date of Mailing: 11/02/18

[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
SUMMARY DECISION
OAL DKT. NO. EDU 14057-17
AGENCY DKT. NO. 177-8/17

JAMAYLA SCOTT,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,
Respondent.

Kathleen Naprstek Cerisano, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Sandra Varano, Esq., for respondent (Nirenberg and Varano, attorneys)

Gail Oxfeld Kanef, Esq., for intervenor Jerome Land (Oxfeld Cohen, attorneys)

Record Closed: August 7, 2018 Decided: September 20, 2018

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

STATEMENT OF THE CASE

Jamayla Scott (Scott), a school social worker formerly employed by respondent, the Englewood Board of Education (the Board), contends that her employment was

terminated in violation of her tenure and seniority rights. She seeks reinstatement and back pay. The Board replies that its actions were consistent with applicable law and regulation.

PROCEDURAL HISTORY

The petition of appeal was filed with the Commissioner of Education (the Commissioner) on August 7, 2017. The Board filed an answer on September 18, 2017. The contested case was transmitted to the Office of Administrative Law (OAL) on September 20, 2017. The matter was initially assigned to Judge Joan Bedrin-Murray, and was reassigned to me on December 15, 2017, after her elevation to the Tax Court.

Via motion filed on April 4, 2018, Scott sought leave to amend her petition. Via letter dated April 25, 2018, the Board indicated that it did not oppose the motion. Via letter order dated April 25, 2018, Scott was granted leave to amend. An answer to the amended petition was filed on May 14, 2018.

During pre-hearing discussions with counsel, the question of whether notice should be given to potential intervenors was discussed at length. It was agreed that the position sought by Scott remained unfilled; accordingly, a ruling in her favor by the Commissioner would not displace another school-district employee. The parties agreed to proceed on stipulated facts and cross-motions for summary decision.[1] Scott filed her brief and motion on May 25, 2018.

On June 8, 2018, I received a letter from Gail Oxfeld Kanef, Esq., on behalf of Jerome Land, a social worker currently employed by the Board. Ms. Kanef asked that Land be permitted to enter this proceeding as an intervenor. Unbeknownst to me, the Board attorney had notified Land about this proceeding. I conferred with counsel on June 18, 2018, and was advised that upon receiving Scott's brief, the Board attorney now felt that Land's position might be in jeopardy. Hearing no objection to Ms. Kanef's request, via order dated June 20, 2018, I granted Land permission to intervene.

[1] Notwithstanding that agreement, the Board supplemented the record with the certification of its superintendent of schools.

The Board cross-moved for summary decision via brief and certification filed on July 24, 2018. Via letter of counsel dated July 24, 2018, Land joined in the arguments of the Board. Scott replied to the Board's submission on August 7, 2018, and the record closed.

ISSUE PRESENTED

The petition had initially averred that the Board did not honor Scott's right to continued employment because it believed that she did not hold the proper certificate to perform her job duties, and was thus not protected by tenure. But after completing discovery, the parties agreed that this dispute raised an entirely different issue. The Board concedes that Scott was employed under tenure at the time of the reduction in force (RIF). And Scott agrees that no less senior social workers are currently employed by the Board. Scott thus no longer claims that the Board violated her rights when it acted to reduce force effective June 30, 2017. Rather, she contends that on October 27, 2017, a social worker resigned, and the Board failed to honor her rights when it did not then reappoint her. Scott so asserts even though the Board has left the controverted position unfilled, to date.

The issue presented is thus whether the Board may reduce its ranks via attrition without formalizing that reduction via resolution. And if obliged to take formal action, did the Board's failure to do so here give rise to a remedy for Scott?

FINDINGS OF FACT

The Board submitted the certification of Robert L. Kravitz; the facts that he related are uncontroverted. I **FIND**:

During the 2016–17 school year, the Board employed eleven social workers. Two were employed at Dwight Morrow High School's Eagle Initiative, an Alternative High School Program, including Scott. Several district school buildings were staffed with multiple social workers. In or about February 2017, a newly hired acting director of

Guidance introduced a staffing model that would place a Child Study Team at each school; the Team social worker would be the only one assigned at that school. This plan was discussed at an April 27, 2017, budget hearing; the elimination of the Eagle Initiative program was also discussed.

On May 11, 2017, the Board abolished the Eagle Initiative program together with all positions associated with it, to include the two social-worker positions. Additionally, to reduce the complement of social workers at each school building, two additional social workers were RIFfed. All were RIFfed based on seniority, including Scott and three less senior social workers, two of whom were nontenured. Prior to June 2017, there had been three social workers assigned to McCloud Elementary School: Linda Ruder, Jerome Land, and Risory Caraballo. Caraballo was non-tenured and was RIFfed in June; only two social workers were assigned to McCloud at the start of the 2017–18 school year. As will be more fully set forth in the stipulated facts, after a staff member resigned in October 2017, Land would be transferred, leaving only one social worker at McCloud. Land's transfer was formally approved by the Board.

The parties agreed to the underlying facts via joint stipulation dated March 7, 2018, and I **FIND**:

1. On or about September 11, 2008, Scott began her employment with the Board as a full-time social worker at the Eagle Initiative.

2. At the time of her initial employment with the Board, Scott held a standard New Jersey Educational Services Certificate with an endorsement as a school social worker.

3. Scott had been employed continuously by resolution of the Board in the position of social worker during the 2008–09, 2009–10, 2010–11, 2011–12, 2012–13, 2013–14, 2014–15, 2015–16, and 2016–17 school years.

4. Scott acquired tenure on September 12, 2011, as a school social worker under her Educational Services Certificate, which carried a school social worker endorsement.

5. On or about May 12, 2017, Scott was informed by the Board that she would not be offered employment for 2017–18 school year.

6. As of June 30, 2017, Scott had 8.71 years of seniority credit as the result of her service under her Educational Services Certificate with an endorsement as a school social worker.

7. On or about August 3, 2017, Scott filed a petition of appeal seeking to enforce her seniority and recall rights.

8. At the beginning of the 2017–18 school year, respondent employed a total of seven social workers as follows:

a. Grace Haughton—Janis E. Dismus Middle School
b. Toni Foster and Pamela Humphrey—Greico Elementary School
c. Glenda James—Donald A. Quarles Elementary School
d. Linda Ruder and Jerome Land—McCloud Elementary School
e. Dennis Sullivan—Dwight Morrow High School

9. Each of these individuals held tenure as a school social worker under their Educational Services Certificate.

10. As of June 30, 2017, Grace Haughton had 16.74 years of seniority credit as the result of her service under her Educational Services Certificate with an endorsement as a school social worker.

11. As of June 30, 2017, Toni Foster had 13.17 years of seniority credit as the result of her service under her Educational Services Certificate with an endorsement as a school social worker.

12. As of June 30, 2017, Glenda James had 12.74 years of seniority credit as the result of her service under her Educational Services Certificate with an endorsement as a school social worker.

13. As of June 30, 2017, Linda Ruder had 12.74 years of seniority credit as the result of her service under her Educational Services Certificate with an endorsement as a school social worker.

14. As of June 30, 2017, Pamela Humphrey had 10.74 years of seniority credit as the result of her service under her Educational Services Certificate with an endorsement as a school social worker.

15. As of June 30, 2017, Dennis Sullivan had 10.74 years of seniority credit as the result of his service under his Educational Services Certificate with an endorsement as a school social worker.

16. As of June 30, 2017, Jerome Land had 9.74 years of seniority credit as the result of his service under his Educational Services Certificate with an endorsement as a school social worker.

17. Glenda James resigned from employment with the Board effective October 27, 2017, leaving a vacancy.

18. On November 16, 2017, the Board transferred Jerome Land from his position at McCloud Elementary to Ms. James' vacated position at Quarles Elementary.

19. To date, respondent has not formally abolished Mr. Land's social worker position at McCloud Elementary.

20. Following Mr. Land's transfer to Quarles Elementary, the Board continued to employ a total of six social workers as follows:

a. Toni Foster and Pamela Humphrey—Greico Elementary School

b. Grace Haughton—Janis E. Dismus Middle School
c. Linda Ruder—McCloud Elementary School
d. Dennis Sullivan—Dwight Morrow High School
e. Jerome Land—Donald A. Quarles Elementary School

I **FIND** that after the RIF in June 2017, the district reduced its social workers further by attrition, from seven social workers to six. The district does not have social-worker positions assigned to specific schools; rather, social workers are assigned at Kravitz's discretion. There continue to be two social workers working at Greico Elementary School. The goal is to reduce the number of social workers further through attrition, and ultimately have only one social worker serve there as well.

I **FIND** that the district has not hired any additional social workers since October 2017 when James resigned. All social workers currently employed by the district are more senior than Scott.

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 "[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 [in

a summary judgment motion] offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, '[f]anciful, 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 & 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, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 251–52.

I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts that require a plenary hearing, and the Board is entitled to judgment as a matter of law. Tenure is a legislative status; it is earned by operation of law, and upon meeting the precise requirements of the tenure statute. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63 (1982); Zimmerman v. Newark Bd. of Educ., 38 N.J. 65 (1962); N.J.S.A. 18A:28-5. Scott was employed under tenure; accordingly, the reduction in force that resulted in her termination needed to be made on the basis of seniority, and according to standards established by the Commissioner and approved by the State Board. N.J.S.A. 18A:28-10; see N.J.A.C. 6A:32-5.1; Howley v. Ewing Twp. Bd. of Educ., 1982 S.L.D. 1328, 1339, aff'd, 1983 S.L.D. 1554.

The facts reveal that effective with the 2017–18 school year, the Board reduced its school social workers by four. The facts further reveal that Scott was among those with the fewest years of seniority. Accordingly, I **CONCLUDE** that the action of the Board was compliant with the statutes and regulations that govern reductions in force. But Scott urges that she is nonetheless entitled to reinstatement. She asserts that subsequent to her RIF, a colleague resigned; a "vacancy" was thus created at McCloud Elementary School; that position remains unfilled; and it has not been formally abolished by the Board. The Board replies that it was unnecessary to abolish the controverted social-work position because it had the discretion to simply leave it unfilled.

The prerogative of the Board to effectuate economies via a reduction in force is as set forth in N.J.S.A. 18A:28-9, which provides:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members employed in the district whenever, in the judgment of the board, it is advisable to abolish any such 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 Board urges that Scott's argument strains the intent of the tenure and seniority laws. I agree. The statute clearly grants the Board the right to "reduce the number of teaching staff members," when doing so is advisable for fiscal or educational reasons. Indeed, the "meaning of a statute is first derived by an examination of its plain language." Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 531 (App. Div. 1999) (citing Chase Manhattan Bank v. Josephson, 135 N.J. 209 (1994)). As the Carpenito court noted, "[t]he reduction-of-force statute on its face contemplates a reduction in the number of teaching staff members employed in the district." Id. at 532. I **CONCLUDE** that in accordance with N.J.S.A. 18A:28-9, the Board may choose not to replace a resigning employee and thus reduce its ranks via attrition. Our tenure laws "are an 'important expression of legislative policy' and should be given 'liberal support, consistent, however, with legitimate demands for governmental economy.'" Id. at 528 (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949)).

Pursuant to N.J.S.A. 18A:28-12, a teaching staff member who has been RIFfed must remain on a preferred eligibility list, and be reemployed "whenever a vacancy occurs in a position for which such person shall be qualified." Scott relies on Lammers v. Board of Education, 134 N.J. 264, 268 (1993), and its holding that "[a] vacancy exists when the teacher leaves the position permanently, as in the case of a resignation or a retirement." Once James resigned, Scott contends, a "vacancy" thus was created. But in Lammers, the RIFfed teacher was aggrieved because a position available due to a

maternity leave was not offered to her on recall, rather, it was filled by a nontenured long-term substitute.[2] Scott thus ignores the fundamental difference between this case and Lammers. Here, there was a "vacancy," but it was offered to and filled by no one. While the Board could not ignore Scott's rights if it chose to replace James, it was well within its rights to leave the position unfilled. A contrary conclusion would entirely frustrate the Board's right to staff its schools in a fiscally sound manner.[3]

And even assuming, for argument's sake, that the Board should have abolished the position left vacant by James, I **CONCLUDE** that this error would not entitle Scott to the relief she seeks. In Madison Township Board of Education v. Madison Township Education Association, 1974 S.L.D. 488, the board RIFed two coordinators of pupil personnel services, citing economies, but it did not formally act to abolish their positions. The Commissioner held that, "[i]n [his] judgement, the Board should have taken formal action pursuant to N.J.S.A. 18A:28-9, setting forth in clear language that it was abolishing . . . positions for reasons of economy." Id. at 497. But while terming the board's action there an "error of procedure," the Commissioner emphasized that "the substance of a situation and not its shape must control." Madison, 1974 S.L.D. at 496 (citing Union Beach Bd. of Educ. v. N.J. Educ. Ass'n, 53 N.J. 29 (1968)). Notwithstanding the absence of a formal resolution to that effect, the Commissioner held that the board "did, in fact, abolish the two positions." Madison, 1974 S.L.D. at 497.

Madison rightly recognizes that reinstating a RIFed employee due to an error of procedure would frustrate the intent of the statute, which is to allow local boards broad discretion to reduce staff when in the best interest of the school district and its students. I am thus compelled to reject Scott's argument that the Board's failure to formally abolish the vacant social-work position at McCloud Elementary gives rise to a remedy. I

---

[2] The Court in Lammers determined that a leave of absence does not create a "vacancy" giving rise to a right to reemployment, and thus denied Lammers' claim.

[3] Scott also appears to suggest that the Board somehow violated her rights when it transferred Land to the vacancy created by James' resignation. But the Board's prerogative to transfer staff members is likewise well established. N.J.S.A. 18A:25-1; Carpenito, 322 N.J. Super. at 528. Scott's argument ignores the Board's broad right to determine how to deploy its staff.

CONCLUDE that by not filling the vacancy created by James' retirement, the Board has taken action that is tantamount to abolishing one additional social-work position.

Scott's argument that her rights should be governed by the holding in Guerra v. Hudson County Vo-Tech Board of Education, 1990 S.L.D. 340, is unavailing. In Guerra, a tenured coordinator was transferred to a teaching position in the aftermath of a RIF. But the board took no formal action to abolish the coordinator position until a year after the transfer. The Commissioner held that the transfer "was ultra vires, absent formal action under N.J.S.A. 18A:28-9 to abolish the coordinator position." Id. at 352. The rationale behind the holding in Guerra is clear: to protect tenured staff from demotions under the ruse of a reduction in force. To hold otherwise would allow local boards to evade the protections of N.J.S.A. 18A:28-5. The power of a local board to transfer staff is quite broad, but it is limited to the extent provided by the tenure laws. See Williams v. Plainfield Bd. of Educ., 176 N.J. Super. 154 (App. Div. 1980); see also Howley v. Ewing Bd. of Educ., 1982 S.L.D. at 1339–40.

Scott's case is readily distinguishable. Here, the Board did not demote or transfer Scott under the ruse of a reduction in force. It reduced the number of district social workers, both via a reduction in force and via attrition. Even if I were to accept the view that a reduction via attrition must be formalized by the Board, I concur with the Commissioner's holding in Madison that the substance of the matter and not its shape must prevail. This is particularly true under the facts presented here. To hold otherwise would ask the taxpayers of Englewood to fund an unneeded position, and is an outcome inconsistent with the school laws.

I **CONCLUDE** that Scott's arguments are without merit, and that the petition of appeal must be dismissed.

ORDER

Based on the foregoing, 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.

September 20, 2018

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 9/20/18

Date Mailed to Parties:

sej

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
33 Washington Street
Newark, NJ 07102
(973) 648-6054
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Ellen S. Bass
Administrative Law Judge

June 20, 2018

Kathleen Naprstek Cerisano, Esq.
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570 Broad Street – Suite 1402
Newark, N.J. 07102

Sandra N. Varano, Esq.
Nirenberg & Varano
32 Mercer Street
Hackensack, N.J. 07601

Gail Oxfeld Kanef, Esq.
60 Park Place, Suite 600
Newark, N.J. 07102

RE: Jamayla Scott v. Board of Education of the City of Englewood, Bergen County
OAL DKT NO. EDU 14057-17
Agency Dkt. NO. 177-8/17

Dear Counsel:

Enclosed please find a copy of the Order Permitting Intervention in the above referenced matter.

Very Truly Yours,

Ellen S. Bass
Administrative Law Judge

EB/sej

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER PERMITTING INTERVENTION

OAL DKT. NO. EDU 14057-17
AGENCY DKT. NO. 177-8/17

JAMAYLA SCOTT,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,
Respondent.

Kathleen Naprstek Cerisano, Esq., for petitioner (Zazalli, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Sandra Varano, Esq., for respondent (Nirenberg and Varano, attorneys)

Gail Oxfeld Kanef, Esq., for Intervenor, (Oxfeld Cohen, attorneys)

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

This matter arose on August 7, 2017, with the filing of a petition before the Commissioner of Education through which petitioner challenged the actions of respondent, Englewood Board of Education (the Board), in failing to appoint her to a position as a Social Worker. She asserted a violation of her tenure and seniority rights. At the time the petition was filed, we discussed the need to notify any staff members whose employment might be affected by a decision in petitioner's favor of their right to

intervene pursuant to N.J.A.C. 1:1-16.3. It initially appeared that petitioner's claim would not implicate the employment rights of any of her colleagues.

It continued to so appear even after a Motion to Amend the Petition was granted by me on April 25, 2018. That Motion was filed after discovery revealed that this dispute raised legal issues not originally pled. But, on May 25, 2018, petitioner filed a brief that, for the first time, suggested that she was claiming an entitlement to a position held by Jerome Land, also a Social Worker in the school district. Upon reviewing the brief, counsel for the Board alerted Mr. Land of his right to intervene. On June 8, 2018, I received a letter from Gail Oxfeld Kanef, Esq., in which she indicated that she represents Jerome Land, who indeed wishes to intervene in this proceeding.

I conferred with counsel via telephone on June 18, 2018. Neither counsel for the petitioner nor counsel for the Board raised any objection to the intervention request. As Mr. Land's employment status may be adversely affected by my decision, it is clear that he has a significant interest in the outcome of the case. N.J.A.C. 1:1-16.3(a). His intervention in the case will not result in confusion or undue delay. Ibid. I therefore **CONCLUDE** that his request to intervene should be **GRANTED**. It is so **ORDERED**.

It is further **ORDERED** that counsel immediately share the Stipulation of Fact, and other pertinent documents or discovery with Ms. Kanef. It was agreed that the parties did not anticipate that Land's entry into the case would affect the briefing schedule, or necessitate expansion of the factual record beyond the scope of the stipulation previously filed. Accordingly, as agreed upon when we spoke, it is also **ORDERED** that briefs will be filed by the respondent and the intervenor on or before **July 16, 2018**. Replies will be filed on or before **July 30, 2018**. If, upon reviewing any produced documents, Ms. Kanef has concerns about the stipulated facts, she is to alert her adversaries and me at once, via a request for a conference call.

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.

6/20/18
DATE

ELLEN S. BASS, ALJ

sej

NICOLA TASOFF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the respondent Board's denial of monetary compensation for retroactive approval of sick bank leave. Respondent denied petitioner's request for monetary compensation on the basis that *N.J.S.A.* 18A:30-1 and the Bank Guideline and Rules (Guidelines) did not allow monetary compensation for retroactively approved sick bank leave, rather it only allowed for sick bank leave credit going forward. The Board argued that petitioner fails to state a claim upon which relief can be granted, and therefore dismissal is warranted. Petitioner asserted that her third application for use of sick bank days was ultimately granted based upon her demonstrated need for sick bank days in March/April 2017, not for an unspecified time in the future.

The ALJ found, *inter alia,* that: there are no material facts at issue here, and the matter is ripe for summary decision; the underlying issue here is whether the Employee Sick Leave Bank Committee (Committee) acted appropriately in granting petitioner sick leave credit going forward rather than compensation for the retroactively approved sick bank days; the Committee failed to follow its own guidelines in reviewing petitioner's applications for sick bank leave in a timely fashion, which compromised her ability to use sick bank days when she needed them following surgery, *i.e.*, from March 23 through May 4, 2017; the overarching intent behind both *N.J.S.A.* 18A:30-1 and the Guidelines is to make a sick bank leave recipient financially whole; the Board's argument that there is no authorization for the Committee to award money in lieu of sick bank days is without merit; and petitioner met all of the criteria for receiving sick bank days. The ALJ concluded that under the statute and Guidelines, the Committee's actions in approving petitioner's application for twenty-seven sick bank days, but awarding her future sick leave credit instead of monetary reimbursement for the approved sick bank days was improper. Accordingly, respondent's motion for summary decision was denied, and petitioner's motion for summary decision was granted.

Upon review, the Commissioner agreed with the findings and conclusion of the ALJ, and adopted the Initial Decision as the final decision in this matter. The Board was directed to pay petitioner for twenty-seven sick days.

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

November 2, 2018

OAL DKT. NO. EDU 00220-18
AGENCY DKT. NO. 277-11/17

NICOLA TASOFF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC 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.

Upon such review, the Commissioner concurs with the Administrative Law Judge – for the reasons thoroughly set forth in the Initial Decision – that petitioner is entitled to receive payment for the twenty-seven sick bank days that were approved by the Employee Sick Leave Bank Committee for when she was out on unpaid medical leave.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board is directed to pay petitioner for twenty-seven sick days.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 11/02/18

Date of Mailing: 11/02/18

* 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 00220-18
AGENCY DKT. NO. 277-11/17

NICOLA TASOFF,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,
Respondent.

Robert P. Merenich, Esq., for petitioner (Gemmel, Todd & Merenich, P.A., attorneys)

Benjamin B. Brenner, Esq., for respondent (The Carroll Law Firm, PLC, attorneys)

Record Closed: September 12, 2018 Decided: September 21, 2018

BEFORE **TAMA B. HUGHES**, ALJ:

STATEMENT OF THE CASE

Nicola Tasoff (petitioner), an employee of the Pleasantville Board of Education (respondent) appeals the Employee Sick Leave Bank Committee (Committee), denial of monetary compensation for retroactive approval of sick bank leave.[1] Respondent denied petitioner's request for monetary compensation on the basis that N.J.S.A. 18A:30-1 and the Bank Guideline and Rules (Guidelines) did not allow monetary compensation for retroactively approved of sick bank leave, it only allowed for sick bank leave credit going forward.

PROCEDURAL HISTORY

On March 14, 2018, respondent filed a Motion to Amend the complaint to add a third-party – the PEA. By Order dated May 17, 2018, the Motion was denied. Thereafter, on July 13, 2018, petitioner filed a Motion for Summary Decision. On this same date, respondent filed a Motion to Dismiss for failure to state a claim, pursuant to N.J.A.C. 6A:3-1.5(g). Upon receipt of supplemental submissions, the record closed on September 12, 2018.

FINDINGS OF FACT

Based on the undisputed documents presented by the parties, I **FIND** the following **FACTS**:

1. In January 2017, petitioner was an employee of respondent and a participant/member of the Employee Sick Leave Bank (Bank).

2. Under Guidelines, the Committee determines whether a member is eligible for sick bank days. (Respondent's Opposition Brief, Exhibit E)

3. The Guidelines state in relevant part that:

[1] The Committee is made up of representatives of respondent and representatives of the Pleasantville Education Association (PEA).

- A member in the Bank must have exhausted all accrued sick, vacation and personal time before they are eligible to receive sick bank days.
- The member must put their request in writing for use of sick bank days to the Committee and clearly state the nature of the illness and the exact leave time requested.
- The written request must be accompanied by an initial medical certificate from a physician that clearly indicates the:

a) Cause of Illness;
b) Treatment plan;
c) Prognosis; and
d) Return to work date.

- Failure to provide the correct documentation will result in the delay of processing the leave request.
- The request for sick bank days must be for a catastrophic or life threatening illness or injury and the original leave request must be for thirty days.
- Sick leave may only commence after the Committee grants the request and days can be used starting on the date the initial application was received by the committee.
- After proper documentation is received, a decision will be made within fourteen days.
- Once days are donated by a member, they are non-refundable.

4. On March 2, 2017, petitioner filed an application for use of sick bank days. Submitted as part of the application was an Attending Physician's Statement signed by Dr. Ernest Rosato, M.D. that provided petitioner's: 1) Diagnosis (Choleithiasis); 2) Treatment (surgery on March 23, 2017 – removal of petitioner's gall bladder); and 3) Anticipated dates petitioner would be unable to work (March 23, 2017 - May 4, 2017). No prognosis was provided (Respondent's Opposition Brief, Exhibit B).

5. On March 16, 2017, the Committee voted to deny petitioner's application. (Respondent's Opposition Brief, Exhibit C) By letter dated April 7, 2017, three weeks after the Committee voted to deny the application, petitioner was formally notified of the Committee's decision, stating "The documentation did not meet the criteria." (Petitioner's Opposition Brief, Exhibit A).

6. On April 13, 2017, petitioner filed a second application for use of sick bank days for the same anticipated duration of March 22, 2017 – May 4, 2017. Attached to the application was a March 23, 2017 "Operative Report" and an Attending Physician's Statement signed by Dr. Ernest Rosato. (Respondent's Opposition Brief, Exhibit D) The Attending Physician's provided petitioners: 1) Diagnosis (Chronic Calculous Choleithiasis and Rectosigmoid Stricture and Obstruction); 2) Treatment (Surgery – Laparoscopic Cholecystectomy and Laparoscopic Rectosigmoid Resection); and 3) Anticipated dates petitioner would be unable to work (March 22, 2017 - May 4, 2017). No Prognosis was provided. (Respondent's Opposition Brief, Exhibit D).

7. Almost two months after petitioner filed the second application, on June 12, 2017, the Committee voted to deny the application. On the line next to petitioner's name were the words "2nd review." The basis for the denial was that petitioner's condition was not considered catastrophic or life threatening, and that surgery was voluntary on petitioner's part. (Respondent's Opposition Brief, Exhibit E).

8. By letter dated June 13, 2017, petitioner was formally notified of the Committee's determination which stated: "The documentation did not meet the criteria." (Petitioner's Opposition Brief, Exhibit B).

9. Two and a half months later, on August 28, 2017, petitioner filed a third application for use of sick bank days and requested that the Committee reconsider her earlier applications. On this application, petitioner identified the anticipated duration of her illness as six weeks and requested twenty-seven days of sick bank pay – not donor days, which totaled $8,390.70. The twenty-seven days represented days without pay when she went out on sick leave without pay from March 22 through May 4, 2017. Also attached to the application was a letter from Dr. Ernest Rosato's, the surgeon who performed the March 23, 2017 surgery. Through this letter, Dr. Rosato outlined petitioner's medical condition and basis for surgery. (Petitioner's Brief, Exhibit C).

10. On September 12, 2017, the Committee voted to approve petitioner's request for twenty-seven days of sick bank days. On the line with petitioner's name were the words "3rd review." The approval was for twenty-seven "donor days" - not the value of the twenty-seven days or $8,390.70 as requested by the petitioner. In the notes/rationale for approval, Dr. Rosato's letter was noted and the Committee's determination that based upon his letter, petitioner's illness was deemed catastrophic. By letter dated September 13, 2017, petitioner was formally notified of the Committee's determination. (Respondent's Supplemental Submission, Exhibit 1).

ANALYSIS AND LEGAL CONCLUSIONS

For the following reasons, respondent's motion to dismiss will be treated as a motion for summary decision. While N.J.A.C. 1:1-12.1 does not specifically limit the types of motions that may be made in administrative hearings, and a motion to dismiss is not otherwise precluded under the Uniform Administrative Procedure Rules, the more common method for resolving a case on the papers without a plenary hearing in administrative proceedings, is by a motion for summary decision under N.J.A.C. 1:1-12.5.

The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). In Brill, the Court looked at the precedents established in Matsushita Electric Industrial Company v. Zenith Radio Corporation, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); and Celotex Corporation v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), wherein the Supreme Court adopted a standard that "requires the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict, i.e. 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill, 142 N.J. at 533 (quoting Liberty Lobby, 477 U.S. at 251-252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214). The Court stated that under the new standard:

> A determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder 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."
>
> [Id. at 540 (quoting Liberty Lobby, 477 U.S. at 251-252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214).]

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to 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." Id. at 541.

In addressing whether the Brill standard has been met in this case, further guidance is found in R. 4:46-2:

> An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issues to the trier of fact.

The underlying issue in this matter is whether the Committee acted appropriately in granting petitioner sick leave credit going forward rather than compensation for the retroactively approved sick bank days.

Petitioner asserts that her third application, filed on August 28, 2017 and approved on September 12, 2017, was granted based upon her demonstrated need for sick bank days in March/April 2017 – not for an unspecified time in the future. The argument being that granting of prospective sick bank leave is "illusory" without a

demonstrated "need" and would be contrary to underlying intent of both the statute and the Guidelines. As such, the Committee's approval of twenty-seven sick bank days was for the unpaid sick leave in March/April 2017 when a "need" had been demonstrated and when the loss of income for unpaid sick leave in the amount of $8,390.70 had occurred. Petitioner reaches this interpretation by reading N.J.S.A. 18A:30-11 et seq. and Guidelines in their entirety in conjunction with the overarching intent behind both the statute and the Guidelines which is to make a recipient whole.

Respondent argues that the petitioner's claim fails to state a claim upon which relief can be granted, therefore dismissal of the appeal is warranted. More specifically, respondent asserts that there is no authorization in the statute, regulations or Guidelines that allow the Committee to award a retroactive lump sum award, in lieu of sick bank days.

N.J.S.A. 18A:30-1 (Establishment of Sick Leave Bank for Employees of Board of Education) states in relevant part:

> "...[S]ick leave bank may be established for employees of a board of education if both the board and the majority representative or majority representatives of the employees who would be eligible to participate consent to the establishment of the sick leave bank. The purpose of the sick leave bank shall be to enable employees of the board who are entitled to sick leave under chapter 30 of Title 18A of the New Jersey Statutes to draw needed days of sick leave in addition to any days to which they are otherwise entitled. The sick leave days available to a board employee from the sick leave bank shall be leave days previously donated to the bank by board employees. Employees may donate sick leave days or any other leave time as agreed upon by the board and the majority representative. Sick leave drawn from the bank shall be treated for all purposes as if it were accrued sick leave time of the employee who receives it. No employee shall be required to participate in the bank." [emphasis added]

Administration of the Bank is by a committee. The committee may:

> "...establish standards or procedures that it deems appropriate for the operation of the sick leave bank, which may include a

> requirement that employees donate leave time to be eligible to draw leave time from the sick leave bank and limitations on the amount of sick leave time which may be drawn or the conditions under which the sick leave time may be drawn. No day of leave which is donated to a sick leave bank by an employee shall be drawn by that employee or any other employee from the sick leave bank unless authorized by the committee in order to provide sick leave."
>
> N.J.S.A. 18A:30-11

In the instant matter, the Committee administers the Bank and has created Guidelines in accordance with N.J.S.A. 18A:30-11.

It is undisputed that petitioner's first and second application were denied by the Committee for failure to meet the Guideline criteria for approval of sick bank leave. These findings were based on the medical documentation provided by petitioner with each application and the Committee's determination on both applications that petitioner's condition, was not catastrophic or life threatening.

It is also undisputed that the Committee failed to follow its own Guidelines in reviewing petitioner's first and second application in a timely fashion and notifying her of their decision. Such failure clearly prejudiced petitioner by denying her the choice and/or opportunity to refile sooner had she wished to do so. Having said that, and as noted above, both the first and second denial were based upon the documentation provided by the petitioner. While dilatory, the Committee's denial was in accordance with the Guidelines based upon the medical information provided by petitioner at that time.

Despite the first and second denial, it appears that the Committee handled petitioner's second and third application as supplements to her first application. This is evidenced by the verbiage "2nd review" and "3rd review" on the Committee Sign-In Sheets and supported by their ultimate approval of twenty-seven days of donor leave time for the retroactive period of March 23, 2017 through May 4, 2017. Even assuming arguendo that the third application was viewed separately, granting an applicant sick

bank leave credit for an unidentified future medical event would be violative of both the statute and Guidelines – literally and in spirit.

Respondent relies upon Queen v. City of Bridgeton et al (2012 N.J. Super. Unpub. LEXIS 2425) arguing that the petitioner has failed to allege in any manner that the Guidelines and the Committee's administration of the same were arbitrary and capacious. Further arguing that there is no authorization in the guidelines or statute for the award of money in lieu of sick days.

The instant matter is distinguishable from Queen as that matter involved a claim of discrimination for being denied access to the Bridgeton's Sick Leave Bank. Plaintiff's specific argument was that access to the Bridgeton's Sick Leave Bank was mandated as a reasonable accommodation under the New Jersey Law Against Discrimination even though she failed to take the necessary steps to provide the required documentation to become eligible. These were not the facts or issue in the instant matter.

Regarding respondent's argument that there is no authorization either by law or in the Guidelines to award money in lieu of sick days, it is mistaken. N.J.S.A. 18A:30-10 and the Guidelines are not silent on: how sick bank days are qualified; when and how a person is eligible for sick bank days; and when and how they are to be used.

As noted above, under the Guidelines, to be eligible to receive sick leave bank days, a member/applicant of the Bank must exhaust all accrued sick, vacation and personal time before they are eligible to receive bank days. Petitioner met this criterion.

An application for use of sick bank days must be filed by the member/applicant, which sets forth the nature of the illness and amount of leave time required. Petitioner met this criterion.

A medical certificate from a physician must accompany the initial application which identifies the cause of the illness, treatment plan, prognosis and anticipated return to work date. Petitioner met this criterion.

A request for sick bank days must be for a catastrophic or life-threatening illness or injury. Petitioner met this criterion.

Petitioner is not seeking compensation for unused sick leave, she is seeking compensation for approved sick bank days which by statute are considered accrued sick leave and available to an applicant/member as needed.[2] In this case, petitioner demonstrated a "need" and was approved for twenty-seven sick bank days for the unpaid used sick leave period of March 23, 2017 through May 5, 2017.

Had petitioner's first application been granted, she would have been paid as if the days were accrued sick leave days. The fact that the approved days were for retroactive time does not change the nature of the award and that by statute and under the Guidelines petitioner is entitled to payment for those days.

Based upon the foregoing, I **CONCLUDE** that under the statute and Guidelines, the Committee's actions in approving petitioner's application for twenty-seven sick bank days but awarding her future sick leave credit instead of monetary reimbursement for the used and approved sick bank days was improper. Accordingly, respondent's motion for summary decision is **DENIED**.

I further **CONCLUDE** that petitioner has met her burden and is entitled to receive payment for twenty-seven days of used sick leave as approved by the Committee in

[2] The issue in this matter is not one of accumulated unused sick leave which by statute, except in limited circumstances, an employee would not be entitled to a lump sum payment. See N.J.S.A. 18A:30-3.2 (Credited With Unused Sick Leave); N.J.S.A. 18A:30-3.5 (Payment for Accumulated Sick Leave by Board of Education); N.J.S.A. 18A:30-3.3 (Certificate Issued Showing Unused Sick Leave) Additionally, N.J.A.C. 4A:6-1.22(e)(2) (Civil Service – Donated Leave Program) which states "upon retirement, the leave recipient shall not be granted supplemental compensation on retirement for any unused sick days which he or she had received through the leave donation program".

accordance with the Guidelines. For the foregoing reasons, petitioner's motion for Summary Decision is **GRANTED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 21, 2018
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: September 21, 2018

Date Mailed to Parties: September 21, 2018

/lam

EXHIBITS

For Petitioner:

1) Petitioner's Motion for Summary Decision and Attached Exhibits 1 through 3
2) Petitioner's Reply Brief to Respondent's Opposition
3) Petitioner's Brief in Opposition to Respondent's Motion to Dismiss
4) Certification of Nicola Tasoff and Attached Exhibits A and B

For Respondent:

1) Respondent's Brief in Opposition to Respondent's Motion for Summary Decision – Exhibits A through G
2) Respondent's Motion to Dismiss and Attached Exhibits A through G
3) Certification of Counsel
4) Respondent's Reply Brief to Petitioner's Opposition
5) Respondent's Letter, dated September 11, 2018 with Attachments

Martino, Lysa

From: Microsoft Outlook
To: Karin Molnar; Samantha Price
Sent: Friday, September 21, 2018 9:15 AM
Subject: Relayed: ID EDU 00220-18

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

Karin Molnar (Karin.Molnar@doe.nj.gov)

Samantha Price (Samantha.Price@doe.nj.gov)

Subject: ID EDU 00220-18

Martino, Lysa

From: Microsoft Outlook
To: 'ben@carrolllawfirm.com'; 'BobMerenich@comcast.net'
Sent: Friday, September 21, 2018 9:39 AM
Subject: Relayed: Tasoff, Nicole v. City of Pleasantville BOE, Atlantic County EDU 00220-18 ID

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

'ben@carrolllawfirm.com' (ben@carrolllawfirm.com)

'BobMerenich@comcast.net' (BobMerenich@comcast.net)

Subject: Tasoff, Nicole v. City of Pleasantville BOE, Atlantic County EDU 00220-18 ID

GARY CORCORAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
QUEEN CITY ACADEMY CHARTER SCHOOL, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the respondent Queen City Academy Charter School's (Queen City) deduction of one personal day from his leave bank after he was absent on Columbus Day, a public holiday; petitioner alleged that respondent's action violated *N.J.S.A.* 18A:25-3. The parties filed opposing 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; Queen City follows the academic calendar of the Plainfield Public School District (Plainfield); the 2017 academic calendar of Plainfield called for a district-wide Professional Day to be held on October 9th, which was also Columbus Day; petitioner notified the director of Queen City in advance that he would be observing the Columbus Day holiday and therefore would not attend the Professional Day scheduled for October 9, 2017; he further requested that he not be charged one of his allocated personal days for his absence on Columbus Day, in accordance with the statutory provision in *N.J.S.A.* 18A:25-3; petitioner was subsequently charged one personal day for his absence on October 9, 2017; prior case law supports the position that any compensation, either salary or by way of a benefit such as a personal day, taken for use of a holiday as it relates to *N.J.S.A.* 18A:25-3 constitutes a violation of the statute; in passing *N.J.S.A.* 18A:25-3, the New Jersey Legislature clearly intended to remove barriers from individuals recognizing a public holiday, including Columbus Day; and the loss of a personal day is equivalent to a financial loss. The ALJ concluded that the respondent Queen City violated *N.J.S.A.* 18A:25-3 when it improperly withheld a personal day from petitioner. Accordingly, petitioner is entitled to restoration of a personal day or compensatory wages for the 2017 Columbus Day holiday.

Upon review, the Commissioner agreed with the findings and conclusion of the ALJ, and adopted the Initial Decision as the final decision in this matter. The petitioner is entitled to restoration of a personal day.

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

November 2, 2018

OAL DKT. NO. EDU 02418-18
AGENCY DKT. NO. 3-1/18

GARY CORCORAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
QUEEN CITY ACADEMY CHARTER SCHOOL, UNION 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.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons thoroughly set forth in the Initial Decision – that respondent violated *N.J.S.A.* 18A:25-3 when it deducted a personal day from petitioner due to his absence on Columbus Day. The Commissioner further agrees with the ALJ that the loss of a personal day is a loss in compensation equivalent to a day's salary.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is entitled to restoration of a personal day.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11/02/18

Date of Mailing: 11/02/18

* 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 02418-18
AGENCY DKT. NO. 3-1/18

GARY CORCORAN,
Petitioner,
v.
QUEEN CITY ACADEMY CHARTER SCHOOL, UNION COUNTY,
Respondent.

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

Shana Don, Esq., for respondent (Scarinci & Hollenbeck, attorneys)

Record Closed: September 11, 2018 Decided: September 20, 2018

BEFORE **ELISSA MAZZONE TESTA**, ALJ

PROCEDURAL HISTORY AND STATEMENT OF CASE

Petitioner, Gary Corcoran, challenges Respondent, Queen City Charter School's (Queen City) deduction of one personal day after he was absent from school on Columbus Day, a public holiday. Petitioner, an employee/teacher of the Respondent,

alleges that Respondent's action violated N.J.S.A. 18A:25-3. On February 2, 2018, this matter was transferred to the Office of Administrative Law (OAL) from the New Jersey Department of Education.

On February 7, 2018, Respondent filed a Motion to Dismiss in Lieu of an Answer in accordance with N.J.A.C. 6A:3-1.10 and N.J.A.C. 6A:3-1.5(g). On March 19, 2018, pursuant to a telephone conference held with the undersigned and counsel for the parties, it was agreed that there are no disputed facts with respect to this matter, and Respondent's Motion to Dismiss in Lieu of an Answer was converted to a Motion for Summary Decision. On April 24, 2018, Petitioner filed a Letter Memorandum asserting the legal arguments for a Summary Decision. On May 4, 2018, Respondent filed Opposition and a Cross-Motion for Summary Decision. On August 10, 2018, Oral Argument was held on the Summary Decision Motions and on September 11, 2018, the final responsive papers were submitted, and the record closed.

FACTUAL DISCUSSION

The following facts are undisputed and I therefore **FIND** them to be the **FACTS** of the case:

On October 9, 2017, the academic calendar of the Plainfield Public School District (Plainfield) called for a district-wide Professional Day to take place. This Professional Day coincided with Columbus Day, which is declared a public holiday pursuant to N.J.S.A. 36:1-1. Queen City follows the academic calendar of the Plainfield. On or around October 2, 2017, Petitioner informed Danielle West, the Director of Queen City, that he would be observing the Columbus Day holiday and therefore, would not be reporting for the Professional Day scheduled for October 9, 2017. Petitioner requested that one of his allocated personal days not be used in accordance with the statutory provision in N.J.S.A. 18A:25-3. The Respondent did not compel Petitioner to report to work on this day. As discussed, Petitioner did not report to school on October 9, 2017. West then classified Petitioner's planned absence on Columbus Day as a personal day and accordingly deducted one personal day available for his use during the school year.

Queen City and Petitioner signed the 2017-2018 Academic Year Teacher Employee Contract (the "Contract"). Under the Contract provisions for the 2017-2018 school year, Corcoran was allocated two (2) personal days and ten (10) sick days. The Contract stipulated that the employee must work 193 days during the Contract term. The Contract further provides that the employee will not receive vacation days because the employment term is ten months. Following Petitioner's Columbus Day absence, he had only one remaining personal day for the 2017-2018 academic year.

LEGAL ANALYSIS AND CONCLUSION

A party may move for summary decision under N.J.A.C. 1:1-12.5(b), which "may be rendered if the papers and discovery, which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This Motion shares similarities with the summary judgment rule established in New Jersey Court Rules, R. 4:46-2. See Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954). Pursuant to this standard, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Id. at 75. Here, both the Respondent and the Petitioner are moving parties. Summary Judgment is precluded when it is determined that "there exists a genuine issue of material fact." Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995).

Petitioner and Respondent agree that no genuine issues of material fact exist in this case. Therefore, the sole legal question to be determined is if Queen City was required to permit Corcoran to miss a work day to observe the Columbus Day public holiday without deducting a personal day pursuant to N.J.S.A. 18A:25-3 or if Queen City's deduction of a personal day due to Corcoran's planned Columbus Day absence is a valid action under the contract and not a violation of N.J.S.A. 18A:25-3.

N.J.S.A. 18A:25-3 provides the following:

> No teaching staff member shall be required to perform his duties on any day declared by law to be a public holiday and no deduction shall be made from such member's salary by reason of the fact that such a public holiday happens to be a school day and any term of any contract made with any such member which is in violation of this section shall be void.

Corcoran contends that Respondent violated the statute because a personal day was deducted due to his absence on a public holiday. He does not contend that any pay was lost as a result of Respondent's action. Corcoran maintains that the Legislative intent of N.J.S.A. 18A:25-3 is clear. There are a set number of National holidays that are recognized as meaningful and important nationally. In passing the statute, the New Jersey Legislature wanted to remove all barriers from an individual recognizing the holiday in Piscataway Township Education Association v. Piscataway Board of Education, 307 N.J. Super. 263 (App. Div. 1998), the court determined that changes in school calendars are "impact issues [that] are indeed mandatorily negotiable unless negotiations would significantly interfere with the exercise of the related [managerial] prerogative." Id. at 265. Corcoran asserts that the personal day allocation in the Contract was a result of collective bargaining, and that the deduction of his personal day for absence during a National holiday deemed the negotiated days "valueless." Thus, the result of Respondent's action was to create a barrier that impeded Corcoran from recognizing the public holiday and hence violated N.J.S.A. 18A:25-3.

Queen City reiterates that no pay was lost as a result of Respondent's use of his personal day to observe the Columbus Day holiday. The Director approved Corcoran's request for a planned absence on the Columbus Day holiday and did not compel him to attend work on Columbus Day. Petitioner's salary was not reduced due to his observance of the Columbus Day holiday and the use of one personal day did not result in any financial loss to Corcoran since he had not exhausted all of his personal days up to that point and had remaining personal days to use.

In Dohm v. Board of Education of West Milford, EDU 5286-82, Initial Decision (November 18,1982), affirmed, Commissioner (January 6,1983), a comparable controversy was brought before the OAL when a social studies teacher, Dohm, requested a planned absence on Lincoln's birthday. Lincoln's Birthday was a public holiday and also a scheduled school day in the district. Id. at *13. The employment contract negotiated by the school district and the Teacher's Association dictated that each teacher report for 185 working days. Id. at *16. While the district allowed Dohm to observe the holiday, it stipulated that if he was absent on Lincoln's Birthday, he would be required to report to work an additional day after the regularly scheduled academic year or his paycheck would be reduced by one day's compensation. Ibid.

Dohm reported to work on Lincoln's birthday and was therefore not required to report for a make-up day and did not have his paycheck reduced by one day's compensation. Id. at 21. Later, Dohm retroactively requested an additional day off from work of his choosing or an additional day's compensation because he attended work on Lincoln's Birthday. Id. at 13. The presiding Administrative Law Judge decreed that the district had not violated N.J.S.A. 18A:25-3 because it did not compel Dohm to report to work on Lincoln's Birthday and because Dohm was not required to work any days beyond the 185 work days stipulated in the employment contract. Id. at 22.

In Moldovan v. Board of Education of Township of Hamilton, 1971 S.L.D. 246, joint petitioners brought a claim against the Board of Education of Hamilton Township (Board) after the Board deducted one day's compensation from their salaries due to their absence on Columbus Day. The Commissioner of Education found that the actions of the Board were improper and in violation of N.J.S.A. 18A:25-3. Ibid. The Commissioner stated that it was "evident that this statute does not prohibit school sessions on public holidays, but instead protects the right of teaching staff members to be absent on public holidays without suffering financial loss." Id. at 253. In Moldovan, the joint petitioners were absent on a public holiday and did suffer a financial loss as a result; hence the school district clearly violated N.J.S.A. 18A:25-3.

There is no question that personal days or personal business days are creatures of contract and not specifically provided for in Title 18A or any statutory provision. Piscataway Township Education Association v. Piscataway Board of Education, 307 N.J. Super. 263 (App. Div. 1009). Further, to engage in collective bargaining, each side surrenders something of value in exchange for a benefit. In the case at hand, the question at issue becomes what constitutes a deduction in salary as per the statute or financial loss and/or compensation as per the case law. While the Petitioner in the instant case is a salaried employee pursuant to the "Contract" and he did not get a deduction in salary per se, I agree with Petitioner's argument that he was required to forfeit the value of a personal day which, in all respects, is the equivalent value of a day's pay. If Petitioner had in fact expended all of his contractual and statutory paid leave, then Respondent would have had to deduct or withhold one day of pay from Petitioner's salary. Further, the "Contract" between Petitioner and Respondent sets forth a "package" which includes a salary with additional compensatory benefits, including but not limited to, personal days, sick days, professional days, health benefits and a pension. (Emphasis added). One would need to look at the entire compensatory package in order to determine whether to accept employment and to determine if, as a whole, it makes financial sense to the employee. Therefore, if any of the compensation, either salary or by way of a benefit, is taken for use of a holiday as it relates to N.J.S.A. 18A:25-3, then a violation of the statute has occurred.

Paul M. De Pascale v. State of New Jersey, 2011 N.J. Super. Unpub. Lexis 2626 (App. Div. 2011), best lays out the definitions of salary and compensation, which Legislature has deemed interchangeable. The definition of "salary" according to Black's Law Dictionary is "an agreed **compensation** for services – esp. professional or semiprofessional services – usu. paid at regular intervals on a yearly basis, as distinguished from an hourly basis. Black's Law Dictionary (8th ed. 2004) (emphasis Added). Turning to "compensation," American Heritage defines the term as "something given or received as equivalent for services, debt, loss, injury, suffering, lack, etc.; indemnity." American Heritage Dictionary of the English Language (4th ed. 2006) . . . . Black's defines the term compensation as "[r]emuneration and other benefits received in

return for services, rendered; esp. salary or wages. Black's law Dictionary (8th ed. 2004); see DePascale at *28.

When a statue does not clearly set forth the definition of a pertinent term, in this case "member's salary", then one would need look at the intent of the Legislature. Courts look to case law that has interpreted the meaning of words. The New Jersey Court in Hyland v. Township of Lebanon, 419 N.J. Super. 375 (App. Div. 2011), addressed whether "salary" includes vacation, sick and person days for a public employee whose "salary is protected by Statute." In recognizing the relationship between the term salary and direct or indirect forms of compensation, the Appellate Division held,

> Although the statutory bar applies specifically to "salary" rather than to "salaries, wages or compensation," there is no indication that the Legislature intended to limit statutory bar to base salary for the four named officers and to exclude from its scope other forms of compensation such as payments for vacation days, sick leave and personal time, particularly when such compensation directly relates to the amount of salary paid to these officers.
>
> [Id. 384.]

I **CONCLUDE** that the in passing N.J.S.A. 18A:25-3, the New Jersey Legislature intended to remove all barriers from an individual recognizing the holiday. The conditional approval imposed on Petitioner in deciding to recognize Columbus Day and in turn, the loss of a personal day is one such barrier and is a direct contradiction of the Legislature's intent. Further, it is clear that a loss of a personal day is the equivalent to a financial loss.

This analysis is further supported by Middlesex County Educational Services Commission Education Association v. Board of Middlesex County Education Services Commission Board of Education, 1987 S.L.D. 262 which holds,

> Essentially, N.J.S.A. 18 A:25-3 protects the right of teaching staff members to be absent on public holidays without financial loss. Moldovan v. Board of Education of the Township of Hamilton, 1971 S.L.D. 246. Thus, although a district board may determine that school will be open on a public holiday when it establishes its calendar, it may not require its teaching staff members to work that day. Ibid. Accordingly, if a member is absent on that day, the district board is prohibited from penalizing him by deducting an amount from his salary proportionate to his daily rate. Ibid.

Both Respondent and Petitioner relied on the above referenced case when presenting their arguments to the undersigned.

Therefore, having reviewed both parties' submissions, I **CONCLUDE** that no issues of material fact exist. I further **CONCLUDE** that Respondent is in violation of N.J.S.A. 18A:25-3 and Petitioner is entitled to restoration of a personal day or compensatory wages.

ORDER

It is therefore **ORDERED** that the Petitioner's Motion for Summary Decision be and hereby is **GRANTED**. It is further **ORDERED** that the Respondent's Motion for Summary Decision be and hereby 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.

September 20, 2018
DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: September 20, 2018

Date Mailed to Parties:

EMT/sej

BRIEFS RELIED ON

For Petitioner

Petitioner's Letter Memorandum in Support of Motion for Summary Decision

Reply to Respondent's August 15, 2018 submission

For Respondent

Respondent's Motion to Dismiss in Lieu of an Answer

Respondent's Opposition to Petitioner's Motion for Summary Decision and Cross-Motion for Summary Decision

Respondent's submission dated August 15, 2018, with attached case law.

345-18

OAL DKT. NO. EDU 9817-17
AGENCY DKT. NO. 128-6/17

AMY COPLAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY SCHOOL OF TECHNOLOGY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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: 11/02/18

Date of Mailing: 11/02/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. EDU 09817-17
AGENCY DKT. NO. 128-6/17

AMY COPLAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE HUDSON COUNTY SCHOOL OF TECHNOLOGY, HUDSON COUNTY,
Respondent.

Gail Oxfeld Kanef, Esq., on behalf of petitioner Amy Coplan (Oxfeld Cohen, attorneys)

Christine S. Diana, Esq., for respondent Board of Education of the Hudson County School of Technology (Netchert Dineen & Hillman, attorneys)

Record Closed: September 26, 2018 Decided: September 26, 2018

BEFORE **GAIL M. COOKSON**, ALJ:

On or about June 28, 2017, petitioner Amy Coplan (petitioner) appealed alleged violations of her tenure and seniority rights by the Board of Education of Hudson County School of Technology (respondent). The Board filed its Answer and Separate Defenses to the Petition of Appeal under cover of July 7, 2017. The matter was transmitted to the Office of Administrative Law (OAL), on July 11, 2017, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

I held several telephonic case management conferences with counsel and also scheduled the matter for a plenary hearing. After several adjournments, the hearing was commenced on May 5, 2018. During the close of that first day of the evidentiary hearings, counsel requested time to conduct some further settlement discussions. We scheduled another hearing date, nevertheless, for November 14, 2018.

Under cover of September 25, 2018, counsel for petitioner forwarded a fully executed Settlement and Release between the parties and requested that if approved, I incorporate same into an order.

I have reviewed the record and the terms of Settlement and Release 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 26, 2018

DATE

GAIL M. COOKSON, ALJ

Date Received at Agency:

Date Mailed to Parties:

id

LAW OFFICES

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SAMUEL B. WENOCUR **
SHERRI L. GOLDMAN *
BARRY FRANK **
OF COUNSEL

* MEMBER OF NJ BAR
** MEMBER OF NJ & NY BAR
*** MEMBER OF NJ & PA BAR

September 25, 2018

VIA OVERNIGHT DELIVERY
Hon. Gail M. Cookson, ALJ
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

RECEIVED
2018 SEP 26 A 11:16
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

RE: Amy Coplan
~and~
Hudson County School of Technology
OAL Docket No.: EDU 09817-2017N

Dear Judge Cookson:

I am pleased to enclose the parties' fully executed settlement agreement regarding the above matter. Assuming Your Honor approves the settlement, the hearing date presently scheduled for November, 14, 2018 will be unnecessary.

As you can see from the agreement, Ms. Coplan will be returning to work with the Hudson County Schools of Technology as a result of this settlement. Both parties are eager to have her return as soon as possible. To that end, if Your Honor would expedite the approval of the agreement, the parties would be grateful.

Thank you.

Very truly yours

GAIL OXFELD KANEF

GOK/elj
Cc: Jack Dineen, Esq.
Amy Coplan
Tom DeSocio
Aileen O'Driscoll, Esq.

AMY COPLAN Petitioner, v. HUDSON COUNTY SCHOOLS OF TECHNOLOGY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU-09817-2017 Agency Ref. No.128-6/17 **SETTLEMENT AND RELEASE**

RECEIVED
2018 SEP 26 A 11:46
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Amy Coplan ("Petitioner"), and the Respondent, Hudson County Schools of Technology ("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 Amy Coplan v. Hudson County Schools of Technology, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 09817-2017N, Agency Dkt. No. 128-6/17 (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 $257,005, for the period from February 5, 2016 through June 30, 2018 broken down as follows: for the period February 5, 2016 through June 30, 2018, $48,396 representing step 20 plus longevity for 20 years of service. For September 1, 2016 through June 30, 2017, $102,712 representing step 21 plus longevity for 21 years of service. For the period of September 1, 2017 through June 30, 2018, $105,897 representing step 22 plus longevity for 22 years of service.

These amounts shall be reduced by Ms. Coplan's actual earnings of $41,565 for the 2016-2017 school year and $65,440 for her earnings during the 2017-2018 school year.

2. The Parties agree that Petitioner had no earnings from other employment during the period from February 5, 2016 through June 30, 2018 other than that listed in paragraph 1 above. Thus, the Final Gross Amount of back salary due to petitioner is $ 150,000, payable in equal installments of $50,000 payable on the date of her return to employment in 2018,

January 15, 2019 and January 15, 2020. 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 "Amy Coplan". Plaintiff agrees that *she* will be solely responsible for all taxes, if any, that may be owed by *her* as a result of any payment made pursuant to this Agreement. In the event that any governmental agency, including without limitation any local, state or federal taxing authority or agency, determines that all or any portion of the above amount is taxable income, Plaintiff agrees to indemnify and hold Defendant harmless with respect to any taxes, interest or penalties assessed because of any payment made by Defendant pursuant to the terms of this Agreement.

3. The Respondent shall cooperate with the Teachers Pension and Annuity Fund to ensure that Petitioner receives the additional 2.5 years of pension credit to which she is entitled pursuant to this award of full back pay for the period February 5, 2016 through June 30, 2018 but in no event shall it increase the payment liability of the Board as referenced in Paragraph #2 above.

4. The Parties agree that the payments specified herein shall constitute full and final settlement of any and all claims, whether in tort or contract, however pleaded to money damages for salary or on any other basis which were or could

have been asserted against the Board in this or any other Litigation with respect to the 2013-2018 school years and her employment up until the present. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from February 5, 2016 to June 30, 2018. In addition, Petitioner's seniority will be credited for 2.5 years and those years shall be treated as 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 2017-2018 school year, and she shall accrue days for future years as per the collective bargaining agreement.

5. 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. 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 2018-2019 school year or thereafter.

6. The Parties agree that Petitioner's seniority as of June 30, 2018 as a result of this settlement is:

a) 24 years as a music teacher.

7. Respondent shall offer petitioner reinstatement to her former position as a music teacher effective September 1, 2018. Said offer of reinstatement shall include step placement at Step 23 of the salary guide plus longevity pay credit reflecting her 24 years of seniority. Petitioner agrees that as a condition of this agreement she shall apply for and obtain her "vocational certificate" within one year of her reinstatement.

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. 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. Petitioner understands that payments hereunder include her attorney fees for which she is solely responsible.

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. If any of the provisions, terms or clauses of this Agreement are declared illegal, unenforceable or ineffective in any legal forum, those provisions, terms and clauses shall be deemed severable, such that all other provisions, terms and clauses of this Agreement shall remain valid and binding upon both parties.

14. 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.

15. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Hudson County Schools of Technology 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.

16. 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 the time frames referenced in Paragraph #2.

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:
9/17/18

AMY COPLAN

FOR RESPONDENT,
HUDSON COUNTY SCHOOLS OF TECHNOLOGY

Date:

Craig Guy, Board President

346-18

ADAM FITZGIBBONS,[1]	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent State Board of Examiners (SBE) that he had not met the requirements, as set forth in *N.J.A.C.* 6A:9B-8.3(a)(5), for issuance of a Teacher of Physical Education Certificate of Eligibility (CE). Specifically, petitioner had not passed the mathematics section of the Basic Skills Assessment of the Praxis exam. Petitioner contended that he qualified for the CE because, at the time he submitted his application in April 2015, the Basic Skills Assessment was not a requirement for a certificate of eligibility, as that requirement did not go into effect until September 2015. The SBE argued that although petitioner's application for certification was initiated in April 2015, the requirements for the CE he sought were not completed until after the Basic Skills Assessment requirement was added in September 2015; accordingly, petitioner failed to meet the regulatory requirements for issuance of the certificate he sought. The SBE filed a motion to dismiss in lieu of an answer.

The ALJ found, *inter alia*, that: when petitioner filed his application for a CE in April 2015, only the Physical Education Content Knowledge portion of the Praxis exam was required, as was a college degree; petitioner did not meet these two requirements until after he initiated his application; petitioner received his bachelor's degree in December 2015, and passed the Physical Education Content portion of the Praxis in January 2016; in September 2015, certification requirements were expanded to include successfully completing the Basic Skills Assessment on the Praxis II exam; this test requires an applicant to demonstrate competency in reading, writing and mathematics; petitioner has been unable to pass the mathematics section of this assessment; the SBE's denial of petitioner's application for a CE was consistent with applicable law; per the Commissioner's decision in *Gueli v. New Jersey State Board of Examiners*, Commissioner Decision No. 76-18, issued March 8, 2018 – which found that an application is evaluated in accordance with the regulations in effect when the application becomes complete – the SBE's determination regarding petitioner is consistent with *N.J.A.C.* 6A:9B-5.3(b); the SBE's interpretation of relevant regulatory language is consistent with regulatory intent, which is to rigorously vet applicants for certification; an administrative agency's interpretation of its own regulations is entitled to substantial weight; and petitioner's contention that he is disabled, and was denied an accommodation regarding the Praxis requirement, is without merit. The ALJ dismissed the petition.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, for the reasons expressed therein. The petition was dismissed.

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

[1] The Initial Decision improperly captioned the petitioner as Brian Fitzgibbons.

November 2, 2018

346-18

OAL DKT. NO. EDU 09483-18
AGENCY DKT. NO. 77-4/18

ADAM FITZGIBBONS,[1]	:	
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, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by petitioner, and the reply thereto filed by the New Jersey State Board of Examiners (Board).

By way of background, petitioner challenges the denial of his application for a Teacher of Physical Education Certificate of Eligibility. In its decision on March 7, 2018, the Board denied petitioner's application because he did not meet the requirements of *N.J.A.C.* 6A:9B-8.3; specifically, he had not passed the mathematics section of the Basic Skills Assessment of the Praxis exam. Petitioner argued that his application should be evaluated by the regulations in effect at the time he submitted his application in April 2015. At that time, the mathematics Praxis was not required for a certificate of eligibility, as that requirement did not go into effect until September 2015. Pursuant to *N.J.A.C.* 6A:9B-5.3(b), the Board "shall issue the appropriate certificate upon the candidate's completion of all certification requirements in effect at the time the Office receives the application." However, *N.J.A.C.* 6A:9B-5.3(b) also states that "[a]n application shall be deemed filed with the Office when it and all required supporting documentation has been received." The Administrative Law Judge (ALJ) found that petitioner's application was not complete in April 2015, because he did not earn his bachelor's degree until December 2015; further, he did not pass the physical education component of the Praxis until

[1] The Initial Decision improperly captioned the petitioner as Brian Fitzgibbons.

January 2016. As such, his application was not considered filed until well after September 1, 2015, when a passing score on the Basic Skills Assessment became a requirement. As petitioner has not yet passed the mathematics portion of the Praxis, the ALJ found that the Board acted consistent with the regulations and dismissed the petition.

In his exceptions, petitioner argues that he should be granted a certificate because he has met all of the requirements that were in effect at the time the Board received his initial application. Petitioner contends that pursuant to *N.J.A.C.* 6A:9B-5.3(b), the Board must review petitioner's application based on completion of the requirements that were "in effect at the time the Office receives the application." If the application is evaluated based on the requirements at the time the application is completed, then it renders the statement meaningless. Petitioner maintains that the statement in *N.J.A.C.* 6A:9B-5.3(b) that the application "shall be deemed filed with the Office when it and all required supporting documentation has been received" is not inconsistent with the former statement, as the requirements differentiate between when the application is "received" and "filed."

Additionally, petitioner argues that the ALJ failed to accept petitioner's contention that the Board "converted" his application to a Teacher of Physical Education Certificate of Eligibility from his initial Teacher of Health and Physical Education Certificate of Eligibility. He disputes the Board's argument that it does not convert applications and that petitioner had filed a second application in December 2015. Petitioner also points out that the ALJ failed to address his argument that he should be exempted from taking the mathematics section of the Praxis examination due to the neurocognitive/learning issues set forth in a letter from his doctor.

In reply, the Board maintains that the ALJ correctly found that petitioner did not meet the requirements for a certificate of eligibility. Although petitioner argues that he now meets all of the certification requirements that were in effect at the time he submitted his application in April 2015, the Board points out that the ALJ appropriately found that petitioner did not meet the requirements until he earned his degree and passed the physical education exam, both of which occurred after September 1, 2015. The Board agrees with the ALJ that petitioner's interpretation of

N.J.A.C. 6A:9B-5.3(b) "would render much of the regulatory language superfluous." (Respondent's reply at 4). The Board maintains that the ALJ relied on applicable case precedent, *i.e.*, *Gueli v. New Jersey State Board of Examiners*, Commissioner Decision No. 76-18, March 8, 2018, which examined *N.J.A.C.* 6A:9B-5.3(b) and found that an application is evaluated in accordance with the regulations in effect when the application becomes complete. Additionally, with respect to petitioner's argument that he was entitled to a testing accommodation, the Board argues that petitioner never requested an accommodation. Further, the letter that he submitted from petitioner's doctor seeks to exempt him from taking exams altogether, rather than a testing accommodation.

Upon review, the Commissioner agrees with the ALJ that petitioner has not met the requirements for a Teacher of Physical Education Certificate of Eligibility as to date he has not submitted a passing score on the mathematics section of the Basic Skills Praxis. The Commissioner further concurs that petitioner's initial application was not complete until his degree was conferred in December 2015, and he passed the physical education component of the Praxis in January 2016. Accordingly, as petitioner met those requirements after September 1, 2015, he must comply with the new standards that went into effect on that date, as an application is not considered filed until all supporting documentation is received – including "coursework, degree, tests, fees, GPA, and all certificate rules pursuant to *N.J.A.C.* 6A:9B-8 through 13." *N.J.A.C.* 6A:9B-5.3(b); *see Gueli, supra* (finding that petitioner's application was not deemed filed until after she submitted the oath of allegiance, rather than when she initiated the application, so she was required to meet the heightened GPA requirements that went into effect before her application was complete).

The Commissioner does not find petitioner's exceptions to be persuasive. *N.J.A.C.* 6A:9B-5.3(b) indicates that "[a]n application shall be deemed filed with the Office when it and all required supporting documentation has been received." When this is read together with the statement that a certificate will be issued upon completion of all requirements "in effect at the time the Office receives the application," it is clear that the regulation intends for an application to be evaluated by the regulations in effect when a completed application is received. Additionally, whether the Board

"converted" petitioner's application or whether petitioner submitted a second application is immaterial. Regardless of whether petitioner's initial application was submitted before or after September 1, 2015, it is uncontroverted that the application was not complete until well after that date. As such, petitioner was required to pass the Basic Skills Assessment of the Praxis; as he has not yet passed the mathematics section of this mandated test, he cannot receive a Teacher of Physical Education Certificate of Eligibility. Finally, the Commissioner does not have jurisdiction over whether the Board's action violates the Americans with Disabilities Act, 42 *U.S.C.* § 12101 *et seq.*, as his authority is limited to controversies and disputes arising under New Jersey school laws. *N.J.S.A.* 18A:6-9.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter – for the reasons expressed therein – and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 11/02/18

Date of Mailing: 11/02/18

[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
MOTION TO DISMISS
OAL DKT. NO. EDU 09483-18
AGENCY DKT. NO. 77-4/18

BRIAN FITZGIBBONS,

Petitioner,

v.

NEW JERSEY STATE BOARD OF EXAMINERS,

Respondent.

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

Kerry Soranno, Deputy Attorney General, for respondent, State Board of Examiners (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: August 3, 2018 Decided: August 8, 2018

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

STATEMENT OF THE CASE

Petitioner, Adam Fitzgibbons, challenges the denial of his application for a Teacher of Physical Education Certificate of Eligibility by the State Board of Examiners (the Examiners). The Examiners reply that Fitzgibbons failed to meet the regulatory requirements for issuance of this certificate. N.J.A.C. 6A:9B-8.3(a)(5).

PROCEDURAL HISTORY

Fitzgibbons filed a petition of appeal with the Commissioner of Education (the Commissioner) on April 2, 2018. A Motion to Dismiss, in lieu of an Answer, was filed by the Examiners on June 18, 2018, and the contested case was transmitted to the Office of Administrative Law (OAL) on June 20, 2018. Fitzgibbons opposed the Motion on July 17, 2018. The Examiners replied via letter brief on August 3, 2018, 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

> [t]he 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 purposes of the Motion, the facts alleged by the petition will be deemed admitted. I **FIND** as follows:

Fitzgibbons is a Teacher's Assistant who has been employed by the Hudson County Schools of Technology for approximately thirteen years. On or about April 27, 2015, he submitted an application to the Examiners for a Teacher of Health and Physical Education Certificate of Eligibility. In April 2015, when Fitzgibbons filed his application,

only the Physical Education Content Knowledge portion of the Praxis Examination was required. The applicant also was required to hold a college degree. Fitzgibbons did not meet these two requirements until after he initiated his application. He received a bachelor's degree from Kean University in December 2015. He passed the Physical Education Content portion of the Praxis on January 9, 2016. After April 2015, the certification requirements were expanded to include successfully completing the Basic Skills Assessment on the Praxis II Examination. This part of the Praxis asked an applicant to demonstrate competency in reading, writing and mathematics. Fitzgibbons has been unable to pass the mathematics section, having last sat for the Praxis on October 1, 2016.

Fitzgibbons asserts that his April 2015 application was at some later point "converted to a Teacher of Physical Education Certificate of Eligibility" application. The Examiners reply that they do not "convert" applications, and assert that Fitzgibbons filed two separate applications, one in April 2015 and another in December 2015. The April application was denied both because Fitzgibbons had not yet received a college degree, and because he had not passed the mathematics Praxis. The Examiners shared paperwork that reflects the filing of an application by Fitzgibbons in December 2015, which was accompanied by the requisite fee. While he had obtained his college degree by the time this later application was filed, Fitzgibbon still had not passed the Praxis, and his application was again denied.

On April 24, 2017, Fitzgibbons communicated via counsel with Dr. Robert Higgins, Secretary of the State Board of Examiners, and asked that the Examiners grant his application for a Teacher of Physical Education Certificate of Eligibility. Judith Cifone, Manager of Certification and Induction, replied that Fitzgibbons could file an appeal of the denial of his application; he did so on or about October 18, 2017. Included with the appeal was a letter from Dr. Brett J. Prince of Neurobehavioral Rehabilitation Associates, in support of Fitzgibbons' argument that he suffers from a disability, and that the Americans with Disabilities Act (ADA) thus requires that he be exempted from the examination as an accommodation. That letter is dated May 13, 2017.

The Examiners met on March 1, 2018, considered the arguments of Fitzgibbons' counsel, and again denied Fitzgibbons' application. This appeal followed. The eligibility

requirements for the Teacher of Physical Education Certificate of Eligibility are as set forth at N.J.A.C. 6A:9B-8.3. It is uncontroverted, and I **FIND,** that presently Fitzgibbons has met all certification requirements other than achieving a passing score on the mathematics portion of the Praxis.

CONCLUSIONS OF LAW

The issue presented by this appeal is "whether the decision [by the Examiners to deny Fitzgibbon's application] is consistent with the applicable statutory and regulatory provisions." Walder v. State Bd. of Exam'rs, EDU 08530-14, Initial Decision (November 10, 2014), aff'd with mod., Comm'r (December 29, 2014), <http://njlaw.rutgers.edu/collections/oal/>. Fitzgibbons carries the burden of demonstrating by a preponderance of the credible evidence that he is entitled to the certification 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://njlaw.rutgers.edu/collections/oal/>. I **CONCLUDE** that the Examiners' decision was consistent with applicable law and thus, must be upheld.

All agree that Fitzgibbons met the regulatory requirements for issuance of the controverted certification, with the exception of that contained at N.J.A.C. 6A:9B-8.3(a)(5). The regulation states that "[a]fter September 1, 2015 [a candidate for certification must] achieve a minimum score established by the Department on a Commissioner-approved test of basic reading, writing and mathematics skills..." The date upon which his application was deemed "received" thus becomes critical to Fitzgibbons, who relies upon N.J.A.C. 6A:9B-5.3(b), as follows:

> The Board of Examiner shall issue the appropriate certificate upon the candidate's completion of all certification requirements in effect at the time the Office receives the application...[a]n application shall be deemed filed with the Office when it and all required supporting documentation has been received.

The submissions of the parties suggest a factual issue regarding whether Fitzgibbon's application was "received" before or after September 1, 2015. But, this factual dispute is

not material to my decision. If the application at issue is the one initiated in December 2015, then clearly the requirement that Fitzgibbons pass the mathematics Praxis was in place. And if we accept that the only relevant application was the one initiated in April 2015, the Commissioner's decision in Gueli v New Jersey State Board of Examiners, EDU 06766-17, Initial Decision (January 24, 2018), aff'd, Comm'r (March 8, 2018), <http://njlaw.rutgers.edu/collections/oal/>, disposes of Fitzgibbons' contention that this application was "received" by the Examiners, as that term is intended by the regulation, before September 1, 2015.

Focusing on the phrase "all certification requirements in effect at the time the Office receives the application," Fitzgibbons urges that the mathematics Praxis requirement was not in effect in April 2015 when he initiated his application; accordingly, he is excused from this requirement. The Examiners reply that an application is not deemed "received" until all supporting documentation is on file with the Examiners. Fitzgibbons' application was not complete until after September 2015; indeed, he did not pass the physical education component of the Praxis until January 2016, nor earn his bachelor's degree until December 2015.

Gueli presents analogous facts. The petitioner there initiated the process for a Teacher of Elementary Education Certificate of Eligibility on August 30, 2016. Her application was not deemed complete until the Examiners received an Oath of Allegiance form on September 29, 2016. Prior to September 1, 2016, the applicable regulation permitted an applicant with a GPA between 2.50 and 2.75 to satisfy the GPA requirement by exceeding a passing score on an appropriate subject matter test by ten percent or more. But after September 1, 2016, an applicant had to achieve a cumulative GPA of at least 2.75 to qualify for certification. Gueli's GPA was 2.58; since her application was deemed complete in late September 2016, and not as of the date of initial filing, the Commissioner upheld the Examiners' decision that Gueli did not qualify for a Certificate of Eligibility.

The decision in Gueli is consistent with well-accepted concepts of regulatory interpretation. 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).

Fitzgibbons asserts that his application was "received" by the Examiners in April 2015, but his interpretation would render much of the regulatory language superfluous. Indeed, the regulation indicates that "[a]n application shall be deemed filed...when it and all supporting documentation has been received." This latter phrase, when read in conjunction with the earlier part of the regulation, makes it plain that Fitzgibbons' argument is without merit. His April 2015 application was not "received" until it was complete; by then, the mathematics Praxis had become a requirement. I **CONCLUDE**, per the decision in Gueli, that the Examiners' determination that Fitzgibbons failed to meet the requirements for issuance of a Certificate of Eligibility is consistent with the requirements of N.J.A.C. 6A:9B-5.3(b). I moreover **CONCLUDE** that the Examiners' interpretation of the relevant regulatory language is consistent with the regulatory intent, which is to rigorously vet applicants for certification. 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).

Finally, Fitzgibbons urges that he was entitled to an exemption from the Praxis due to a disability. He claims that denying him an accommodation violates the Americans with Disabilities Act, (ADA), 42 U.S.C. § 12101 et. seq. The Commissioner of Education is without jurisdiction to consider claims arising under this Federal law. 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. For this reason, I **CONCLUDE** that this claim must be dismissed.

And even assuming, for argument's sake, that the Commissioner could address the ADA claim, the Examiners correctly point out that Fitzgibbons' application did not contain a request for an exemption or other accommodation; that request came only later, after his application was denied. Indeed, the letter from his physician post-dates the denial of his application. Nor did he ask for any accommodations during the

administration of the Praxis; indeed, he passed all sections of the test, but for mathematics, without any accommodations. I **CONCLUDE** that Fitzgibbon's contention that he was denied a requested accommodation has no support in the factual record and must be dismissed.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the Board of Examiners' Motion to Dismiss is **GRANTED** 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.

8/8/18
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 8/8/18

Date Mailed to Parties:

sej

C.F. AND E.F., ON BEHALF OF MINOR CHILD, G.F.	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Pro se petitioners appealed the elementary school assignment of their daughter, G.F., for the 2018-2019 school year, and requested that she be reassigned to the Pequannock elementary school that was closest to the house they were in the process of purchasing. The respondent Board denied petitioner's request for a transfer based on Board policy governing school placement. The Board filed a motion for summary decision, which was opposed by petitioners. Oral argument on the motion took place on August 23, 2018, at which time the record closed.

The ALJ found, *inter alia*, that: that there were no genuine issues of material fact in this case, and the matter is ripe for summary decision; the Pequannock Township School District (District) began accepting kindergarten registration applications for the 2018-2019 school year in January 2018; initial kindergarten placement decisions were made on May 2, 2018, and parents were subsequently notified; on May 8, 2018, petitioner registered their daughter, G.F., in the District to begin kindergarten in the 2018-2019 school year; petitioners were informed during the registration process that there was no guarantee that G.F. would be placed in the elementary school closest to the house they were purchasing, and that she could be placed in any of the three elementary schools operated by the District; petitioners were notified on May 18, 2018 that G.F. had been placed in one of the other elementary schools, and began the within appeal; students who were registered for kindergarten in the District after initial assignments were made in early May 2018 were placed in the third kindergarten section, including G.F.; the Board indisputably has the management prerogative to adopt policies regarding the assignment of pupils within the District, and presented ample evidence that Board Policy No. 5120 and the Assignment Plan was followed when placing G.F. for the 2018-2019 school year; there is no evidence to support petitioners' argument that G.F.'s school assignment was based on the fact that she is Hispanic; and the Board did not act in an arbitrary or capricious manner, or with bad intentions, in effectuating G.F.'s placement in accord with established policy. The ALJ granted the Board's motion for summary decision.

Upon consideration and review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, and the petition was dismissed with prejudice.

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

November 2, 2018

OAL DKT. NO. EDU 08309-18
AGENCY DKT. NO. 137-6/18

C.F. AND E.F., ON BEHALF OF MINOR CHILD, G.F.	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner adopts the Administrative Law Judge's (ALJ) recommended decision for the reasons thoroughly set forth therein. Accordingly, the petition of appeal is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11/02/18
Date of Mailing: 11/02/18

*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 08309-18
AGENCY DKT. NO. 137-6/18

C.F. AND E.F. ON BEHALF OF
MINOR CHILD G.F.,
Petitioners,
v.
TOWNSHIP OF PEQUANNOCK BOARD
OF EDUCATION, MORRIS COUNTY,
Respondent.

C.F. and **E.F.**, petitioners, pro se

Amy E. Canning, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: August 23, 2018 Decided: September 26, 2018

BEFORE **SUSANA E. GUERRERO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or around June 8, 2018, C.F. and E.F., parents of minor child G.F, (petitioners) filed a Petition of Appeal with the Commissioner of Education seeking to change the assignment of their daughter, G.F., from one Pequannock elementary school to another.

Respondent Township of Pequannock Board of Education (Board or Respondent) denied petitioners' request for a transfer based on Board policy governing placement.

Petitioners initially requested that the matter be considered on an emergent basis, and an emergent hearing was scheduled for June 20, 2018. Petitioners withdrew their request for emergent relief on that day, and an evidentiary hearing was scheduled.

Respondent subsequently filed a motion for summary decision, which petitioners opposed, and oral argument on the motion took place on August 23, 2018, at which time the record closed.

FACTUAL DISCUSSION

Based on the submissions presented, and oral argument on the motion, I rely on the following **FINDINGS of FACT** in deciding this motion:

On or shortly after May 8, 2018, petitioners presented to register their daughter, G.F., in the Pequannock school district (District), where she would be enrolled in the 2018–2019 kindergarten class. Petitioners were in the process of purchasing a home in Pequannock that was close to Hillview Elementary School (Hillview). The proximity of the house to this school was a factor in their purchase. While enrolling G.F. in the District, petitioners were informed that there was no guarantee that G.F. would be placed at Hillview, and that she could be placed in another elementary schools in the District. Respondent operates three public elementary schools in Pequannock, all of which contain kindergarten classes: Hillview, Stephen J. Gerace Elementary School (SJG), and North Boulevard Elementary.[1] Hillview is generally considered by many in the District to be the "best" and most desirable of the three elementary schools.

The District began accepting kindergarten registration applications for the 2018–2019 school year in or around January 2018. On May 3, 2018, initial placement decisions

[1] All three schools are located on the same road. Hillview is located between SJG and North Boulevard, and the distance between Hillview and these schools is approximately one mile.

were made, and parents were subsequently notified. Petitioners' application was received after the initial kindergarten placements had been made.

On or around May 18, 2018, petitioners were informed that G.F. had been placed at SJG. Petitioners contacted Pequannock's Superintendent of Schools to request a change in kindergarten placement based on the location of their home, as it was closest to Hillview. The Superintendent indicated that he was unable to change G.F.'s placement, as her placement was consistent with Board policy, and he referred petitioners to the District's "Elementary School Attendance Plan."

Board Policy No. 5120 and the attendance area plan referenced therein set forth the factors to be considered when assigning students to elementary schools within the District. Policy No. 5120 was adopted by the Board in response to declining enrollment in the District over the past several years. It states in relevant part:

> The Board of Education directs the Superintendent to assign elementary students to the schools of the District according to an attendance area plan which shall be approved by the Board. Taken into account for the establishment of attendance areas is the concept of maximum stability over the long range which promotes continuity to a given school, with minimum or no changes. The attendance plan was established for the best utilization of buildings and optimum space provisions for instructional purposes.
>
> Assignment to Elementary School
>
> In the assignment of students to schools, consideration shall be given to the following rank-ordered factors in the following sequence:
>
> 1. Special/Mandated Programs – Programs that address individual student needs, such as English-as-a-Second Language and Special Education placements;
>
> 2. Siblings – Sisters and brothers shall be assigned to the same school whenever possible; and
>
> 3. Class Size – Every reasonable effort shall be made to provide relative equality in class sizes at each grade level throughout the district as determined by the Superintendent

> of Schools and regulated by New Jersey QSAC . . . Regulation.
>
> For all enrollment requests made after June 13, 2008 (May 30 of 2009 and for every year thereafter), the student's assignment will be made on a space available basis. The Superintendent of Schools shall assign the student to a school with the most potential room in order to provide relative equality in class sizes across all elementary schools. Once assigned to an elementary school, the student's family will be added to that school's attendance zone, making it the permanent school for all of the student's siblings.
>
> The Superintendent of Schools may make exceptions to this policy for extraordinary reasons. Requests for exceptions to school assignments shall be made in writing to the Superintendent of Schools.

Pequannock's "Elementary School Attendance Plan" (Attendance Plan),[2] which was referred to by respondent when the Superintendent denied petitioners' transfer request, states that it is "designed to ensure the best utilization of school facilities and optimal space provisions for the enhancement of instruction." The Attendance Plan lists the criteria to be considered in assigning elementary students to their school building:

> 1. Kindergarten students will be assigned to the school where an older sibling attends.
>
> 2. Each school will have two sections of kindergarten in their building.
>
> 3. A third section will be added each year in one of the elementary schools on a rotating basis.
>
> 4. Kindergarten students who are new to the district will be assigned with the aim of balancing class sizes.
>
> 5. Classes will have level enrollment in all three elementary schools. All new students (K-5) will be assigned to the school with the lowest class size for the enrolling grade.

[2] The "Elementary School Attendance Plan" is the attendance area plan referred to in Policy No. 5120 and therefore incorporated by reference into the Policy.

> 6. Once a student is assigned to an elementary school, he/she remains in that school until he/she goes to middle school . . . .
>
> 9. Assignments will not be made based on the geographical location or proximity of the child's residence to an elementary school.
> 10. The attendance zone for K-5 students will be the total area known as the Pequannock Township.
>
> 11. Only exceptions noted in this plan will be considered when assigning students to a particular school. Example: existing sibling in a school.
>
> 12. All residences in the Township will be considered part of one residential zone for Grade K-5 placement.

After the Superintendent denied petitioners' initial request for a transfer, C.F. researched and compared the performance of Hillview and SJG and concluded that SJG "far underperforms when compared to Hillview." Petitioners reached out to the Superintendent again to appeal G.F.'s placement and the Superintendent again indicated that he was following Board policy concerning placement. Petitioners then researched demographic information for each District elementary school and concluded that there are a greater number of minority students at SJG as compared to the other two elementary schools. According to the Petition of Appeal, C.F. then asked the Superintendent if G.F. was placed at SJG because she is Hispanic, and again the Superintendent responded that placement is determined pursuant to the aforementioned policy. While the Petition does not expressly claim that G.F. was placed at SJG because she is Hispanic, it is suggested that her ethnicity may have played a role in her placement since petitioners identified G.F. as Hispanic on the application. The Petition also asserts that respondent is "not only forbidden to segregate, they are also required to make every effort to ensure racial balance."

For the 2018–2019 school year, two kindergarten classes were assigned to each of the three schools and a third section was assigned to SJG.[3] Students who register for kindergarten after the initial assignments were made (on May 3), were placed in the third

[3] The third section of kindergarten is assigned on a rotating basis each year. SJG was assigned as the third section for the 2018–2019 school year.

section, at SJG, with the exception of those students assigned to Hillview or North Boulevard because they either require special education services or have an older sibling enrolled in one of those two schools. G.F. does not receive special education services, nor does she have an older sibling in the District.

After placements were announced by the District in May 2018, respondent received multiple requests from District parents to have their children transferred to Hillview from SJG or North Boulevard and those requests were also denied pursuant to Policy No. 5120 and the Attendance Plan.

Respondent's Motion for Summary Decision

Respondent maintains that the District has consistently and carefully followed the requirements set forth in Policy No. 5120 and the Attendance Plan, and did so with respect to G.F.'s placement. Petitioners registered their daughter after the initial student placements had been established, and pursuant to Policy No. 5120 and the Attendance Plan, the District assigns new students to the school with the lowest class size, regardless of the student's proximity to any school. Here, the school with the lowest class size was SJG, where the third (rotating) kindergarten class was assigned that year, and where all new students registering after the initial registration period were assigned since it contained the fewest number of students. The Attendance Plan specifically states that geographical location or proximity of the child's residence to the school is not considered in placement, and the attendance zone for elementary school students is the entire Township of Pequannock.

Pursuant to Policy No. 5120, consideration is given to three "rank-ordered factors" when assigning students to elementary school: (1) the availability and location of special/mandated programs that address individual needs, such as the English Language Learners program and special education services; (2) efforts are made to ensure that registering students are placed in the same school as an older sibling; (3) the size of each class is considered. The Policy requires that every reasonable effort must be made to

provide "relative equality" in class size.[4] For those who register for kindergarten after the initial school assignments are made (in April or early May of each year), the policy directs that these students' assignments "will be made on a space available basis." Specifically, the Superintendent is directed to "assign the students to a school with the most potential room in order to provide relative equality in class sizes across all elementary schools." Here, the school with the most potential room is SJG since that school was assigned the third kindergarten class for the school year and had the lowest enrollment. According to Policy No. 5120, exceptions to the Policy can only be made for "extraordinary" reasons, which do not exist here.

Respondent denies that G.F.'s assignment was based on any individual characteristic, including her ethnicity, and the Superintendent denies that he was even aware of G.F.'s ethnicity when she was placed at SJG. In response to petitioners' assertion that SJG houses a disproportionate number of minority students, respondent provided data on the racial and ethnic breakdown in each of the three schools.[5] Respondent maintains that any discrepancies in these figures is not significant, and certainly not enough to suggest a discriminatory practice, or an arbitrary or unreasonable policy of discrimination against any student.[6]

Respondent maintains that the Board has a legal right to assign and/or transfer its students, and the Attendance Plan expressly states that all Pequannock residences are considered part of one residential zone for kindergarten through fifth grade placement.

Finally, respondent asserts that petitioners cannot demonstrate that the Board's decision concerning G.F.'s placement was arbitrary, unreasonable or capricious because they cannot establish that G.F.'s ethnicity influenced her placement. Her placement was

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[4] During the initial registration process, the administration also takes into consideration, to the extent practicable, two additional factors: the gender of each enrolling child (in an effort to ensure a reasonably equal balance of female and male students assigned to each class); and the proximity of each family's home to the assigned elementary school. This, however, does not apply to G.F. since she registered with the District after the initial kindergarten placements were made.

[5] Respondent refers to statistics reflecting that Hispanic students compose 11% of the students at SJG, 7.7% at Northern Boulevard, and 6.4% at Hillview.

[6] Data was provided from the 2016-2017 Demographic NJ School Performance Reports showing 18.5% minority students at SJG; 9.7% at North Boulevard, and 10.5% at Hillview.

made in accordance with Board Policy, and since she was registered after the administration finalized initial enrollment figures on May 3, 2018, her placement, like those of all other students who registered after May 3, was entirely governed by the need to balance class sizes (with the exception of students with older siblings or special education needs), and the District was balancing class sizes by assigning new students to the third kindergarten class at SJG, which contained the fewest students.

Petitioners' Response to the Motion for Summary Decision

Petitioners assert that since Policy No. 5120 was adopted in 2015, there has been an increase of minority students being placed at SJG and that it is "alarming that the minority students are being placed at the lowest performing school rather than the highest performing school." Petitioners alleged in their written opposition to the motion for summary decision that this amounts to racial discrimination. At oral argument, petitioners testified that while the District may not have intended to discriminate against its students when it adopted Policy No. 5120 and the Attendance Plan, the Policy Plan had a discriminatory effect in the District.

Petitioners provided statistics on the percentage of minority students at SJG over the past three years (where minorities totaled 14% of students for the 2014–2015 school year and increased to 18.4% two years later), and results of State testing at the three District elementary schools. Petitioners assert that the District has an obligation to balance the racial and ethnic composition of students in the three District schools given the current discrepancy of minority students attending these schools and the fact that the school with the highest level of minority students is also the "lowest performing" of the three. This, petitioners suggest, is an "extraordinary reason" for the District to make an exception to Policy No. 5120 and reassign G.F. to Hillview.

Petitioners conceded at oral argument that they have no evidence to support their suggestion that G.F. was intentionally placed at SJG because she is Hispanic, nor that the District deviated from its policies or practice with respect to G.F.'s assignment. At oral argument, C.F. testified that he did not know if his daughter was targeted by the District.

Petitioners also claimed that they were not aware of the District's registration deadlines and timeframes in making placement decisions, and that the District does not appear to follow its policies with respect to the initial placement decisions for kindergarten.

ANALYSIS

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." N.J.A.C. 1:1-12.5(b). To survive a 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/decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995).

It is well settled that actions of local school boards that lie within their discretionary powers may not be disturbed unless they are arbitrary, without rational basis or induced by improper motives. Kopera v. West Orange Board of Educ., 60 N.J. Super. 288 (App. Div. 1960). The management prerogative of boards of education cannot be usurped or assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis. G.M. v. Roselle Park Borough Bd. of Educ., 95 N.J.A.R. 2d (EDU) 107, 109, adopted Comm'r. 95 N.J.A.R. 2d (EDU) 110 (citing Paddock v. Board of Educ. of the Borough of Demarest, 1974 S.L.D. 435).

In G.M., the Administrative Law Judge (ALJ) found that the board of education's decision to change geographic boundaries for kindergarten pupil placement, with a goal of evenly distributing the pupils at different schools within the district, was a reasonable exercise of its authority. Fullen v. Middletown Twp. Board of Educ., 1986 S.L.D. 582, adopted Comm'r. 1986 S.L.D. 603, also dealt with the issues of school overcrowding and redistricting plans. In Fullen, the ALJ stated: "A policy or rule of a board of education is reasonable if it is designed to achieve a legitimate goal . . . . While pupils have a constitutional right to receive a thorough and efficient program of education, there is no

corollary right to receive such education in a specific schoolhouse in the district." Fullen, at 598, 601.

Here, there is no genuine issue as to any material fact. There is no dispute that petitioners registered their daughter in the Pequannock School District after the initial period of enrollment had closed, and that Board Policy No. 5120 and the Attendance Plan govern the assignment of kindergarten students in the District following the initial enrollment period. It is also clear that the Policy/Plan indicate that assignments for new students (i.e., those enrolling after the initial enrollment period) in the District will not be made based on proximity of the child's residence to the school. Instead, according to the Policy/Plan, new students are assigned to the school with the lowest class size for the enrolling grade, with the aim of balancing class size. Petitioners do not dispute that SJG's third kindergarten class, where G.F. was assigned, had the lowest class size. Respondent provided Certifications from the Superintendent, Dr. Brett Charleston, and the District's Data Analyst and Administrative Assistant to the Superintendent, that detail how the kindergarten students, including G.F., were assigned to their respective schools. Nothing in the record suggests that respondent deviated from Policy No. 5120 or the Attendance Plan when it assigned G.F. to SJG.

The Board indisputably has the management prerogative to adopt policies addressing the assignment of pupils within the District, and it presented ample evidence to support a legitimate reason to adopt Policy No. 5120 and the Assignment Plan—i.e., to address decreasing enrollment in the District and the need to balance class size. Petitioners do not challenge the Board's stated reasons for adopting Policy No. 5120. Instead, they assert in their Petition that G.F. should be reassigned from SJG to Hillview because her placement at SJG may have been improperly motivated by the fact that she is Hispanic, and also to "help the balance of minority students within the district."

Nothing presented in the written record or at oral argument supports the suggestion that G.F. was assigned to SJG because she is Hispanic. Petitioners testified that they do not know whether G.F. was ever "targeted" by respondent for being Hispanic, and they conceded that they have no evidence to support a claim that she was assigned to SJG because she is Hispanic.

Petitioners claim that Policy No. 5120 has had a discriminatory effect because it has resulted in an increase in the number of minority students at SJG when compared to the other two schools, and SJG does not perform as well as the other two schools on the State standardized assessments. Petitioners assert, without offering any legal support, that respondent has a duty to "ensure racial balance," and as a Hispanic student, G.F. should be reassigned to Hillview to help balance the minority population in the District. At oral argument, petitioners suggest that respondent should make an exception to Policy No. 5120 with respect to G.F. and reassign her to Hillview to balance the racial/ethnic composition of the District schools. This, however, cannot reasonably be considered an "extraordinary reason" to justify an exception to the Policy. Moreover, the Attendance Plan specifically states that "only exceptions noted in this plan will be considered when assigning students to a particular school."[7] None of the possible exceptions to the Policy as outlined in the Plan apply to G.F., and assigning, or reassigning, students in the District based on their race/ethnicity is inconsistent with the District's Policy.

As parents, it is understandable that petitioners want to see their daughter attend the "best" school in the District, and while they have a right to a thorough and efficient education, they do not have a legal right to receive this education in the school of their choosing within the District.

CONCLUSION AND ORDER

As the moving party, respondent Board carries the burden of proof to demonstrate, by a preponderance of the credible evidence, that summary decision should be entered in favor of respondent because there is no dispute as to any genuine material fact and the Board is entitled to judgment as a matter of law. Here, there is no material fact in dispute and respondent has sufficiently established that summary decision is appropriate because G.F. was assigned to SJG in accordance with Board Policy, and the Board did not act arbitrarily, unreasonably or with bad intentions in effectuating this placement. After

[7] The exceptions noted in the plan are limited to (1) having a sibling in another school; or (2) the need for special education services available at another school.

considering all of the proofs and arguments relative to the motion, I **CONCLUDE** that respondent has met its burden.

Based on the foregoing, I **CONCLUDE** that the respondent's motion for summary decision should be **GRANTED**.

It is, therefore, **ORDERED** that the motion for summary decision filed by the respondent, Pequannock Township Board of Education, is **GRANTED** for the reasons stated herein.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 26, 2018
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: September 26, 2018

Date Mailed to Parties:

jb

OAL DKT. NO. EDU 6940-18
AGENCY DKT. NO. 94-2/18

J.W., on behalf of minor children, J.W., J.W., AND J.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NEPTUNE, MONMOUTH 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 that includes an advisement of petitioner's failure to appear at the scheduled September 12, 2018 OAL hearing – has been reviewed. Petitioner did not file an explanation for his 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: 11/02/18
Date of Mailing: 11/02/18

* 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 13710-18
(EDU 13244-17 ON REMAND)
AGENCY DKT. NO. 156-7/17

LORETTA SIRMAN FERGUSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed stipulation of settlement and general release (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 Agreement, and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/02/18
Date of Mailing: 11/02/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 13710-18
(On Remand EDU 13244-17)
AGENCY DKT. NO. 156-7/17

LORETTA SIRMAN FERGUSON,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,

Respondent.

Robert M. Schwartz, Esq., for petitioner (Schwartz Law Group, LLC, attorneys)

Adam S. Herman, Esq., for respondent (Adams Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: September 27, 2018 Decided: October 3, 2018

BEFORE **TAMA B. HUGHES**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 24, 2018, as a remand of OAL Docket No. EDU 13244-17, for authorization of the Settlement Agreement in accordance with N.J.A.C. 6A:3-1.13 or determination as a contested case, pursuant to N.J.A.C. 1:1-8.2, N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 if the parties are unable to resolve the matter.

The parties have agreed to a settlement and have executed the Settlement Agreement, which is attached hereto.

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

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

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

3. The Settlement Agreement has been executed by in accordance with N.J.A.C. 6A:3-1.13(d).

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.

October 3, 2018
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: 10.9.18

Date Mailed to Parties: 10.9.18

tat/lam

Attachment

SEP 28 2018

STIPULATION OF SETTLEMENT AND GENERAL RELEASE IN FULL

The Camden City Public Schools whose principal office is located at 1033 Cambridge Street, Camden, New Jersey 08105, and its successors, assigns, officers, employees, agents and representatives (collectively, "District"), and Loretta Sirman-Ferguson, residing at 18 Prospect Street Apt. 3C South Orange, New Jersey 07079 ("Ms. Ferguson") (collectively, the "Parties"), have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete global settlement of all outstanding issues as detailed below.

WHEREAS, Ms. Ferguson was most recently employed by the District as a Lead Educator prior to her non-renewal effective July 1, 2017; and

WHEREAS, on or about July 17, 2017, Ms. Ferguson filed a Petition of Appeal ("Petition") with the New Jersey Commissioner of Education ("Commissioner"), which was docketed as Agency Reference Number 156-7/17; and

WHEREAS, the Commissioner transmitted the Petition to the Office of Administrative Law, which was docketed as EDU 13244-2017S and assigned to the Honorable Tama B. Hughes, A.L.J.; and

WHEREAS, on or about August 1, 2017, Ms. Ferguson also filed a Charge of Discrimination ("Charge") with the Equal Employment Opportunity Commission ("EEOC), which alleged race and age discrimination and retaliation, which was assigned docket number 530-2017-03367;

WHEREAS, the Parties intend to adopt, by way of compromise and accord, an amicable final resolution of the subject Petition and Charge; and

NOW THEREFORE, in consideration of the foregoing and of the mutual agreements contained herein, and intending to be legally bound, the Parties mutually agree as follows:

1. **RECITALS**

a. Ms. Ferguson agrees to dismiss the Petition with prejudice.

b. Ms. Ferguson also agrees to withdraw the Charge with Prejudice. A copy of Ms. Ferguson's letter to the EEOC withdrawing the Charge is attached hereto as Exhibit "A."

c. As more fully set forth in Section 5 below, in the event that the EEOC recommends or grants relief to Ms. Ferguson, or in the event that any entity pursues the allegations in her Charge on her behalf, despite her withdrawal with prejudice of the Charge, Ms. Ferguson agrees not to accept any resulting relief whatsoever.

d. Ms. Ferguson waives all claims to tenure and recall to all titles/positions with the District, including, but not limited to, Supervisor, Teacher Trainer and Evaluator and Lead Educator.

e. Ms. Ferguson will receive a check from the District in the gross amount of one hundred and ninety thousand dollars ($190,000.00). The District shall issue to Ms. Ferguson a Form 1099 with the said payment.

f. The District makes no representations as to the tax consequences of the payments referred to in Section 1(e) and shall assume no responsibility for any tax liability attributed to Ms. Ferguson. Ms. Ferguson agrees to pay any and all taxes and liabilities found to be owed from the payments made pursuant to this Agreement. Ms. Ferguson agrees to indemnify and hold the District harmless from any claims, assessments, demands, taxes, penalties and interest owed, or found to be owed, as a result of any payment made pursuant to this Agreement.

g. Ms. Ferguson understands and agrees that to the extent any unemployment compensation she received on or after July 1, 2017 in connection with her separation of employment from the District is required to be paid back to the State of New Jersey, that she shall be solely responsible for same.

h. Ms. Ferguson and the District each agree to bear her/its own costs and attorneys' fees, if any, which have been incurred in connection with the within matter and in connection with the negotiation and preparation of this Agreement. Ms. Ferguson and the District each agree that no monetary amounts other than the settlement payment described in Paragraph 1(e) shall be paid in connection with this matter, and Ms. Ferguson expressly agrees that she shall not receive any other payment and shall not seek to collect any attorney's fees or cost. It is expressly agreed by Ms. Ferguson and the District that neither party will be considered a prevailing party.

i. In addition, Ms. Ferguson agrees to the terms as set forth in the remaining sections of the Agreement.

2. **SCOPE OF AGREEMENT**

This Agreement sets forth the terms and conditions under which the Parties mutually agree to resolve the following claims: all claims raised, or which could have been raised in the subject Grievance. The Parties do recognize there may be other claims which this Agreement does not resolve, which are, claims, if any, arising from the breach of this Agreement. As a result, any claims arising from breach of this Agreement are specifically excluded.

3. **NO ADMISSION OF LIABILITY**

This Agreement is a result of a compromise and accord to buy the Parties' peace. It is expressly understood and agreed that nothing contained in this Agreement is intended to be, nor

shall be construed as, nor shall be represented by any party, their attorneys or their agents to be, as an admission or determination of liability by the District, or its agents, employees or members, as to the validity of any claims asserted or assertable in the Settled Claims, as the District continues to deny any liability and disclaim any responsibility for such claims. It is agreed that this Agreement shall not be used by any party as evidence or in any other matter or for any other purpose in any court proceeding or any other proceeding except for an action arising under paragraph 2 (b) of this Agreement, or in an action concerning any Party's tax status.

4. **NO RE-EMPLOYMENT**

Ms. Ferguson's last day of employment was June 30, 2017. Ms. Ferguson will not apply for reemployment with the District at any time. If Ms. Ferguson does apply for reemployment with the District and is approved for employment, the terms of this Stipulation of Settlement shall control and shall be grounds for the immediate termination of Ms. Ferguson's employment.

5. **RELEASE AND EXTINCTION OF CLAIMS**

(a) In exchange for the consideration set forth above, the sufficiency of which is hereby acknowledged, Ms. Ferguson hereby waives, releases and discharges any and all claims or rights that she has or may have against the District, including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Ms. Ferguson's employment with the District or separation from employment with the District. It specifically includes, without limitation, all claims which Ms. Ferguson may have regarding back pay, tenure, seniority, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker

Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on her employment by and/or termination of her employment with the District, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, wages, attorneys' fees, costs, and/or future wage loss.

(b) To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Ms. Ferguson of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement.

Accordingly, by executing this Stipulation, Ms. Ferguson acknowledges that she: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has 7 days from the date of the execution of this Stipulation of Settlement to revoke it. Ms. Ferguson understands that she may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the 7 day period.

(c) Ms. Ferguson warrants that she has not commenced any additional legal proceedings of any type (including but not limited to charges filed with any governmental agency) aside from the instant Petition and the Charge identified by Docket Number 530-2017-03367. Ms. Ferguson agrees that she will not commence any additional legal proceedings against the District arising from or relating to anything that has happened up to the date that this Agreement is formally approved by the District. In the event of a violation of this paragraph, Ms. Ferguson agrees that the District shall be entitled to immediate dismissal of the legal proceedings, and that she shall be responsible for the District's attorneys' fees and costs incurred in connection with those legal proceedings.

(d) Should any entity, agency, commission, or person file a charge, action, complaint or lawsuit against the District based upon any of the dismissed or above-released claims, Ms. Ferguson agrees to present this Agreement to that entity, agency, commission or person and further agrees not to seek or accept any resulting relief whatsoever, whether it be monetary or non-monetary.

6. **NON-DISPARAGEMENT**

Ms. Ferguson and the District agree not to disparage each other, and further Ms. Ferguson agrees to not disparage any of the District's employees or former employees. In the event of a claimed breach of this provision, either Party may seek relief, including damages, restitution and injunctive relief, at law or in equity.

7. **COVENANT OF GOOD FAITH AND FAIR DEALING**

The Parties expressly agree that their performance under this Agreement is to be governed by a covenant of good faith and fair dealing. No Party will take any action which would deprive another of the full benefit of the Agreement.

8. **FULL UNDERSTANDING**

This Agreement sets forth the complete understanding and entire agreement between the Parties and supersedes any and all prior agreements or understandings between the Parties. This Agreement may not be modified, altered, changed, discharged, terminated or waived except upon express written consent of the parties wherein specific reference is made to this Agreement. It is agreed that there are no other understandings or agreements (either written or oral) which would have any impact upon the present Action. By executing this Agreement, Ms. Ferguson represents and acknowledges that she does not rely, and has not relied upon, any representation or statement not set forth in this Agreement made by the District or its counsel with regard to the subject matter, basis, or effect of this Agreement or otherwise.

9. **MATERIALITY**

The Parties agree that each paragraph of this Agreement is material. In the event that any portion of this Agreement is determined to be illegal, the Parties agree, in advance, to reform the

Agreement in good faith to provide each Party with the full benefit of the settlement memorialized by this Agreement to the extent permitted by law.

10. NON-PRECEDENTIAL

This agreement shall not constitute a precedent in any matters involving other Perguson employees.

11. SERVICES OF COUNSEL

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 they enter into this Agreement knowingly, willingly and without any coercion or improper inducements.

12. AUTHORITY OF SIGNATORIES

Each signatory represents that she or he is a Party or has been duly authorized by a Party to sign on that Party's behalf and that, in the case of the District, all procedural formalities attendant to the execution of this Agreement have been satisfied. The signatory for the District further covenants that he or she is duly empowered by the District to sign this Agreement and that there is no legal reason (i.e. receivership or bankruptcy) which prevents or will prevent the District from completely performing its obligations under this agreement.

13. LAW GOVERNING

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

14. SEVERABILITY

Should any provision of this Agreement be declared or determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not be part of this

Agreement.

15. **EXECUTION IN COUNTERPARTS**

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.

16. **FORMAL APPROVAL**

This Stipulation of Settlement is subject to the formal approval of the State District Superintendent.

WITNESS

_____ Loretta Sirman 7/30/18
LORETTA SIRMAN

Date:

WITNESS

Tonya D. Beaman
TONYA D. BEAMAN
Special Assistant
Date: 8/7/18

Katrina T. McCombs
CAMDEN CITY SCHOOL DISTRICT
By: Katrina T. McCombs
Acting Superintendent
8/7/18

CERTIFICATION

I, Loretta Ferguson, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this 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: July 30, 2018

Loretta Sirman

Loretta Sirman

EXHIBIT "A"

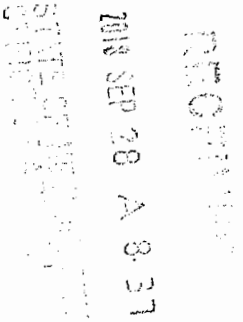
LETTER TO EEOC WITHDRAWING CHARGE NUMBER 530-2017-03367 WITH PREJUDICE

By way of this letter I wish to withdraw the EEOC complaint having Charge No. 530-2017-03367 with prejudice.

Date: July 30, 2018

Loretta Sirman

Loretta Sirman



CERTIFICATION OF CONSENT TO SETTLEMENT BY RESPONDENT TO THE SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-1.13(d):

Dated: 9/27/18

Adam S. Herman, Esq.
ADAMS, GUTIERREZ & LATTIBOUDERE
Attorneys for Respondent, Camden City Public Schools

COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY

IN THE MATTER OF THE TENURE HEARING OF ALBERT D. PORTER BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY	: BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY : : AGENCY DOCKET NO. 104-4/18 : : OPINION AND AWARD

BEFORE: CAROL F. LASKIN, ESQUIRE, ARBITRATOR

Appearances:

Board of Education
Frank DiDomenico, Esquire

Respondent, Albert D. Porter
Kevin McCann, Esquire
Chance & McCann, LLC

Pursuant to N.J.S.A. 18A:6-16, as amended by *P.L. 2012, c. 26* ("TEACHNJ"), tenure charges were brought by the Board of Education of the City of Vineland, Cumberland County ("Petitioner", "District" or "Vineland") against Albert D. Porter ("Respondent" or "Porter") on April 25, 2018. Respondent filed an Answer to the tenure charge with separate defenses on May 8, 2018.

This matter was referred to me by the Bureau of Controversies and Disputes on May 18, 2018, for hearing and decision. The hearings in this matter were conducted on June 26, 2018 and July 16, 2018, at the Board of Education of the City of Vineland. Final submissions were received by late August, whereupon the record was closed.

Thereafter, on September 25, 2018, Respondent applied to reopen the record to include the decision of the Appeal Tribunal, *In The Matter of Albert Porter and City of Vineland Board of*

Education, dated September 13, 2018, issued in reference to Respondent's claim for Unemployment benefits. The District objected, resulting in the undersigned's Ruling, issued October 19, 2018, denying the application.

THE CHARGE

The Sworn Tenure Charge brought against Albert D. Porter, in pertinent part states:

"On January 19, 2018, the Athletic Director for the Vineland School District was advised by two staff members that Albert D. Porter, a tenured social studies teacher at Vineland High School and head coach of the boys' basketball team, was having an inappropriate and improper relationship with a fifteen-year old male freshman student at the high school who is also a member of the boys' basketball team.

The Athletic Director contacted the Principal of the high school who in turn contacted the student's mother. The student's mother granted permission for her son, A.R., to meet with the High School Principal, the Athletic Director and Guidance Counselor. A.R. confirmed that Porter had driven him home from basketball practice and on at least two occasions, on January 17, 2018 and January 18, 2018, Porter drove the student to Porter's home.

A.R. stated that while alone with Porter at his home, Porter applied a cream substance to his bare back. A.R. indicated that Porter referred to this as "blessed cream." When asked if the student had reported an injury to Mr. Porter which required some type of cream, the student replied "No."

The City of Vineland Police Department, as well as the Department of Children and Families, were contacted and each has an ongoing investigation.

Vineland Board of Education Policy #3281, Inappropriate Staff Conduct, specifically prohibits any inappropriate conduct or conduct unbecoming between a staff member and a student. The policy specifically states that, "School staff shall not engage or seek to be in the presence of a pupil beyond the staff member's professional responsibilities." That same policy also prohibits all school staff from providing transportation to a pupil in their private vehicle or even permitting a pupil to drive in their private vehicle. Porter's conduct was in violation of Policy #3281.

Albert D. Porter's conduct was inappropriate, improper and contrary to Board policy and creates just cause for a charge of dismissal.

The conduct of Albert D. Porter as set forth here and above and as summarized, constituted improper and inappropriate conduct with a student and constituted unbecoming conduct and

constitutes just cause for dismissal, pursuant to NJSA 18A:6-10(b)." (J-1)[1]

BOARD POLICY

The charge identified Board Policy # 3281 *Inappropriate Staff Conduct - Teaching Staff Members, B-7.* The Policy is nine pages in length. Specific language referenced therein by the District at hearing and in its post hearing submissions articulates.

> "In support of this Board's strong commitment to the public's trust and confidence of school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.
>
> The Board recognizes and appreciates the staff-pupil professional relationship that exists in a school district's educational environment. This Policy has been developed and adopted by this Board to provide guidance and direction to avoid actual and/or the appearance of inappropriate staff conduct and conduct unbecoming a school staff member toward pupils.
>
> School staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate language or expression in the presence of pupils. School staff shall not engage in inappropriate conduct toward or with pupils. ***School staff shall not engage or seek to be in the presence of a pupil beyond the staff member's professional responsibilities. School staff shall not provide transportation to a pupil in their private vehicle or permit a pupil into their private vehicle unless there is an emergency or a special circumstance that has been approved in advance by the Building Principal/immediate supervisor and the parent/legal guardian.***
>
> The Commissioner of Education has determined inappropriate conduct by a school staff outside their professional responsibilities may be considered conduct unbecoming a member. Therefore, school staff members are advised to be concerned with such conduct which may include, but not limited to, communications and/or publications using e-mails, text-messaging, social networking sites, or any other medium that is directed and/or available to pupils or for public display.
>
> A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety and welfare of school pupils. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the member may also include conduct not specifically listed in this Policy, but conduct

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[1] Exhibits shall be referenced as J-Joint, B-Board and R-Respondent.

determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education and/or appropriate courts to be inappropriate or conduct unbecoming a school staff member." (B-7, emphasis supplied)

ISSUE PRESENTED

Has the Board of Education of the City of Vineland, Cumberland County, met its burden of establishing, by a preponderance of the credible evidence, the tenure charge against Respondent, Albert D. Porter?

If so, does the tenure charge warrant dismissal or a lesser discipline?

BASIC EVIDENTIARY FINDINGS

At hearing, the parties were zealously represented. Each was given a full opportunity to present testimony, written evidence, cross-examine witnesses and submit post hearing briefs.

Petitioner Vineland proffered:

Dr. Mary L. Gruccio - Superintendent
Dr. Joseph Rossi - Executive Director of Personnel
Donald Robbins - Athletic Director
Darya Tomassello - Athletic Trainer
David Reckenbeil - Athletic Trainer

Respondent, Albert D. Porter, testified on his own behalf, in addition to:

Iesha Diggs - Parent
Richard Panas - an Assistant Vice Principal at Vineland High School

Based upon a through review of the record, including all admitted exhibits, testimony, admissions, stipulations, arguments and observations of the demeanor of each witness, I ***find*** the following as ***fact***:[2]

The City of Vineland, Board of Education, is a comprehensive public school district serving approximately 11,500 students in pre-kindergarten through twelfth grade. Vineland High School,

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[2] Controverted evidence will be identified in *Position of the Parties* below.

North and South, houses ninth through twelfth grade, approximately 2,700 pupils. The majority of the students in the district are eligible for free or reduced lunch.

Albert D. Porter is a certified teacher employed by the district for approximately twenty-two and a half years. He commenced employment in 1976, remaining through 1989. Between 1989 and 2000, Porter was the CEO of the Martin Luther King Academy. In 2000, he returned to Vineland High School serving as a history teacher. For the past ten years, he was assigned to instruct two courses: the *African-American Experience I* and *African - American Experience II.* In addition to academic duties, Porter served as a co-advisor to the Vineland High School Student Government Association, as the advisor to the African American Cultural League, and as a "mentor." He was also appointed head basketball coach in 2017-2018.

A few years ago, Respondent was awarded *Teacher of the Year*, a process consisting of nominations, by students, teaching peers, and administration, leading to a committee decision and vote. Prior to the 2017/2018 school year, Porter was not the subject of any discipline. Prior to these charges, Porter was well-known and a respected member of the Vineland community. On January 12, 2018, he was honored with the *Dr. Martin Luther King Award* for his commitment to the Vineland community.

Mentor

Throughout his years at Vineland High School, Porter supported numerous students seeking academic/emotional guidance. He took students to college fairs and helped with their submissions of college applications. He was particularly noted for assistance in obtaining admissions for students at historically black colleges. Approximately five (5) years ago, Dr. Thomas McCain, Principal of Vineland High School, removed an academic period from Respondent's schedule. Instead of the

normal six (6) academic periods of teaching history, the last period of the day was dedicated to assisting all students and to mentioning "at-risk-students." Parents were notified of and granted permission for Mr. Porter to "Mentor" their child.

The students were identified by teachers, guidance counsel and social workers. Porter worked closely with Guidance. Assistant Principal Richard Panas revealed student A.R. was referred to Porter as a fifteen (15) year old freshman, desiring to be a basketball player, who was "at risk" academically.

A.R.'s mother is a Spanish speaker. She had a work schedule which precluded her from transporting her son. In order to assure she understood A.R's issues, Porter obtained assistance from the Bilingual teacher, Sonya Bertini, who translated for Respondent. Ms. Bertini, spoke to A.R.'s mother obtaining permission for Porter to drive A.R. to and from practice and to "mentor" him.

Basketball Coach and Athletic Trainers

In the 2017-2018 school year, Porter was appointed head coach of the boys' basketball team. He had no prior experience serving either as an assistant or head coach with the District. On November 21, 2017, Athletic Director Don Robbins held the Winter Pre-Season Head Coach meeting, providing each coach with an agenda and Guide. (B-8, B-9) Porter was present.

On or about December 4, 2017, a complaint was raised by the sign language interpreter for a player on the basketball team. (B-10) At the request of a parent, at the end of practice, in addition to the discussion of upcoming games, Porter counseled his players on HIV prevention using sexually explicit language. The interpreter, was very uncomfortable with the message.

After an investigation, Porter agreed to six criteria identified by Dr. Gruccio to retain his position of head basketball coach. These included, *inter alia*, a two-week unpaid suspension, a

written apology to the sign language interpreter, attendance at one counseling session, and a season-long probationary period whereby any inappropriate behavior would result in his immediate dismissal from coaching.[3] On December 8, 2017, Porter executed the criteria. (B-12, B-13)

As head basketball coach, Porter was assisted by two (2) unpaid non-staff helpers, William Baumgardner and Mikolai Thompson. At the time of his two (2) week suspension, Porter recommended Baumgardner fill his position. When Respondent was placed on administrative leave on January 19, 2018 Baumgardner earned the position of paid coach. At the end of the winter basketball season, both Baumgardner and Thompson were relieved of further duties.

Darya Tomassello and David Reckenbeil are the athletic trainers at Vineland High School, providing athletic injury management for all athletes of the district. All eligible athletes' names are uploaded into the athletic trainers' computer program, located in the athletic trainers' room. Students are instructed to sign into the program when entering the room. There may be as many as twenty (20) students and staff in the training room at one time. Ice packets are maintained in the room; students are permitted to take these packets without speaking to a trainer.

A.R. was not listed as an eligible athlete in the trainers' system. A.R. never signed in on the computer when he entered the athletic trainer's room. Both Thomasello and Reckenbeil testified they have no knowledge of A.R.

January 2018

The record revealed on Saturday, January 6, 2018 and Saturday, January 13, 2018, Porter picked up A.R. at his home for practice and delivered him thereafter. Porter and A.R. communicated

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[3] The Agreement signed by Mr. Porter applied only to his position as the basketball coach. It was not, in anyway, referenced in the Tenure Charge, J-1. In its Closing Brief, Petitioner references the December 8, 2017 document as a "Last Chance Agreement."

by text. At the bottom of each of Porter's text, the words "what would Jesus do?" appear.

During the school week, basketball practice takes place each day from 2:23 p.m. to 6:00 p.m. A.R., a freshman, practiced in the Freshman gym. After practice, on a number of occasions, Porter drove A.R. home. There is a 6:00 p.m. activity bus available to students after basketball practice.

Iesha Diggs is known as "Basketball Mom." She is the Secretary for team parents, attending nearly every game. In mid - January, on the first day of a fund raiser, she was present at Varsity basketball practice to sell shirts. She revealed A.R. came into the Varsity practice complaining of a bad back. In Ms. Diggs' presence, Porter instructed A.R. to go to the athletic training room. Ms. Diggs disclosed A.R. sat out practice with an ice pack on his back, returning to the training room for additional ice. A.R. never registered in the computer in the athletic training room. (B-6). Ms. Diggs disclosed Porter had successfully "mentored" one of her sons, adding, at practice, the coach always stressed academics to the basketball team.

On January 17, 2018 and on January 18, 2018, the basketball team attended away games. The team returned approximately 8:30 p.m., long after any activity bus was available for students. On both evenings, Respondent admitted he drove A.R. to his condo, located directly across the street from the high school, taking pizza left over from the pre game meeting. While eating pizza, Porter discussed academics with A.R.. Before driving him home, on both occasions, Porter lifted the back of A.R's shirt and applied a natural muscle relief lotion. Porter referenced the ointment as "blessed cream" and on cross, expressed his belief that the cream provided a "spiritual benefit." A.R. texted Respondent that the cream was effective.

On the morning of January 19, 2018, Assistants Baumgardner and Thompson reported to Athletic Director Donald Robbins that on the two previous evenings, they followed Porter driving

A.R. to his condo. They called Porter's phone; no one answered. Thereafter, they followed Porter driving A.R. home. Immediately consistent with Board Policy, Athletic Director Robbins notified his superiors, including the Principal, Dr. McCann. (B-2)

Earlier that morning, at 7:54 a.m., Porter emailed Sarah Numberger, A.R.'s French teacher as follows:

> "I am attempting to ensure that A..... become a student athlete. Therefore, if you would permit him to make up any assignments that he missed or received a zero it would be helpful. ***I am his mentor and coach***. Thanks"

At 2:18 pm, Ms. Numberger replied by email:

> "Mr. Porter,
> A..... may make up his missing assignments. I attempted to speak with him about that today, but security removed him from my room before the end of the period, and before I could have that conversation with him.
>
> On a regular basis in class, A... talks to his friends, put his head down, gets on his phone, and tries to get out of doing work or make excuses for why the work didn't get done. I have tried to be patient, I have tried to be tough but I still do not see the motivation or effort from him that I would like to see. A.... needs to take more initiative to complete his assignments when they are due, and to participate in class without talking back or goofing off. I spend a lot of time redirecting him, only to get nowhere.
>
> If you can speak to him and encourage him to increase his participation and improve his behavior, it would be helpful." (R-4)

In the afternoon of Friday, January 19, 2018, Dr. Joseph Rossi in a meeting with Dr. McCann, Athletic Director Don Robbins, Security Director John Provenzano and Union representatives, presented Porter the following letter:

> "I told you that administration had received information concerning your possible inappropriate behaviors with a student. I told you that the police and DYFS were notified and are investigating the matter.
>
> I informed you that, effective immediately, you are on paid, administrative leave. I told you that you may not have contact with any student and that you may not come to Vineland

Public School's property unless summoned by district or legal authorities." (B-1)

After investigation, Porter was not subject to criminal charge. The State of New Jersey, Department of Children and Families, Institutional Abuse Investigation Unit found A.R. was not a "neglected child as defined by statute." (B-3, B-4).

POSITION OF THE PARTIES

The Parties presented arguments at hearing and through post hearing submissions; the essence of each is as follows:

Albert D. Porter

Porter disputes the District's assertion that he had an inappropriate relationship with A.R. The District sanctioned the relationship by requesting Porter be his "mentor." Ms. Ruiz, A.R.'s mother knew and approved of Porter taking A.R. from home on occasions and transporting him to school. Indeed, she was appreciative of Porter's attempts to assist A.R. particularly, because he has no father figure in his life.

Respondent requests the arbitrator to impose a negative inference as the District did not call certain witnesses, particularly Principal Dr. Thomas P. McCann and the Assistant Coaches Baumgardner and Thompson.

Porter believed he was complying with Ms. Ruiz's wishes and not violating school policy in driving A.R. home after practice and after basketball games. On both nights in issue, Porter had no choice but to transfer A.R. home because they arrived home at 8:30 p.m. The district does not provide any transportation after the game.

Porter maintains many coaches and teachers drive the students after practice or after games. Indeed, at hearing, Vice Principal Panis acknowledged Baumgardner also drove a student home -

with permission of her family but without any documentation from the Board.

Upon returning from the away games in January, Porter did not hide. He was aware there were two (2) bus loads of students, parents and at least two (2) assistant coaches present.

Prior to this incident, Porter was respected in the community. The Board's declaration, published by the media, that Porter was having an inappropriate and improper relationship with a 15-year old high school freshman and member of the boy's basketball team, has caused him great emotional pain. Counsel notes,

> "In conclusion, Albert Porter is an excellent teacher. He is a seasoned veteran with twenty three and a half unblemished years. He comes in early and leaves late. He is a mentor to his students and does everything he possibly can for the students. The allegations made by the Board of Education are admitted, however it is denied it was inappropriate because Mr. Porter had the permission of A.R.'s mother. He did transport the student, he did take the student to his house. He did applied a cream known as billage natural muscle relief lotion "blessed oil" to A.R.'s back but this is just like applying icy hot which trainers do all the time. It is suggested that any charges against Mr. Porter should be dismissed and he should be returned to the classroom without any penalty at all."

Vineland Board of Education

Petitioner maintains it has established Porter's actions were in violation of Board Policy #3281, revealing unbecoming conduct, inefficiency and other just cause for termination. Specifically, improper and inappropriate conduct with an underage student. Petitioner listed undisputed and admitted facts which establish Porter's violation, these include, *inter alia*,

> "II. UNDISPUTED and ADMITTED FACTS
>
> 1. Respondent admitted to the incident on December 2, 2018 at which time he inappropriately addressed the boys' basketball team and discussed sexually explicit matters degrading to women.
>
> 2. Responded admitted that on several occasions he transported A.R. in Porter's private automobile after either basketball practice or basketball games to A.R.'s home.

3. Porter admitted he contacted A.R.'s mother through an interpreter (Note: A.R.'s mother is a native Spanish speaker) and obtained permission to transport A.R. home after basketball practice or games.

4. Porter admitted he never requested permission from A.R.'s mother to take A.R. to Porter's home.

5. Porter admitted that on two occasions, on January 17, 2017 and January 18, 2018 that he did in fact drive A.R. in Porter's personal automobile from the high school following a basketball game to Porter's condo at Harlen Court Condominiums." (Brief at 3)

The District avers termination is the only appropriate remedy. It considers the December 2017 discussion with the boy's basketball team as another incident of inappropriate student-teacher interaction. Petitioner is also aggrieved Porter did not feel his conduct was improper nor reflect any remorse for his actions. Rather, he blamed his assistants' motivation to become the head coach as the reason for the report.

Attaching *Dunkley v. Board of Education Rathaway Township, Docket No. A-1152-16101*, decided on March 19, 2018, Petitioner asserts, with a similar fact pattern, the arbitrator determined termination was the appropriate remedy. Dunkley, a certified Special Education Teacher, during two (2) school years, was found to have inappropriately and repeatedly touched 13 year old female special education students.

With regard to Board Policy #3281 *Inappropriate Staff Conduct - Teaching Staff Members*, B-7, counsel exclaimed,

"The policy simply reiterates what to most teachers would be common sense that is, a teacher should not place themselves in a compromising situation with a student.

Even absent the Board Policy, Porter should have known that his conduct was inappropriate and conduct unbecoming. Today appropriately, there is a heightened sensitivity to such conduct. The "Me Too Movement", the outcry against sexual harassment, and priests that are sexual predators within the Catholic Church have made society aware that certain conduct is inappropriate and cannot be tolerated." (Brief at 5)

Moreover, Vineland reasoned Porter's religious spin applying a "blessed cream" is conduct which could influence vulnerable persons, such A.R. Vineland concludes:

> "For all the reasons cited herein, the appropriate remedy is termination. Besides violation of Board Policy #3281 in transporting the student in his personal vehicle, Porter's conduct in taking a fifteen (15) year-old to his home with no one else present and then applying cream to the child's back constitutes conduct unbecoming and conduct unacceptable for a teacher. This conduct compounded with the incident of December 2, 1017 raises an issue as to whether or not Porter should have contact with students. The Answer is NO.
>
> The lack of remorse and the complete lack of sense of wrong doing or improper conduct are also extremely troubling. There is a real danger that if Porter is returned to teaching he will repeat this type of conduct.
>
> For all these reasons Porter should be terminated." (Brief at 7)

ANALYSIS

Has the Board of Education of the City of Vineland, Cumberland County, met its burden of establishing, by a preponderance of the credible evidence, the tenure charge against Respondent, Albert D. Porter?

If so, does the tenure charge warrant dismissal or a lesser discipline?

It is axiomatic. New Jersey provides protection to tenured teaching staff members from dismissal or reduction in compensation except for "insufficiency, incapacity or conduct unbecoming such a teaching staff member or other just cause." *N.J.S.A. 18:28-5(b).* While "conduct unbecoming" is not defined by the statute, it has been considered an elastic standard, determined on a case-by-case basis, embracing a wide range of conduct.

At all times, Vineland maintains the burden of establishing by a preponderance of the credible evidence Albert D. Porter engaged in conduct unbecoming as alleged in the tenure charge, J-1. The rationale for these protections in an evidentiary review is highlighted herein for a finding of unbecoming conduct will forever tarnish the employment history and reputation of Albert D.

Porter. Prior to January 19, 2018, Porter, within the school community, was viewed as an exceptional teacher with an extraordinary ability to "mentor" at-risk students. After January 19, 2018, and the publication of tenure charges, Porter has been perceived, by some, as a pedophile.

Upon consideration of the record, in its entirety, I ***find*** the Board of Education of the City of Vineland, Cumberland County has met its burden of establishing Porter violated Board of Education Policy #3281, *Inappropriate Staff Conduct - Teaching Staff Members*, B-7.

I also ***find***, however, Porter did not engage in an "inappropriate and improper *relationship*" with a fifteen-year-old male freshmen student at the high school who was also a member of the boys' basketball team.

Violation of the Vineland Board of Education Policy #3281

Porter clearly admitted conduct unbecoming identified in the undisputed and admitted facts on page 11, herein. While having permission from A.R.'s mother to transport A.R., he did not obtain permission to transport him to his personal residence. Porter acknowledges that on at least two (2) occasions, on January 17, 2018 and January 18, 2018, he drove A.R. to his condo. Therein, he applied a natural muscle relief lotion which he considered to be "blessed cream" to A.R.'s back. Accordingly, I ***find*** Albert D. Porter engaged in conduct unbecoming a public school teacher.

Does the finding of conduct unbecoming by Albert D. Porter warrant dismissal or a lesser discipline?

Upon reflection of this record in its entirety, I ***find*** discipline, lesser than termination, to be appropriate. The record presents sufficient evidence to mitigate the discipline.

Mentor

> *School staff shall not engage or seek to be in the presence of a pupil beyond the staff member's professional responsibilities.*

It is clear Porter was valued as a teacher of the *African American Experience*. His ability to communicate with and propel young high school students to perform academically and seek college acceptance was appreciated by administration. Dr. McCann, Principal of Vineland High School, removed a daily academic period from Porter's roster to enable him to have sufficient time to mentor students, including those identified as "at-risk."[4]

This record revealed others in the high school community recognized Porter's role as a mentor. Indeed, the very day he was placed on administrative leave, A.R.'s French teacher responded, with specificity and without question, to Porter's request for information regarding A.R., as his "mentor and coach." (R-4) This record exposed Vineland imparted upon Porter responsibilities and authority different from those of a certified secondary school teacher.

Throughout the District's case in chief, I expected, and was waiting for documentation that Porter held a valid Student Personnel Services endorsement which would cover any assignment by Dr. McCann for Porter to be an official "mentor." Respondent holds a valid instructional certificate with appropriate subject endorsement. I am not persuaded the job functions and responsibilities of a secondary teacher include the assignment of "mentor."[5]

---

[4]The record was not clear as to how many school years Porter's sixth academic class was replaced with a "mentor" period. The record was clear that the District, during the 2017/2018 school year, identified students for him to "mentor."

[5]When drafting the decision, the undersigned reviewed Vineland Public School's job descriptions of Secondary Teacher #3002 and School Counselor Advisor Secondary #3205. The job titles and scope of each job are copied below. Upon review, a job of a "mentor" is more closely aligned with the duties of a school counselor, requiring Student Personnel Services Endorsement.

JOB TITLE: SECONDARY TEACHER
REPORTS TO: The Principal and assigned supervisor
SUPERVISES: Students
NATURE AND SCOPE OF JOB:
Secondary Teacher

Vineland's counsel raised a reasonable concern over Porter's failure to express sufficient remorse for his conduct. The undersigned, too, is unsettled with Porter's initial lack of recognition that taking a student to his condo violated District Policy. However, throughout many years, Vineland District Board of Education has sanctioned Porter to regularly communicate, one-on-one, with those "at-risk" students, it determined he "mentor." Many of these students, including A.R., were not assigned to his history classes. No evidence was proffered to establish the District supervised Porter activities as a "mentor." Striving to achieve the expectations of the District as a "mentor" does not an inappropriate and improper *relationship* make.

Assumes professional responsibility for providing learning experiences and supervision of assigned students in a supportive and positive classroom climate that develops in each student the skills, attitudes, and knowledge to meet and exceed the State Core Curriculum Content Standards, following the approved curricula and directives of the school. Achieving academic excellence requires that the Secondary Teacher work collaboratively with other members of the school staff and with parents of each student.

QUALIFICATIONS:
The Secondary Teacher shall:
1. Hold a New Jersey instructional certificate in accordance with the requirements of N.J.S.A. 18A:27.1 et seq., and N.J.A.C. Title 6 Chapter 11 with appropriate subject area endorsement(s) for the position held

JOB TITLE: SCHOOL COUNSELOR/ADVISOR SECONDARY
REPORTS TO: The Principal and District Supervisor of Student Personnel Services
SUPERVISES: Students
NATURE AND SCOPE OF JOB:
Assumes professional responsibility for providing comprehensive developmental guidance and counseling services in the areas of educational and career planning, and social and emotional development so that each student develops the skills, attitudes, and knowledge to meet and exceed the State Core Curriculum Content Standards. Working collaboratively with other members of the school staff and with parents, the School Counselor/Advisor Secondary acts as an advocate for the student, arranging for appropriate resources when necessary, and assisting students in understanding the school and its environment, understanding themselves and their relationships with others, understanding their strengths and needs, and planning for future educational and career opportunities.

QUALIFICATIONS:
The School Counselor/Advisor Secondary shall:
1. Hold a valid New Jersey educational services certificate in accordance with the requirements of N.J.S.A. 18A:27.1 et seq., and N.J.A.C. Title 6 Chapter 11 with a student personnel services endorsement (N.J.A.C. 6:11-11.11) and other appropriate endorsement(s) in accordance with the requirements of N.J.A.C. 6:11-10.1 et seq.

Driving students in their Private Vehicle in Violation of Board Policy #3281

> *School staff shall not provide transportation to a pupil in their private vehicle or permit a pupil into their private vehicle unless there is an emergency or a special circumstance that has been approved in advance by the Building Principal/immediate supervisor and the parent/legal guardian.*

Porter, on numerous occasions, drove A.R. in his private vehicle. While Respondent had permission from A.R.'s mother, he did not obtain specific permission, in writing or verbally, from Vineland High School Administration.

It is widely recognized principle that upon discharging an employee based upon a violation of a rule/ policy, the Employee must understand the rule, be adequately warning of its consequences, and the penalty imposed should be consistently implied and enforced in a nondiscriminatory manner, reasonably related to the seriousness of the offense and the past record. This record reveals it has been well-known in Vineland that coaches and teachers drive students in their private vehicles, often without prior notice to administration. Even Superintendent Dr. Gruccio acknowledged, in the past, before society became so litigious, teachers drove students in Vineland.

When imposing discipline for failure to comply with an administrative policy, such as failure to obtain prior permission, requiring employees to submit a form, the undersigned, at hearing, is normally presented with such forms to establish their existence, normal procedure, and the failure of the employee to conform to known requirements . No such evidence was proffered herein.

The District does not provide any transportation for student athletes after 6:00 p.m. Obviously, during every season, student athletes representing Vineland, traveling by bus to away games, may return after 6:00 p.m. On cross, Donald Robbins claimed, during his entire tenure as Athletic Director, he had no knowledge of, nor was ever approached by, students, such as A.R., a

freshmen whose family could not pick him up, requiring assistance from the District for transportation home. I ***find*** his testimony disingenuous.

The December 2, 2017 basketball practice speech does not support a request for termination

The executed statement of criteria, B-11, developed as a consequence of Porter's discussion on HIV prevention with his team, signed by the district's sign language interpreter, is not a "last chance agreement," as argued by Vineland. At hearing, the District stipulated the agreement related only to coaching, not teaching duties. As such, it exclaimed any "inappropriate behavior," during the season - long probationary period, would result in Porter's removal from coaching. (B-13) On January 19, 2018, Porter was so removed.

Appropriate Discipline

Vineland has established, by a preponderance of the credible evidence, significant discipline should be imposed. Porter indeed violated Board Policy #3281. He transported a fifteen-year-old student to his home, without anyone present, on more than one occasion and applied cream to the student's back. Unlike Vineland, however, the undersigned feels no danger of Porter repeating this type of conduct, upon his return and assignment to duties consistent with a certification of a secondary teacher. Porter should not be assigned an academic period as a "mentor" or otherwise be signaled out by administration to work, one on one, with "at-risk" students.

AWARD

The Board of Education of the city of Vineland, Cumberland County has established Albert D. Porter engaged in conduct unbecomingly. There is sufficient evidence in this record to support discipline less than dismissal:

1. As soon as practical, Albert D. Porter should be returned as a teacher of secondary education, consistent with his subject area endorsement(s).

2. Respondent Albert D. Porter engaged in conduct constituting cause for the imposition of a One Hundred and Twenty (120) day suspension, and the permanent loss of one salary increment.

DATED: 10/29/18

Carol F Laskin
CAROL F. LASKIN, ESQUIRE

STATE OF NEW JERSEY :

COUNTY OF CAMDEN :

I CERTIFY that on October 29, 2018

I, CAROL F. LASKIN, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Decision and Award.

DATED: October 29, 2018 Lynda A Green
NOTARY PUBLIC

LYNDA A GREEN
ID # 2316329
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires June 28, 2019

S.F., ON BEHALF OF MINOR CHILD, R.F.,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her child, R.F., seeking a determination that R.F. is entitled to a free public education in Orange schools. The respondent Board contended that a residency verification investigation in the Fall of 2017 indicated that petitioner and her child are not domiciled in Orange. S.F. failed to appear at the OAL hearing in this matter. The Board filed a counterclaim for tuition for the period of R.F.'s ineligible attendance.

The ALJ found, *inter* alia, that: pursuant to *N.J.S.A.* 18A:38-1, a petitioner has the burden of proof in a determination of residency ineligibility; in this matter, a hearing was scheduled for September 5, 2018 and petitioner received appropriate notice thereof, but failed to appear at the hearing; the Board's attendance officer appeared at the hearing and testified that a residency verification had determined that S.F. and R.F. were not domiciled in Orange during the 2017-2018 school year; R.F. continued to attend Orange schools for a total of 137 days, from November 6, 2017 through June 20, 2018, after the notice of ineligibility was received; and the per day tuition rate for this period was $77.06. The ALJ concluded that S.F. was not domiciled in Orange during the 2017-2018 school year; accordingly, the Board's counterclaim for tuition was granted, and petitioner was ordered to reimburse the Board in the total amount of $10,577.22 for the period of R.F.'s ineligible attendance. The petition was dismissed.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and the Initial Decision was adopted as the final decision in this matter, with modification to the amount of tuition owed. Petitioner was ordered to reimburse the Board in the amount of $10,557.22, 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.

November 8, 2018

354-18

OAL DKT. NO. EDU 18797-17
AGENCY DKT. NO. 260-11/17

S.F., ON BEHALF OF MINOR CHILD, R.F.,	:	
PETITIONER,	:	
		COMMISSIONER OF EDUCATION
V.	:	
		DECISION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	
	:	
RESPONDENT.		
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Administrative Law Judge's (ALJ) recommended decision in this matter dismissed petitioner's residency appeal as a consequence of her failure to appear at the hearing scheduled for this matter without providing any explanation for the non-appearance. The ALJ further concluded that petitioner should be assessed tuition costs in the amount of $10,577.22. The parties did not file exceptions to the Initial Decision. [1]

In accordance with *N.J.A.C.* 1:1-14.4(d), an ex parte hearing was held during which the Board presented the testimony of Walter Howell, the district's attendance officer, regarding the investigation into S.F.'s domicile and tuition due for R.F.'s ineligible attendance in Orange schools. Based upon Mr. Howell's undisputed testimony and the evidence submitted by the Board, the ALJ found that the minor child was ineligible to attend school in Orange for a total of 137 days, from November 6, 2017 through June 20, 2018. Accordingly, petitioner was ordered to pay the Board tuition in the amount of $77.06 per day for 137 days for the time period

[1] The Commissioner was not provided with a transcript of the September 5, 2018 hearing at the OAL.

of the minor child's ineligible attendance in Orange's schools. It appears the ALJ mistakenly calculated the amount of tuition owed as $10,577.22, when it should be $10,557.22.

The Commissioner fully concurs with the ALJ's determination and recommendation that petitioner's failure to prosecute this matter necessitates its dismissal and the award of tuition to the Board. Accordingly, the recommended decision of the OAL – as modified herein – is adopted as the final decision in this matter and petitioner is hereby directed to pay the Board $10,557.22 in tuition for her child's ineligible attendance in Orange from November 6, 2017 through June 20, 2018.

IT IS SO ORDERED.[2]



COMMISSIONER OF EDUCATION

Date of Decision: 11/08/18

Date of Mailing: 11/08/18

[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
FAILURE TO APPEAR
OAL DKT. NO.: EDU 18797-17
AGENCY DKT. NO.: 260-11/17

S.F. ON BEHALF OF MINOR CHILD, R.F.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,
Respondent.

S.F., petitioner, pro se failed to appear

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

Record Closed: September 5, 2018 Decided: September 26, 2018

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

Respondent, (Board of Education of the City of Orange), seeks reimbursement of tuition from petitioner, parent of minor child R.F. for a period of 137 days, commencing November 6, 2017 and ending June 20, 2018, asserting that petitioner and her children were not domiciled within the School District.

PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL) on December 28, 2017, for hearing as a contested case. On due notice to all parties, the hearing was scheduled for August 3, 2018, which was adjourned at the request of the parties. The matter was scheduled and heard on September 5, 2018, at which time petitioner failed to appear. Respondent entered evidence and testimony into the recorded and the record was closed on September 5, 2018.

ISSUE

The issue in this matter is whether minor child R.F. is eligible to attend respondent's Orange public schools free of charge in accordance with N.J.S.A. 18A:38-1 and, if not, whether respondent's request for tuition reimbursement should be granted.

FINDINGS OF FACT

1. On August 3, 2018, the OAL mailed a Peremptory Notice to Appear at the OAL on September 5, 2018, to petitioner at the address she provided.
2. The United States Postal Service never returned the above communication as undeliverable.
3. The OAL received no communication from petitioner regarding her failure to appear on September 5, 2018.

4. A residency check conducted by respondent found that R.F. did not reside in Orange, New Jersey.
5. On October 26, 2017, the District provided to S.F. a notice of Initial Ineligibility for her child, R.F. who attends school in Orange.
6. The daily tuition rate for the minor child is $77.06.

LEGAL ANALYSIS

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

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

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

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

Respondent produced district attendance officer Walter Howell, who testified on respondent's its behalf. He stated that as a result of a residency verification investigation, it was determined that R.F. was not domiciled in Orange, and a Notice that the child was ineligible to continue to attend its public schools was sent to the petitioner. The child continued to attend school in the district for a total of 137 days this school year, the cost of tuition totaling $10,557.22.

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), which provides as follows:

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

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

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that petitioner's children were not a domiciliary in the City of Orange Board of Education School District for the days sought and that respondent is entitled to reimbursement for the costs of audited tuition in the amount of $10,577.22.

DECISION AND ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's determination that petitioner and her child are not residents and domiciliary in Orange, New Jersey, and were not domiciled within its school district during the period from November 6,

2017 through June 20, 2018, is hereby **AFFIRMED**. It is further **ORDERED** that respondent is entitled to reimbursement from petitioner at a daily tuition rate $77.06 for the total cost of audited tuition in the amount of $10,577.22.

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

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

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

DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

id

OAL DKT. NO. EDU 06747-18
AGENCY DKT. NO. 112-5/18

J.M., ON BEHALF OF MINOR CHILD, K.L., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY AND MACKEY PENDERGAST, SUPERINTENDENT, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

The record of this matter, the proposed settlement agreement and 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: 11/08/18

Date of Mailing: 11/08/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 06747-18
AGENCY DKT. NO. 112-5/18

J.M. ON BEHALF OF MINOR CHILD K.L.,
Petitioner,
v.
MORRIS SCHOOL DISTRICT BOARD OF EDUCATION AND MACKEY PENDERGAST, SUPERINTENDENT,[1]
Respondents.

Laura A. Siclari, Esq., for petitioner (McCusker, Anselmi, Rosen & Carvelli, attorneys)

Marie-Laurence Fabian, Esq., for respondents (Porzio, Bromberg & Newman, attorneys)

Record Closed: September 24, 2018 Decided: September 25, 2018

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

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[1] Although the transmittal lists the student as K.M. and the Board of Education of the Township of Morris, the parties agree that the student's initials are K.L. and the Board is the Morris School District Board of Education.

On or about May 9, 2018, petitioner, J.M., on behalf of her son, K.L., filed a Petition with the Commissioner of Education contesting the District's determination that K.L. must be evaluated by one of the Board's psychiatrists before he is permitted to return to school. Petitioner also filed a motion for emergent relief. The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on May 10, 2018, for determination as a contested case. On June 12, 2018, I issued an order denying petitioner's application for emergent relief, which the Commissioner adopted on June 28, 2018. The hearing commenced on August 10, 2018. The parties engaged in discussions toward an amicable resolution. Counsel for the Board submitted the attached Settlement Agreement and Release under letter dated September 21, 2018, along with a Resolution of the Board approving the Settlement Agreement.

I have reviewed the record and the terms of the consent order and I **FIND**:

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

2. The consent order 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 25, 2018
DATE

Margaret M Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

RECEIVED
2018 SEP 24 P 12:44
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and General Release ("Agreement") is made and entered into by and between the MORRIS SCHOOL DISTRICT BOARD OF EDUCATION (hereinafter "the Board" or "the District") and J.M. o/b/o K.L. (hereinafter the "Releasor" or the "Parent"), (collectively the "parties") for full settlement of certain civil and administrative claims that were alleged and/or could have been alleged by Releasor.

WITNESSETH:

WHEREAS, the Board operates the Morris School District; and

WHEREAS, J.M. and K.L. are domiciled in the Morris School District; and

WHEREAS, on May 8, 2018 J.M. filed a petition against the Board, which is pending before the New Jersey Commissioner of Education/Office of Administrative Law, bearing Agency Reference Number 112-5/18 and OAL Docket No. EDU 06747-2018 N; and

WHEREAS, the parties desire to resolve this dispute and avoid the additional expenses and delay of litigation.

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration, it is hereby agreed by and between the parties hereto as follows:

1. **Non-Admission By the Parties.** This Agreement shall not be construed as an admission by the Board of any of the acts or omissions alleged or those that could have been alleged by Releasor, or of any acts or omissions alleged or which could have been alleged against the Board. The Board specifically denies any liability whatsoever for any damages, injuries or other claims by Releasor or those which were alleged or could be claimed by Releasor.

2. This Agreement shall not be construed as an admission by J.M. as to the necessity of the subject Psychiatric Risk Assessment Evaluation or any acts or omissions alleged by the Board with respect to Petitioner.

3. **Psychiatric Risk Assessment Evaluation.** The parties agree that J.M. will select from among the five psychiatrists who are currently approved by the Board and will make an appointment for K.L. to be examined by the doctor J.M. has selected on a date following approval of this Agreement by the Board. The psychiatric risk assessment for school clearance purposes will be performed at Board expense. It is anticipated that this Agreement will be presented to the Board at its meeting on September 17, 2018. The following psychiatrists are currently approved by the Board: (1) Ellen Platt, D.O., 908 Pompton Ave, Cedar Grove, NJ 07009; (973) 239-4848; (2) Bryan Fennelly M.D., 8 Shunpike Rd #9, Madison, NJ 07940; (973) 660-0084; (3) Mark P. Faber, M.D., 594 Valley Road, Upper Montclair, NJ 07043; (973) 746-6711; (4) Seth M. Dorsky, M.D., 40 Main Street, Suite 7, Chatham, NJ 07928; (973) 635-4244; and (5) Hayley M. Cohen, M.D., 28 Millburn Ave # 3, Springfield, NJ 07081; (973) 218-0777. However, Dr. Faber has declined to conduct the evaluation and so J.M. may choose from the remaining four.

4. **Authorization to Release Information.** J.M. agrees to sign an authorization in the form attached hereto as Exhibit A and made a part hereof allowing the District to provide a confidential letter to the doctor selected as set forth in Paragraph 5 below and allowing the doctor to provide a written report to J.M. and the District, to include the information set forth in Paragraph 6 below.

5. **Communication with Doctor Selected by Petitioner.** The parties agree that, in lieu of a telephone conversation, the Board will send a confidential letter to the doctor containing

whatever information about the student, including reference to student records, it determines is relevant to the psychiatric risk assessment evaluation, in its sole discretion, including the risk factors that led it to request a risk assessment psychiatric evaluation and clearance in April 2018. J.M. will receive a copy of the letter in advance of the date of the psychiatrist's appointment and will be given the opportunity to rebut any of the information provided during the parent interview portion of the assessment.

6. **Contents of the Report.** The doctor who performs the risk assessment evaluation will be notified that he/she must provide a written report to the Board, to the attention of Mackey Pendergrast, Superintendent, which contains the following:

A. Identifying information i.e. the student's name and date of birth, date of evaluation, and date of report;

B. Medical and family history;

C. Review of presenting problem or incident;

D. Mental status examination;

E. Recommendations for follow-up services, as appropriate;

F. Other information deemed relevant by the doctor; and

G. A specific statement as to whether K.L. presents a danger to himself or others and whether or not he is cleared to return to school.

The parties have agreed that this is not a full psychiatric evaluation for special education or child study team purposes and will not be used as such. As such, the report should not contain diagnostic information for K.L. The report should specifically state on its cover page that this evaluation is being required by the Morris School District and the psychiatrist has no prior

doctor-patient relationship with K.L. The parties agree that Mr. Pendergrast will share the report only with Mark Manning, Principal of Morristown High School and Suzanne Olimpio, Assistant Superintendent for Pupil Services. The report will be housed in a confidential student file in the Principal's office at Morristown High School. The report will not be used for any other purpose other than psychiatric clearance.

7. **Home Instruction Pending Medical Clearance.** The parties acknowledge and agree that, unless K.L. is cleared to return to school sooner than the first day of school, home instruction will resume on Thursday, September 6, 2018, the first day for students in the 2018-2019 school year, and will continue until such time K.L. is cleared to return to school. The parties agree that when home instruction resumes, it will continue to be provided at the Public Library or another mutually agreeable location.

8. **Return to School in Morris School District.** In the event the doctor determines that K.L. is not a danger to himself or others and clears him to return to school, J.M. and K.L. will attend a re-entry meeting with Mark Manning, the Principal of Morristown High School, along with an Assistant Principal and K.L.'s Guidance Counselor, which meeting will be scheduled by Mr. Manning at a date prior to K.L.'s first day back in school.

9. **Release.** In exchange for the consideration set forth herein, the Releasor releases and gives up any and all claims and rights she may have against the Board for any damages or injuries to Releasor in connection with the subject matter of the claims filed in the Petition in this litigation, including any claims for compensatory education, compensatory damages, punitive damages, or any damages or injuries to K.L., arising out of alleged acts or omissions, whether known or unknown, that have taken place through the date of this Agreement. As used in this Agreement, the term "Board" means: the Morris School District Board of Education, 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. Releasor specifically releases the following claims as to the Board:

(a) Any and all claims relating to the subject matter of the Petition in this matter that were brought or could have been brought in the Petition bearing Agency Reference No. 112 5/18 and OAL Docket No. EDU 06747 N; and

(b) Any and all available claims for attorney's fees and expert costs under any law or regulation.

10. **Agreement Not to Sue.** Releasor agrees not to file any lawsuit or claim against the Board, based on any events, whether known or unknown, occurring prior to the date of the execution of this Agreement, 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.

11. **Confidentiality and Non-Disparagement.** The Parties specifically acknowledges and agrees that this Agreement was reached without any admission by either party of any of the acts or omissions alleged or those that could have been alleged. The parties agree that the terms of this Agreement will be kept confidential to the extent permitted by law and that they will not disparage each other. The parties further agree that in the event of a discussion about this settlement, the parties shall state, "the matter was resolved without an admission of liability." Releasor acknowledges that this confidentiality/non-disparagement requirement is a material term to this Agreement.

12. **Non-Domicile.** The Board's obligations under this Agreement shall end immediately upon K.L. no longer being domiciled within the boundaries of the Morris School District.

13. **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 shall not be construed as an admission by the Board of any wrongdoing.

14. **Who is Bound.** The parties and their agents are bound by this Agreement. Those who succeed to their rights and responsibilities, such as heirs, the executors of their estate, or their personal or legal representatives, are also bound.

15. **Representation.** The parties acknowledge that they are fully satisfied with their respective legal representation in this matter and that they have reviewed the terms of this Agreement with their respective counsel.

16. **Entire Agreement.** This Agreement and all exhibits contain the sole and the entire agreement between Parties, and fully supersedes any and all prior agreements and understandings between the Parties pertaining to the subject matter of this Agreement. Each party represents and acknowledges that they have not relied upon any representation or statement by the other party, or their 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 the Parties, and expressly stated to be a modification of this Agreement.

17. **Signatures.**

BY SIGNING THIS AGREEMENT BOTH PARTIES STATE THAT:

A. THEY HAVE READ IT;

B. THEY AGREE WITH EVERYTHING IN IT;

C. THEY HAD THE OPPORTUNITY TO CONSULT WITH AN ATTORNEY PRIOR TO EXECUTING THIS AGREEMENT;

D. EACH PARTY SIGNS THIS AGREEMENT KNOWINGLY AND VOLUNTARILY.

Releasor

J.M.

J.M.

Dated: 9-17-18

Morris School District Board of Education

By: Lisa Pollak
Board President

Dated: 9/18/18

Attest:
Anthony LoFranco, Business Administrator/Board Secretary

MORRIS SCHOOL DISTRICT

LIMITED AUTHORIZATION TO RELEASE AND RECEIVE INFORMATION

I, Joan McKenna, hereby give my limited written consent and authorization for a written statement of concerns regarding my son, **Kaden Lehman (D.O.B. 8/31/2003),** to be released, in writing, by the Morris School District, to Seth M. Dorsky M.D. for the purpose of conducting a psychiatric clearance risk assessment evaluation of my son on September 26 2018, or any additional dates necessary to complete said evaluation, for purposes of determining whether he presents a danger to him/herself or others and whether he is cleared to return to school. The form of this consent form has been agreed to as part of a larger settlement between Joan McKenna and the Morris School District and is Exhibit A to that agreement.

I also give my written consent and authorization for Dr. Dorsky to release a written report prepared as a result of the psychiatric risk assessment evaluation, which will include the following information:

A. Identifying information i.e. Kaden's name and date of birth, date of evaluation, and date of report;
B. Medical and family history;
C. Review of presenting problem or incident;
D. Mental status examination;
E. Recommendations for follow-up services, as appropriate;
F. Other information deemed relevant by the doctor; and
G. A specific statement as to whether Kaden Lehman presents a danger to him/herself or others and whether or not he is cleared to return to school.

The parties have agreed that this is not a full psychiatric evaluation for special education or child study team purposes and will not be used as such. As such, the report should not contain diagnostic information for K.L. The report should specifically state on its cover page that this evaluation is being required by the Morris School District and the psychiatrist has no prior doctor-patient relationship with K.L.

This authorization is in effect for the period September 17, 2018 through _____.

Joan McKenna — 9-17-18

Joan McKenna — Date

4022226
4030575
4040484

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF MORRIS SCHOOL DISTRICT, MORRIS COUNTY, NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK.

RECEIVED
2018 SEP 24 P 12:44
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

The Board of Education of Morris School District, in the County of Morris, New Jersey, convened in Regular Session on **Monday, September 17, 2018, at 7:24 p.m.** in the Learning Commons of Morristown High School, 50 Early Street, Morristown, New Jersey.

The following members of the Board of Education were present: **Mrs. Nancy Bangiola, Ms. Meredith Davidson, Ms. Ann Rhines, Ms. Melissa Spiotta, Mrs. Lisa Pollak, and Ms. Jeanette Thomas**

The following Resolution was offered by **Mrs. Bangiola,** seconded by **Ms. Thomas** and adopted by the Board of Education by the following roll call vote:

Roll Call:

AYES:	Mrs. Davidson, Ms. Galdi, Dr. Gallerstein, Ms. Michello, Mr. Posey, Mrs. Rhines, Ms. Spiotta, Ms. Thomas, Mrs. Bangiola, Ms. Pollak
NOES:	None
ABSTAIN:	None
ABSENT:	None

POLICY

STIPULATION OF SETTLEMENT

Motion #3 that, upon the recommendation of the Superintendent, the Board of Education approve a Stipulation of Settlement resolving a dispute pertaining to student #613058 which is on file in the office of the Business Administrator.

STATE OF NEW JERSEY)
)ss
COUNTY OF MORRIS)

I, Anthony Lo Franco, Business Administrator/Board Secretary of Morris School District, in the County of Morris, State of New Jersey, hereby certify that the foregoing Extract from the Minutes of the Meeting of the Board of Education of said district, duly called and held on **Monday, September 17, 2018** compared by me with the original Minutes as officially recorded in my office in the Minute Book of said Morris School District 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 **18th day of September, 2018**

(Seal)

Business Administrator/Board Secretary

OAL DKT. NO. EDU 6472-18
(ON REMAND EDU 17468-17)
AGENCY DKT. NO. 258-11/17

T.S. and C.S., on behalf of minor child, S.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TOTOWA, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon the review of the record, the Commissioner is in accord with the ALJ's conclusion – for the reasons set forth in the Initial Decision – that the issues raised by the petitioner are moot. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is hereby dismissed as moot.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 11/08/18
Date of Mailing: 11/08/18

[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
DISMISSAL
OAL DKT. NO. EDU 06472-18
AGENCY DKT. NO. 258-11/17

(ON REMAND EDU 17468-17**)**

T.S. AND C.S. ON BEHALF OF MINOR CHILD S.S.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF TOTOWA, PASSAIC COUNTY,
Respondent.

Leonard S. Miller, Esq. for petitioners

Raymond B. Reddin, Esq., for respondent

Record Closed: October 2, 2018 Decided: October 3, 2018

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE

Petitioners T.S., Sr., and C.S. challenges the Board of Education of the Borough of Totowa's (respondent or Board) residency determination of S.S. At its meeting held

on September 27, 2017, the Board voted to remove S.S. from its school district. Petitioners were advised of the determination and requested a hearing.

PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL) on November 28, 2017, for hearing as a contested case. The matter was initially assigned to ALJ Candido but reassigned to the undersigned on February 12, 2018. The hearing was scheduled and heard on February 12, 2018. The parties submitted closing brief on March 12, 2018. The undersigned rendered a decision was rendered on March 28, 2018 but the matter was remanded to OAL for by Order dated May 4, 2018. A hearing date was scheduled for October 3, 2018. On October 2, 2018, petitioner's counsel submitted a letter requesting the matter be dismissed, as the matter is moot. Under my direction, my assistant contacted respondent's counsel, via email, to inquire if he had any opposition to the matter being dismissed. Respondent's counsel sent a reply stating "no opposition." Said letter and email are attached hereto for reference.

CONCLUSION AND ORDER

Based on the foregoing, I **CONCLUDE** this matter is no longer a contested case at OAL and is hereby **DISMISSED.**

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, 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.

10-3-18

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

ljb

DOCUMENTS RELIED ON

- Letter from Leonard Miller, dated October 2, 2018
- Email chain dated October 2, 2018

Leonard S. Miller, P.A.
A Professional Corporation
Counsellors at Law

12-67 River Road
P.O. Box 1126
Fair Lawn, N.J. 07410

Phone: 201-796-1594 • Fax: 201-796-9408
Email: lmilleresq@lenmillerpa.com
www.lenmillerpa.com

October 2, 2018

Leonard S. Miller

Via Fax no.: 973-648-2358

Hon. Judge Kimberly A. Moss, ALJ
State of New Jersey
Administration Law Office
33 Washington Street
Newark, New Jersey 07102

Re: Thomas and Cheryl Singletary, on behalf of Skye Singletary vs. Totowa Board of Education
Docket no.: EDU 06472-2018
Our file no.: 22,010

Dear Judge Moss:

As you are aware, this office represents the petitioner in the above matter. This matter is scheduled for a hearing tomorrow, October 3rd, 2018. Please dismiss the matter as this case is moot.

If there are any questions or concerns, please feel free to contact me.

Thanking you, I am.

Respectfully yours,
Leonard S. Miller
Leonard S. Miller, Esq.

LSM/gb
Enc.
Cc: Raymond B. Reddin, Esq. *(via fax no. 973-553-0005)*

OAL DKT. NO. EDU 10914-18
(EDU 6316-18 ON REMAND)
AGENCY DKT. NO. 79-4/18

A.R., on behalf of minor, A.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' revised settlement 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 July 26, 2018, the Commissioner remanded this matter to the OAL based upon a determination that the prior settlement agreement recommended for adoption by the Administrative Law Judge ("ALJ") did not include the requisite Board of Education approval.

Upon review of the revised agreement and the record on remand, the Commissioner finds that the deficiency identified in the prior agreement has been corrected. Accordingly, the settlement is hereby approved, and the case is dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 11/08/18
Date of Mailing: 11/08/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10914-18
AGENCY DKT. NO. /1

A.R. ON BEHALF OF MINOR CHILD A.H.,
Petitioner,
v.
TOWNSHIP OF DEPTFORD BOARD OF EDUCATION, GLOUCESTER COUNTY,
Respondent.

A.R., petitioner, pro se

Albert K. Marmero, Esq., for respondent (Grace, Marmero & Associates, LLP, attorneys)

Record Closed: October 9, 2018 Decided: October 10, 2018

BEFORE **MARY ANN BOGAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 1, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

October 10, 2018
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: 10-11-18

Date Mailed to Parties: 10-11-18

MAB/cb

SETTLEMENT AND GENERAL MUTUAL REALEASE AGREEMENT

WHEREAS, Anita Rothmiller ("A.R.") is the parent of a minor child, A.H., who following the issuance of a Final Notice of Residency Determination issued by the Board of Education for the Township of Deptford, Gloucester County (the "Board") filed an Appeal with the New Jersey Department of Education under Agency Docket Number 79-4/18, and which matter was transferred to the Office of Administrative Law under Docket Number EDU-06316-2018S; and

WHEREAS, A.R. and the Board have agreed to a settlement of the Residency Appeal; and

WHEREAS, the Parties expressly understand and agree the terms of the settlement shall remain confidential and shall not be disclosed to any third party whatsoever, except the Parties' counsel, accountants, financial advisors, tax professionals, any federal, state or local or governmental taxing or regulatory authority, and except as required by law or order of court; and

WHEREAS, the Parties acknowledge that the settlement was agreed upon as a compromise and final settlement of all disputed claims and is not an admission of liability by any Party.

NOW, THEREFORE, in exchange for, and in consideration of, the benefits described herein, the Parties, for themselves and each of their successors, assigns, heirs, executors, administrators, affiliates, principals, shareholders, directors, officers, employees, agents and predecessors, insurers, successors and assigns do hereby RELEASE, REMISE and FOREVER DISCHARGE each other of and from the matter described herein, and specifically agree to the following:

- A.R. shall immediately cause the instant Residency Appeal referenced above to be withdrawn with prejudice from the Department of Education and Office of Administrative Law, copying the Law Firm of Grace, Marmero & Associates, LLP, at 44 Euclid Street, Woodbury, New Jersey 08096 on said Notice; and

- A.H. a minor child shall remain enrolled with the Deptford Township School District until the end of the 2017-18 School Year; and

- The Board will not seek monetary reimbursement from A.R. for the remainder of the 2017-18 School Year for the education costs of A.H.; and

- Should A.R. attempt to have A.H. enrolled in the Deptford Township School District for the 2018-19 School Year, A.R. must re-establish residency with the Board in accordance with all applicable rules and regulations; and

- Parties agree to confidentially of this matter; and

- Parties agree to non-disparagement covenant for this matter;

- This Agreement is valid and enforceable as of its signing and execution, but shall also be prepared and finalized in formal printed form;

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- This Agreement is the entire, final and only binding agreement between A.R. and the Board.

The Parties warrant that they have not assigned, transferred or conveyed to anyone else any right to assert a claim against any other Party which would otherwise be released hereunder.

This General Release is made for the benefit of each of the Parties and all who succeed to their rights and responsibilities.

This General Release is not to be construed as an admission of any violation of any federal, state or local statute, ordinance or regulation by any Party.

The provisions of this Release are severable. If any provision or the scope of any provision is found to be unenforceable or is modified by a court of competent jurisdiction, the other provisions or the affected provisions as so modified shall remain fully valid and enforceable.

This General Release may be executed in separated counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one in the same instrument. It is not necessary for the Parties to execute the same counterpart of this General Release in order for this General Release to become effective.

This General Release may be executed by email, facsimile and or electronic signature.

This General Release shall be governed by, and enforced in accordance with, the laws of the State of New Jersey, without regard to the application of the principles of conflicts of laws.

In Witness Whereof, the Parties have caused this instrument to be executed and delivered as indicated below.

Dated: 10/9/18

Anita Rothmiller

Print Name: Anita Rothmiller

Dated: 10/9/18

Print Name: Albert K. Marmero
Attorney for the Board of Education for the
Township of Deptford

358-18R+

OAL DKT. NO. EDU 13507-18
(EDU 18468-17 ON REMAND)
AGENCY DKT. NO. 284-12/17

R.R., on behalf of minor child, J.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, 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 September 7, 2017, the Commissioner remanded this matter to the 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 contains the requisite Board approval. According to the Agreement, the settlement payment schedule began 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 payments. 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: 11/08/18

Date of Mailing: 11/09/18

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 13507-2018

AGENCY DKT. NO. 284-12/17

(Remand of EDU 18468-17)

R.R. ON BEHALF OF MINOR CHILD J.P.

Petitioner,

v.

BOARD OF EDUCATION OF THE BOUROUGH OF RUTHERFORD, BERGEN COUNTY,

Respondent.

Steven Zakharyayev, Esq., for petitioners (Caruso Smith Picini, attorneys)

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

Record Closed: September 14, 2018 Decided: October 12, 2018

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

This matter was originally transmitted to the Office of Administrative Law (OAL) for determination as a contested case on December 20, 2017, 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 August 1, 2018. This matter was remanded to the OAL on September 7, 2018, for revision of the settlement agreement consistent with the Commissioner's concerns, which were as follows:

> The record, proposed settlement agreement and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to N.J.A.C. 1:1-19.1, have been reviewed.
>
> Upon review, the Commissioner observes that the Superintendent [of] the Rutherford School District signed the agreement on behalf of the Board. The file does not contain a copy of the Board's resolution approving the settlement and designating the Superintendent to sign the agreement on its behalf – as required by N.J.A.C. 6A:3-1.13 under these circumstances – nor is the resolution attached to the settlement agreement itself. In the alternative, the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation. Without either the Board attorney's signature or the appropriate Board resolution designating the Superintendent to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

The parties have settled this matter and have filed an Agreement indicating the terms thereof, which is attached and fully incorporated herein. Consistent with the Commissioner's instructions, also attached are two resolutions, approving the Agreement and confirming that the Superintendent was authorized to sign the Agreement on behalf of the Board.

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

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

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

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 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.

October 12, 2018
DATE

KELLY J. KIRK, ALJ

Date Received at Agency: October 12, 2018

Date Sent to Parties:

mm

AGREEMENT

This AGREEMENT is made this 16th day of July, 2018 between the Rutherford Board of Education, which has offices located at 176 Park Avenue, Rutherford, New Jersey 07070 (hereinafter referred to as the "Board"), and Rumilda Ramos, who resides at 88 Insley Avenue, Rutherford, New Jersey 07070 (hereinafter referred to as "R.R.").

WHEREAS, R.R. filed a verified petition with the Commissioner of Education which claimed that her daughter, J.P., was entitled to a tuition free education in the Rutherford School District (hereinafter referred to as the "District");

WHEREAS, the Board filed a verified counterclaim against R.R. which sought payment for the time J.P. was enrolled in the District while living in the City of Garfield;

WHEREAS, on or about February 26, 2018, R.R. moved into a house located at 88 Insley Avenue, Rutherford, New Jersey 07070;

WHEREAS, the parties are desirous of resolving the issue of payment of the tuition without having to resort to further litigation; and

WHEREAS, the parties have agreed to a payment plan and are desirous of memorializing the terms in a written agreement;

NOW, WHEREFORE, based on the foregoing premises and the mutual promises and covenants contained herein, the parties agree as follows:

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

1. R.R. shall pay the Board the sum of nine thousand five hundred eighty three and 99/100 dollars ($9,583.99) in full satisfaction of the tuition claim for the 2017-2018 school year. An initial payment of one thousand four hundred eighty three and 99/100 ($1,483.99) shall be made no later than July 1, 2018. Thirty six (36) monthly payments of two hundred twenty-five and 00/100 dollars ($225.00) shall be made beginning August 1, 2018 and the first day of each subsequent month. Failure to pay tuition in accordance with the payment schedule shall result in R.R. having to immediately pay the remaining balance of the tuition due. In the event payment of the remaining balance is not received within thirty (30) days, R.R. consents to the entry of default judgment in the Superior Court of New Jersey for the balance of the tuition due and agrees that the Board may proceed by summary action to execute on the judgment for tuition due, less credit for any amount paid to the Board pursuant to the terms of this Agreement. R.R. further agrees that in the event of default, she shall be responsible for the payment of reasonable attorneys fees and costs incurred by the Board in the collection of the outstanding tuition due.

2. R.R. shall make all payments to the Board by certified check, payable to the Rutherford Board of Education, and shall mail or deliver it to the Board office located at 176 Park Avenue,

Rutherford, New Jersey 07070 no later than the date payment is due.

3. Upon receipt of the August 1, 2018 payment, the Board agrees to withdraw its verified counterclaim bearing Agency Ref. No. 284-12/17 and OAL Docket No. EDU 18468-2017 N. R.R. shall withdraw her verified petition of appeal with prejudice.

4. Upon receipt of all payments by R.R. in accordance with the terms of this Agreement, the Board shall provide R.R. with a release for the payment of tuition due in accordance with the terms of this Agreement.

5. In the event R.R. moves out of the Borough of Rutherford, she still shall be obligated to pay the tuition due under the terms of this Agreement. R.R. acknowledges that if she no longer resides in the Borough of Rutherford, J.P. shall not be entitled to a tuition free education in the District.

6. R.R. acknowledges that he has had an opportunity to have this Agreement reviewed by an attorney of her own choice.

7. R.R. further acknowledges that this Agreement has been entered into voluntarily, without duress and of her own free will, with the full understanding of her duties and obligations contained therein, and agrees to be bound by the terms of this Agreement.

8. This Agreement constitutes the entire understanding of the parties with respect to the payment of tuition for the 2017-2018 school year.

9. This Agreement is subject to ratification by the Board. If this Agreement is not approved by the Board, it shall be inadmissible in any litigation between the parties.

10. The parties agree that this Agreement is governed by the laws of the State of New Jersey and that any and all claims arising out of this Agreement shall be litigated in the jurisdiction of the courts of the State of New Jersey.

11. This Agreement may be signed in counterparts, which taken together shall constitute a single document when executed by all parties.

12. The undersigned represent that they have the requisite authority to sign this Agreement on behalf of the Board.

IN WITNESS WHEREOF, the parties have hereunto set forth hands and seals on the date and year shown below.

Witness:

Joseph P. Kelly
Business Administrator/
Board Secretary

Dated:

RUTHERFORD BOARD OF EDUCATION

By:
John J. Hurley
Superintendent of Schools

Witness:

Rumilda Ramos

Dated:

RUTHERFORD PUBLIC SCHOOLS

Rooted in Excellence
176 Park Avenue, Rutherford, NJ 07070
Fax: 201-939-6350

JOHN J. HURLEY
Superintendent of Schools
Phone: 201-939-1717

JOSEPH P. KELLY
Business Administrator/Board Secretary
Phone: 201-939-1718

The following is certified to be a true copy of the official Board minutes from the Regular Meeting of the Rutherford Board of Education held on July 16, 2018:

FINANCE:

Motion by Dr. Recine, seconded by Mr. Mazone to approve Finance Item #4.

TUITION AGREEMENT

4. BE IT RESOLVED BY THE RUTHERFORD BOARD OF EDUCATION to approve the settlement agreement with Ms. Rumilda Ramos for the payment of tuition, as well as the terms of payment, for the 2017/18 school year in the total amount of $9,583.99.

Roll Call Vote on Finance Item #4:

Mrs. Ahmed – aye	Mrs. Jones – aye	Dr. Recine – aye
Dr. Alati – aye	Mrs. Librera – absent	Mr. Rolon – aye
Mr. Healey – absent	Mr. Mazone – aye	Mr. McLean – aye

John J. Hurley
Superintendent of Schools
Date: July 16, 2018

RUTHERFORD PUBLIC SCHOOLS

Rooted in Excellence
176 Park Avenue, Rutherford, NJ 07070
Fax: 201-939-6350

JOSEPH P. KELLY
Business Administrator/Board Secretary
Phone: 201-939-1718

The following is certified to be a true copy of the official Board minutes from the Regular Meeting of the Rutherford Board of Education held on September 10, 2018:

FINANCE:

ADDENDUM:

SUPERINTENDENT AUTHORITY

11. BE IT RESOLVED BY THE RUTHERFORD BOARD OF EDUCATION

WHEREAS, on July 16, 2018, the Rutherford Board of Education ("Board") passed a resolution approving a settlement agreement with Rumilda Ramos; and

WHEREAS, the Superintendent of Schools signed the settlement agreement on behalf of the Board; and

WHEREAS, the Commissioner of Education has required the Board to provide a resolution that authorizes the superintendent of schools to sign the settlement agreement on behalf of the Board; and therefore

BE IT RESOLVED BY THE RUTHERFORD BOARD OF EDUCATION that the Superintendent of Schools is authorized to sign the settlement agreement on behalf of the Board.

Roll Call Vote on Finance Addendum Item 11:

Mrs. Ahmed – aye	Mrs. Jones – aye	Dr. Recine - aye
Dr. Alati – aye	Mrs. Librera – aye	Mr. Rolon – aye
Mr. Healey – aye	Mr. Mazone – aye	Mr. McLean – aye

Joseph P. Kelly
Business Administrator/Board Secretary
Date: September 10, 2018

---x

In the Matter of the Tenure Hearing between

JS Case No. 4527

SCHOOL DISTRICT OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,
Petitioner,

Agency No. 144-6/18

and

OPINION AND AWARD

VINCENT SERPICO,
Respondent,

---x

Before JOHN E. SANDS, Impartial Arbitrator

OPINION

This matter came before me for arbitration pursuant to P.L. 2012 Chapter 26 of Title 18A N.J.S.A. It involves a May, 2018 Tenure Charge certified by the Board of Education on June 14, 2018 that seeks to remove Respondent Vincent Serpico from his position as a tenured teacher. It reads:

Background Facts

1. Respondent Vincent Serpico, was employed by the Piscataway Township School District ("the District") as a mathematics teacher as of January 5, 2004, originally assigned to Quibbletown Middle School. At the time of his hire, Respondent was certified both as a mathematics teacher and a special education teacher.

2. Respondent was reassigned to Piscataway High School for the 2009-2010 school year as a special education mathematics teacher, has remained continuously employed in that assignment to the present, and has attained statutory tenure in the District.

3. From the outset of Respondent's assignment to the High School, he has complained regularly about being transferred from the Middle School, otherwise expressed dissatisfaction with and resentment of this reassignment, and threatened to quit his employment with the District if he were not transferred back to the Middle School.

4. Over the course of Respondent's career in the District, he has been counseled, admonished and disciplined from time to time for disrespectful and demeaning statements to students.

5. For example, Respondent's Summary Evaluation for school year 2008-2009, his last year at Quibbletown Middle School, noted that his sarcasm was often perceived by parents and students as demeaning and hurtful.

6. Respondent's Summary Evaluation for school year 2009-2010, his first year at Piscataway High School, again noted his sarcasm in addressing students, and stated in pertinent part that he "used language that disrespected the students in his class and addressed them in a way that was demeaning and unprofessional. Students in this class have already experienced failure in this content area. Having a teacher who states and implies that they are 'stupid' will not help their self-esteem or create a teaching/learning environment that fosters growth and mutual respect." Other deficits in Respondent's performance also were noted, including lack of student progress on benchmark exams, and not actively participating in professional development and departmental meetings. As a result, Respondent was placed on the District's "comprehensive mode" of evaluation for school year 2010-2011, and the Board of Education voted at its June 10, 2010 meeting to withhold his increment for school year 2010-2011.

7. Respondent's inappropriate behavior continued during the 2010-2011 school year. Assistant Director of Special Education Colleen Canto sent Respondent a letter, on February 24, 2011, admonishing him for calling students "idiots," removing a student from his classroom while she was

sitting at her desk, and telling that student to "shut up" when she entered the classroom laughing.

8. Although Respondent showed some signs of improvement during school year 2010-2011, his Summary Evaluation noted that "there have still been incidents that have been reported to administration regarding conflicts between Mr. Serpico and students in his class." It was recommended that he remain on "comprehensive mode" for school year 2011-2012.

9. Respondent's classroom behavior and treatment of students thereafter remained tolerable until the following events occurred that give rise to this Tenure Charge.

Tenure Charge for Conduct Unbecoming

10. On May 8, 2018, Respondent, who is Caucasian, was in his classroom engaging in a heated argument with M.D., a male African-American student. In the midst of that argument, Respondent yelled at his students, some of whom also were African-American, demanding to know why he always had to hear "Nigger" (which he repeated several times) and "F-You."

11. A female African-American student, S.R., told Respondent that she was upset at his use of the term "Nigger" and asked to leave the room.

12. When M.D. told a fellow student that he believed S.R. was going to report the incident, Respondent angrily accosted M.D. at his desk in a physically aggressive manner, cursing at M.D., screaming that nothing was going to happen to Respondent, that no one cared what Respondent did, that Respondent was tired of working at the High School and similar statements. Portions of Respondent's uncontrolled outburst were captured on video by students in the classroom, which have spread throughout the school community.

13. Respondent's outburst was so loud that it created a significant disruption in and around his classroom.

14. In an investigative interview later that day, Respondent claimed that he was upset with M.D. for laughing about a recent altercation at another special education program in the District, which Respondent did not find humorous.

15. In the course of discussing the matter with M.D., Respondent claimed he also was upset at having to overhear students' music with offensive lyrics, and shouted at the class his frustration with having to hear "Nigger, Nigger, Nigger," "pants down," and "F-You" all the time.

16. Respondent admitted that when he overheard M.D. tell a fellow student that S.R. was probably going to report him, he became angry and, in the interview itself, also became visibly angry about many things he is tired of at the High School.

17. Piscataway High School is a highly diverse community where staff and students are expected to refrain from statements and behaviors that others would reasonably find to be racially, ethnically or culturally intimidating, threatening or demeaning.

18. Even assuming for argument's sake that Respondent's use of the word "Nigger" may have been appropriate in an academic discussion of the cultural implications of rap music, or in an appropriately-worded personal appeal to refrain from playing music with racial slurs that he found offensive, Respondent knew or should have known that repeatedly shouting the word "Nigger" in an angry tirade, directed to his students outside the bounds of any acceptable context, would reasonably be perceived as alarming, offensive, intimidating and unprofessional.

19. Respondent's statements to his students about not caring if he were reported and that nothing would happen to him, thus using his classroom as a soapbox to air his employment grievances, were also highly inappropriate and certain to diminish his effectiveness as a teacher and role model for his students.

20. Respondent's angry outburst and physical aggression toward M.D. was entirely unacceptable behavior on the part any adult staff member at the High School and cannot be tolerated.

21. It would appear that Respondent's course of conduct reflects his ongoing resentment at his High School assignment. However, dissatisfaction with one's lawfully assigned job duties is no excuse for the sort of alarming, intimidating and unprofessional conduct exhibited on this occasion, especially since Respondent had been warned repeatedly in the past about lack of respect for his students.

Conclusion

22. In summary, Respondent on this occasion engaged in conduct unbecoming a teaching staff member by: a) angrily and repeatedly shouting a racially explosive epithet in his students' presence out of any acceptable context, under circumstances where he knew or should have known that students would find it offensive and intimidating; b) employing his classroom as a forum to air personal grievances about his treatment by the High School Administration; and c) engaging in physical aggression toward a student in full view of his class, causing a substantial disruption in and about the classroom.

23. These most recent behaviors on Respondent's part have so undermined his effectiveness as a teacher, especially of students with special needs, that, in view of his prior admonitions and discipline for disrespecting students, I have concluded that he is unsalvageable as a teaching staff member in this District and can no longer support his continued employment.

24. For these reasons, I feel duty bound to file the within Tenure Charge.

In accordance with my statutory arbitral authority, I conducted a hearing in Piscataway, NJ on September 7, 2018. Both parties appeared by counsel and had full opportunity to adduce evidence, to cross examine witnesses,

and to make argument in support of their respective positions. The record before me comprises five Petitioner Exhibits, two Respondent Exhibits, five Stipulations of Fact, and a 240-page transcript[1] of seven witnesses' testimony at the September 7th hearing. Each party has submitted a post-hearing brief, and neither has raised any objection to the fairness or timeliness of this proceeding.

On the entire record so produced, indluding my assessments of witnesses' credibility and the probative value of evidence, I find the following relevant facts. Respondent is Vincent Serpico, a tenured teacher whom the District has employed since 2004. He is triple-certified to teach mathematics, special education, and elementary education.

Serpico initially taught mathematics at the Quibbletown Middle School. Following a change of State rules that required special education teachers to be content-area certified, for the 2009-10 school year the District reassigned Serpico to Piscataway High School as a special education mathematics teacher. He has remained in that assignment ever since.

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[1]I note that the transcript's Index contains several errors. With respect to direct examination of the District's witnesses, it refers to Petitioner's attorney, Mr. Rubin, as "Mr. Sands." With respect to Respondent's direct examination, it calls his attorney, Ms. Oxfeld Kanef, "Mr. Sands;" and with respect to his cross examination, it calls Mr. Rubin, "Ms. Oxfeld Kanef." In fact "Mr. Sands" is the arbitrator, and I did not examine any witnesses for any party.

Serpico has been unhappy in that assignment and has unsuccessfully sought reassignment back to teaching middle school mathematics. Because dual-certified special education/mathematics teachers are prized assets in high demand, the District has denied those requests notwithstanding Serpico's repeated expressions of dissatisfaction. As a result, Serpico was frustrated and resentful in his job. Serpico testified why he preferred teaching a middle school population:

> I think the middle school is just easier for me to get my information across. I think that the material – I am not concerned if they don't know it, but they will know it when we teach it to them in middle school. I think the high school, for the population that I am working with right now, lacks a lot of the basic skills. And I'd rather be in the middle school[. I]f the kids don't really know the information, we could teach it to them. [Transcript, p. 167.]

The event that gave rise to this Tenure Charge occurred in a second period special education geometry class on May 8, 2018. Prior to that class, Serpico had been in a boys' bathroom where a student whom he did not know was playing music on a boom box with "offensive lyrics and cursing" that Serpico "didn't really enjoy."

Serpico went across the hall to his classroom for his class, which comprised nine resourced students, seven of whom he had taught the year before. One of the new students was SR, who had arrived later in that year. Another

student, whom Serpico had had the year before, was MD, who Serpico testified always presented behavioral problems:

> There was always something, whether it was he didn't have a pencil, didn't have his homework, got up out of his seat to go text on the phone because he had – plugged in on the side. So you know, it was always something. I don't want to say every single day, but I would like to say pretty much everyday, because we don't have class everyday. . . . [Transcript 192-93.]

According to Serpico, MD came in and started talking and laughing about a fight in which a student who had been in the class knocked another teacher to the floor. Serpico told MD he didn't find it funny. Serpico's testimony continued:

> A. Then I have a student with earbuds in, when clearly it states – I have rules and it says don't come in with your earbuds, no texting, no Facetiming, etc., etc., etc., and it wasn't the first time and it wasn't the second time, it was numerous times. And I got upset.
>
> * * *
>
> Q. And so when you say you got upset, what did you do?
>
> A. I walked back to my desk, I asked him to remove the earbuds again. And I just got upset, and I said, you know, I come out of the bathroom – *I go in the bathroom I hear nigger, nigger, nigger, fuck you, suck my dick, this is all I hear all day.* And it is not only that class, it is predominantly all classes that I have every single day, indluding my assessments of witnesses' credibility home room.
>
> Q. I just want to know what you said.
>
> A. *That's what I said.*

[Transcript 195-96; emphasis added.]

SR got upset by Serpico's words and asked to leave the class to go to The Haven, a counseling area at the high school. Serpico asked if she would like to talk to him outside the class, and she said no. According to Serpico, she told him he couldn't say the words he did, and Serpico explained that he hadn't directed them toward anyone but had just repeated what he had heard. Serpico gave her a pass so that she could leave.

Serpico turned his attention back to the room. MD was speaking to another student, LJ, ten or twelve feet away and laughing that SR was going to report Serpico and get him suspended or fired. MD repeated that two or three times, and Serpico literally blew up and, in his own reported words, "went ballistic,"[2] actions captured on students' cell phones and posted online. Here's the exchange on his direct examination:

> Q. So after MD said she is going to get him suspended or fired, at least twice if not three times, what happened next?
>
> A. That's when you saw I approached him on the video.
>
> Q. And is it fair to say that you were yelling at him?
>
> A. Yeah. Yes.
>
> Q. And is it fair to say that you got into his face?

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[2]Transcript, p. 31.

A. Yes.

Q. So why did you do that?

A. I was upset. Everything was going through my head of all the years I wanted to put in for a transfer, all the years I was denied, all the years that I put grades in, they switched them. It was just constant stuff going through my head. It wasn't that instant, instance. It was just everything at once.

* * *

Q. Sitting here, having reviewed the video, how do you feel about it looking back at it now?

A. It looks worse – that's not me. I look foolish. They got the best of me, that's all I could say. That's not my behavior. I am sorry I even did that. It was just bad judgment.

[Transcript, pp. 198-200.]

The videos, in evidence as Petitioner Exhibit 5, go way beyond that description. The first, 18 seconds long, begins with Serpico first asking MD, "Something funny?" Then Serpico comes close to MD, leans in less than three feet away, and in a loud, angry voice, asks him, "Report me for what? Report me for what? Report me for what? I'm asking you again." On the second video, one minute long, Serpico continues his angry screed to MD, saying things like "There are no rules for any kids." "I'm annoyed because you don't listen." "I've been here so long because I'm smart. I only say stuff that nothing's going to happen [about] because nothing gets fixed." On the third video, also one minute long, Serpico keeps yelling in MD's face so close that MD has to get up from his seat

and move back. Serpico continues, "I have nothing to worry about in this place ever again because nobody cares." Serpico jabs his finger about a foot away from MD's face so close that MD says he's scared. On the fourth video, 49 seconds long, Serpico continues to vent his personal frustration, saying "I need to be in an environment that kids want to learn instead of embarrassing yourself in front of other people." And, repeatedly, "I don't care." And finally, on the fifth video, 46 seconds long, Serpico says "I'm tired of this shit that you pull every day." And "I have nothing to worry about because nobody cares." These videos went viral in the school district community, and Superintendent of Schools Theresa Rafferty received complaints about Serpico's meltdown from a number of parents.

At the close of Serpico's direct testimony, his attorney gave him an opportunity to express remorse and an intention to improve by asking, "Given that the incident happened, why do you think you should keep your employment with the Piscataway School District?" Serpico simply blew that opportunity by replying,

> My goal at Piscataway was to retire from Piscataway. My goal was to hopefully get transferred back to the middle school, to enjoy coming to work, to enjoy driving to work, to enjoy leaving and saying, you know what, I got some kids hanging out with me after school. I will stay. I don't feel that. I just feel – I don't enjoy the drive anymore. I don't enjoy driving to work. I don't enjoy the environment. I figured if I go back to the middle school and the change of environment would help me, help me stay here in

Piscataway, would help me give the kids the knowledge that I was given, whether it was from teaching or personal experience.

But I don't enjoy the drive anymore. I enjoy teaching middle school kids. I enjoy not having to ask the simple stuff of where is your pencil, where is your paper, where is your homework. It is just repetitional everyday that I am tired of. I am just tired of saying the same stuff everyday, numerous times everyday for X amount of years. . . .

* * *

I already said I made the mistake. . . . But you know, I don't think I should lose my position over it. I would like to be transferred, but that was the whole goal.

I didn't want to be in the special ed environment anymore. I felt that it was . . . giving me more anxiety than what I needed. I just felt that . . . if I went to more general class or general math class, it would give me less anxiety.

[Transcript, pp. 207-08.]

There was a great deal of testimony concerning Serpico's past record of evaluations, negative comments concerning his interactions with students, his psychotherapy for anxiety, and his use of toothpicks to control inappropriate verbal outbursts. He also testified that he responded to a District goal of reducing referrals to discipline by five percent by stopping referring misbehaving students for discipline but just recording the incidents in the Genesis computer program. Serpico acknowledged that the District had provided professional development activities to accomplish that goal by using classroom management skills so as to reduce occasions of bad behavior or, when they did happen, to de-escalate them so

that disciplinary referrals would be unnecessary.[3] I will not recite those facts in detail here because Serpico never challenged or grieved any of the negative items in his record; he never followed up on his therapist's recommendation of anxiety medication to address his situation; he never reported his anxiety problem to the District, and he never requested an accommodation. The record on those issues is accordingly established although Serpico has suffered no discipline or negative evaluations since 2011.

On these facts Petitioner argues (a) that tenured teachers must act in a professional manner and serve the welfare of the students in their care; (b) that the use of racial and ethnic slurs is unbecoming conduct deserving of termination; (c) that Serpico's repeated use of the word, "nigger," had no place in a special education math class and is cause in itself for dismissal; (d) that Serpico's claim he was merely expressing frustration at vulgar rap lyrics he had overheard is no defense; (e) that Serpico's violent outburst at MD later that period further establishes his unfitness to remain as a classroom teacher; (f) that Serpico squandered his chance to express remorse and promise better behavior in the future by reiterating his hatred for his current assignment and resentment at not

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[3]Notwithstanding that acknowledgment, Serpico testified that he had written fewer referrals "because it was less of a target on me. . . . I just wanted to be switched to the middle school, so I kept myself out of harm's way."

being transferred back to the middle school; (g) that Serpico's prior disciplinary record placed him on notice of conduct that would be considered unacceptable, including his actions on May 8th, and (h) that Petitioner has met its burden of demonstrating Serpico's guilt of conduct unbecoming a teaching staff member and that his employment must be terminated.

Respondent, on the other hand, contends (a) that, aside from negative comments in his 2008-09 and 2009-10 evaluations that he denies, a withheld salary increment for the 2010-11 school year based on allegations that he had used "sarcasm" in his classroom and called students "stupid" and "idiots," and a February 2011 memorandum admonishing him for telling a student to "shut up," Serpico has had no other discipline or negative evaluations; (b) that Serpico does not deny that he engaged in the behavior charged, acknowledges that his behavior was inappropriate, and is remorseful about it; (c) that progressive discipline should be applied because of Serpico's long history of positive service with the District; (d) that Serpico's case is distinguishable from those of teachers who denied accusations, were untruthful in their testimony, and expressed no remorse for their actions; (e) that Serpico's actions with respect to MD were an attempt to control the classroom after his repeated talking and laughing about an incident in which a student injured a teacher; (f) that, in view of Serpico's acknowledgment of the

severity of his actions and their inappropriateness, it is clear he would not again engage in such behavior if given discipline less severe than termination; (g) that, under these circumstances, there was no just cause to terminate Serpico's employment; (h) that, because Serpico is receiving counseling and will soon be on anxiety medication, he will not commit a similar act in the future; (I) that the testimony of SR and MD was contradictory and should not be considered in full; (j) that Serpico's numerous transfer requests were ignored by the District and created an issue with the Superintendent, who has a clear and apparent bias against Serpico; (k) that a temporary suspension is therefore the most proper punishment Serpico should receive under the circumstances of this case, which distinguish it from those of *Parezo* and *Hendrickson*, neither of whom admitted any wrongdoing, and (l) that I should accordingly impose a penalty less than termination in this case.

In its reply brief, the District addresses Respondent's contentions that had not been anticipated in its first brief, arguing (a) that progressive discipline is inappropriate where, as here, Serpico did not have an unblemished past record and did in fact suffer progressive discipline that he neither grieved or challenged; his half-hearted expression of regret rang false in view of his minimizing his wrongdoing, deflecting responsibility onto others, and he accused the

Superintendent of bias against him; (b) that grievant's claim that all will be well once he is on medication is unavailing in absence of medical evidence establishing a causal connection between his anxiety condition and his misconduct at issue; (c) that Serpico's attempt to blame his misconduct on the District's refusal to transfer him back to the middle school is a red herring that evidences his refusal to accept personal responsibility for his inexcusable behavior on May 8th, and (d) I should accordingly find him guilty of the Tenure Charge and sustain termination of his employment.

On the entire record before me, I must find Petitioner has met its burden of proving Respondent guilty of conduct unbecoming a teaching staff member and of establishing just cause for terminating his employment. I reach that conclusion for the following reasons.

First, the parties do not dispute what happened on May 8th. Serpico vented his personal frustration at having once again had to hear offensive rap lyrics by using the same offensive words, "nigger, nigger, nigger," "fuck you," and "suck my dick" in his special education math class. Just as the lyrics' n-word had upset Serpico, an adult responsible for the education and welfare of his students, his repeating it so upset one of them, SR, a 16-year-old cognitively-impaired and emotionally-disturbed African-American female, that she had to leave the class to

seek a counselor's assistance. If that hadn't been enough, Serpico compounded his misconduct by going "ballistic" in response to student MD's amused reaction. Not only does Serpico not dispute either of these events; five different video clips that went viral in the school community confirm them.

Second, Serpico's initial outburst –saying the words "nigger, nigger, nigger," "fuck you," and "suck my dick" to his class– was not just inappropriate; it served no legitimate pedagogical purpose. This was a special education geometry class, not an American literature class reading *The Adventures of Huckleberry Finn* or a social studies class considering the cultural impact of rap music lyrics. Those words –fraught as they are with racial and societal opprobrium– have nothing at all to do with mathematics and, with only a few legitimate exceptions, have no place in a classroom. Serpico's use of them on May 8th to express his personal frustration was beyond inappropriate; it was a self-indulgent excrescence.

Third, Serpico's enraged interaction with MD compounded that offense. The videos show Serpico in MD's face, shouting and intimidating him, and spewing negative comments about MD and this special education class. Not only was it inappropriate, self-indulgent, and bereft of pedagogical purpose; it was actually destructive of pedagogical purpose. Instead of modeling appropriate behavior for MD –a student whose disability includes distraction, struggling to

exercise judgment, and difficulty staying on and carrying out tasks– to emulate, Serpico exercised no judgment, blew up, and lost sight of his primary educational task. Moreover, Serpico's rant included negative statements about his special education population and the District's commitment to the program:

- ". . . [N]othing's going to happen because nothing gets fixed."
- "I have nothing to worry about in this place ever again because nobody cares."
- "I need to be in an environment that kids want to learn instead of embarrassing yourself in front of other people."
- "I don't care."
- "I'm tired of this shit that you pull every day."
- "I have nothing to worry about because nobody cares."

These examples are consistent with the attitude reflected by Serpico's testimony quoted above at page 7 that his special education students are beyond instruction:

> I think the high school, for the population that I am working with right now, lacks a lot of the basic skills. And I'd rather be in the middle school[. I]f the kids don't really know the information, we could teach it to them.

Of course the special education population "lacks a lot of the basic skills." But special education teachers are trained and expected to appreciate and address those students' special needs effectively. Serpico utterly failed to use his training to meet that requirement. Serpico's rant is destructive of what special education students need to hear. And District parents are appropriately concerned that a

teacher of their children would so misbehave and that the District would tolerate such misconduct.

Fourth, it was only after the District preferred this Tenure Charge that Serpico first appreciated the severity of his behavior. Responding to a question about his having voluntarily come to his supervisor's office on May 8th to report that day's incident, Serpico testified,

> A. I voluntarily told them what happened with MD. But it wasn't – I told them that . . . I got upset. I didn't get into detail, because *I didn't really think it was – it was a big deal at the time, but now obviously I do.*
>
> * * *
>
> Q. Did you think your behavior was appropriate?
>
> A. No, not at all. I already said I was inappropriate. I said I shouldn't have done it, and obviously we're here. [Transcript, pp. 206-07; emphasis added.]

Clearly what's at issue here is *not* no big deal. It is, as Serpico now appreciates, a big deal; and we are, indeed, "here." And we are "here" not because the Superintendent of Schools was biased against Serpico or because the District's lack of support for his disciplinary referrals caused his outburst. We are "here" because of Serpico's own gross misconduct on May 8th.

Fifth, the record before me contains no convincing expression of remorse or purpose to improve. The closest Serpico came to that appears on pages 199-200:

Q. Sitting here, having reviewed the video, how do you feel about it looking back at it now?

A. It looks worse – that's not me. I look foolish. They got the best of me, that's all I could say. That's not my behavior. I am sorry I even did that. It was just bad judgment.

Aside from that the record is replete with Serpico's expressions of his contempt for the special education population in his classes because they can't learn, his resentment of the District's denials of his annual transfer requests, his intention to continue those efforts to get back to teaching middle school students who can learn, and his bewilderment why the District would not want him to be happy in his work. What appears clear is that, if Serpico were to return to employment as a special education math teacher at the high school, he will continue to seethe with resentment and "mail it in" with respect to teaching his special education students.

Sixth, in reaching this conclusion, I reject as unsupported by the record Serpico's arguments that the District's investigation was flawed, that the testimony of SR and MD was inconsistent, that the progressive discipline element of just cause requires a lesser penalty than termination, and that Superintendent Rafferty's decision to prefer this Tenure Charge was motivated by personal bias against him. In the first place, the District's investigation was entirely appropriate. Serpico's supervisors interviewed all potential witnesses and heard Serpico's

version of what happened. That investigation required no participation by Rafferty, who appropriately delegated that process to those of her reports responsible for Serpico's service. In addition, there are no relevant disputed facts that additional investigation or Rafferty's participation would have disclosed. Moreover, no inconsistency between the testimony of SR and MD had anything to do with the relevant facts of Serpico's misconduct. He did what he did; it so upset SR that she had to leave the class for counseling, and it had a negative impact on MD and the class. Fourth, Serpico suffered disciplinary loss of an annual increment for related misconduct seven years earlier, which meets the requirement of progressive discipline. And last, Serpico has adduced no evidence of bias on Rafferty's part save his suspicion that she resented his repeated transfer requests. In fact legitimate business considerations motivated her denials of those requests –State rules required a dual-certified teacher like Serpico for his position at the high school– and Serpico himself never followed up on Rafferty's invitation to come speak her about his unhappiness in that assignment. In the final analysis, Serpico's own egregious misconduct on May 8th, not any considerations of bias or personal resentment, impelled Rafferty's judgment to prefer this Tenure Charge and seek termination of his employment.

Finally, the record before me provides no basis to believe that Serpico can continue effective service as a teacher in the District. I see no reason to expect that his fulminating resentment and frustration will abate, that therapy and anxiety medication will make him any happier teaching special education math at the high school, or that, if reinstated to employment, future such misconduct could not recur.

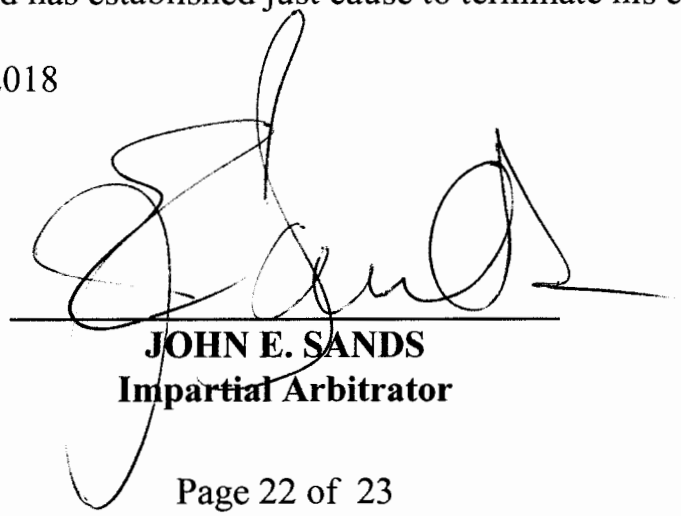
I accordingly find that the District has fully met its burdens of proving Respondent Vincent Serpico's guilt of the Tenure Charge of conduct unbecoming a teaching staff members and establishing just cause for its decision to terminate his employment.

By reason of the foregoing, I issue the following

AWARD

Petitioner, the School District of the Township of Piscataway, Middlesex County, has borne its burden of proving Respondent Vincent Serpico's guilt of the Tenure Charge of conduct unbecoming a teaching staff member and has established just cause to terminate his employment.

Dated: November 4, 2018
Roseland, New Jersey

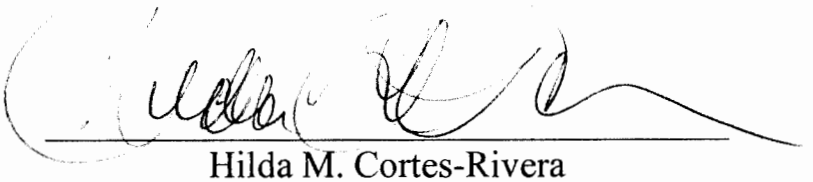


JOHN E. SANDS
Impartial Arbitrator

ACKNOWLEDGMENT

STATE OF NEW JERSEY)
>ss.:
COUNTY OF ESSEX)

On November 4, 2018, JOHN E. SANDS, whom I know, came before me and acknowledged that he had executed the foregoing as and for his Opinion and Award in the above-captioned matter.



Hilda M. Cortes-Rivera
A Notary Public of New Jersey
My Commission expires October 10, 2023

AGENCY DKT. NO. 249-10/18

IN THE MATTER OF DENNIS CRONIN,	:	
BOARD OF EDUCATION OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF WOODLAND, BURLINGTON COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC) – finding that respondent violated the School Ethics Act for failure to timely file his Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent failed to file his Disclosure Statements despite the issuance of its August 28, 2018 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty, nor has he instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

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

Accordingly, respondent is hereby removed – effective from the date of this decision – as a school official found to have violated the School Ethics Act for failure to file his Disclosure Statements.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 11/09/18
Date of Mailing: 11/09/18

* 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	:	BEFORE THE SCHOOL ETHICS COMMISSION
DENNIS CRONIN	:	DECISION FOR FAILURE TO FILE PERSONAL/RELATIVE AND FINANCIAL DISCLOSURE STATEMENTS
WOODLAND TOWNSHIP SCHOOL DISTRICT, BURLINGTON COUNTY	:	
	:	DOCKET NO.: D02-18

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on August 28, 2018, and mailed on August 29, 2018, through regular and electronic mail (e-mail), directing Respondent, a "school official" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find him in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1.

The OTSC issued by the Commission provided notification to Respondent that he had twenty (20) days to respond to the OTSC, and that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. Annually, on or before April 30th of each year, all school officials, as defined in N.J.S.A. 18A:12-23, must file Disclosure Statements with their local board secretaries or charter school designees. N.J.A.C. 6A:28-3.1(a). In addition, after the April 30th filing date, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. N.J.A.C. 6A:28-3.1(c), (d), (e) and (f).

Respondent is a returning school official and, therefore, was required to file his Disclosure Statements by April 30, 2018. Respondent failed to file his Disclosure Statements within the statutorily required timeframe.

By correspondence dated July 20, 2018, from the Burlington County Office of Education, Respondent was reminded that his Disclosure Statements had not yet been filed with the Commission. This correspondence further advised Respondent that if he failed to file his

Disclosure Statements by July 31, 2018, the Commission had the authority to issue an OTSC, find him in violation of the Act, and recommend a penalty up to and including removal for his non-compliance.

When the correspondence from the Burlington County Office of Education failed to cause Respondent to file his Disclosure Statements, the Commission sent him another letter dated August 2, 2018, and informed Respondent that failure to file his Disclosure Statements by August 17, 2018, would result in the Commission voting to issue an OTSC. The Commission further advised that, if an OTSC issued, Respondent would be assessed a penalty, up to and including removal.

When Respondent failed to file his Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by August 17, 2018, and despite receiving multiple reminders and opportunities to file his Disclosure Statements, an OTSC was issued by the Commission at its meeting on August 28, 2018. After having been served with the OTSC, Respondent still failed to file his completed Disclosure Statements, or to otherwise respond to the OTSC.

DECISION/PENALTY RECOMMENDATION

Based on the record as set forth above, at its meeting on September 25, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files his Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

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

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked

"Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4-1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: September 26, 2018

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
DENNIS CRONIN	:	
WOODLAND TOWNSHIP SCHOOL DISTRICT, **BURLINGTON COUNTY**	:	**RESOLUTION ADOPTING DECISION**
	:	**DOCKET NO.: D02-18**

WHEREAS, Respondent is a "school official," as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), at the Woodland Township School District; and

WHEREAS, as a returning school official, Respondent was required to file his Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2018; and

WHEREAS, Respondent failed to file his Disclosure Statements within the statutorily required timeframe; and

WHEREAS, at its meeting on August 28, 2018, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why he failed to file his Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1; and

WHEREAS, Respondent failed to file his Disclosure Statements following issuance of the OTSC; and

WHEREAS, Respondent failed to otherwise file a response to the OTSC; and

WHEREAS, at its meeting on September 25, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by failing to file his Disclosure Statements; and

WHEREAS, at its meeting on September 25, 2018, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files his Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

WHEREAS, at its meeting on September 25, 2018, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on September 25, 2018.

Kathryn A. Whalen

Kathryn A. Whalen, Director

360-18L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

November 8, 2018

Benjamin B. Brenner, Esq.
Carroll Law Firm, PLC
1 N. New York Road, Suite 39
Galloway, New Jersey 08205

Annie Kotokpo, *pro se*
16 E. Bayview Avenue
Pleasantville, New Jersey 08232

Re: *In the Matter of the Tenure Hearing of Annie Kotokpo, School District of the City of Pleasantville, Atlantic County, Agency Dkt. No. 242-9/18*

Dear Parties:

I have reviewed the correspondence filed by the District seeking to withdraw the tenure charges against respondent, Annie Kotokpo, based on her retirement, along with the respondent's letter of retirement from the District. Upon review of the submissions, I find that since the respondent has retired from the District, there is no need to proceed with the tenure charges.

Accordingly, the withdrawal of the tenure charges is approved pursuant to *N.J.A.C.* 6A:3-5.6, and this matter is hereby dismissed. Additionally, this matter is being forwarded to the State Board of Examiners for such action as it deems appropriate.

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner

c: County Superintendent
State Law Library
State Board of Examiners

LOR/SLP/BCM

AGENCY DKT. NO. 248-10/18

IN THE MATTER OF ELYSA SANCHEZ,	:	
PLEASANTVILLE SCHOOL DISTRICT,	:	COMMISSIONER OF EDUCATION
ATLANTIC COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC) – finding that respondent violated the School Ethics Act (SEA) for failure to timely file her Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent failed to file her Disclosure Statements despite the issuance of its August 28, 2018 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty, nor has she instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

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

Accordingly, respondent is hereby removed – effective from the date of this decision – as a school official found to have violated the SEA for failure to file her Disclosure Statements.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 11/09/18
Date of Mailing: 11/09/18

[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)

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
ELYSA SANCHEZ	:	**DECISION FOR FAILURE TO FILE PERSONAL/RELATIVE AND FINANCIAL DISCLOSURE STATEMENTS**
***PLEASANTVILLE SCHOOL DISTRICT*, ATLANTIC COUNTY**	:	
	:	**DOCKET NO.: D01-18**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on August 28, 2018, and mailed on August 29, 2018, through regular and electronic mail (e-mail), directing Respondent, a "school official" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1.

The OTSC issued by the Commission provided notification to Respondent that she had twenty (20) days to respond to the OTSC, and that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. Annually, on or before April 30th of each year, all school officials, as defined in N.J.S.A. 18A:12-23, must file Disclosure Statements with their local board secretaries or charter school designees. N.J.A.C. 6A:28-3.1(a). In addition, after the April 30th filing date, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. N.J.A.C. 6A:28-3.1(c), (d), (e) and (f).

Respondent is a returning school official and, therefore, was required to file her Disclosure Statements by April 30, 2018. Respondent failed to file her Disclosure Statements within the statutorily required timeframe.

By correspondence dated July 20, 2018, from the Atlantic County Office of Education, Respondent was reminded that her Disclosure Statements had not yet been filed with the Commission. This correspondence further advised Respondent that if she failed to file her

Disclosure Statements by July 31, 2018, the Commission had the authority to issue an OTSC, find her in violation of the Act, and recommend a penalty up to and including removal for her non-compliance.

When the correspondence from the Atlantic County Office of Education failed to cause Respondent to file her Disclosure Statements, the Commission sent her another letter dated August 2, 2018, and informed Respondent that failure to file her Disclosure Statements by August 17, 2018, would result in the Commission voting to issue an OTSC. The Commission further advised that, if an OTSC issued, Respondent would be assessed a penalty, up to and including removal.

When Respondent failed to file her Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by August 17, 2018, and despite receiving multiple reminders and opportunities to file her Disclosure Statements, an OTSC was issued by the Commission at its meeting on August 28, 2018. After having been served with the OTSC, Respondent still failed to file her completed Disclosure Statements, or to otherwise respond to the OTSC.

DECISION/PENALTY RECOMMENDATION

Based on the record as set forth above, at its meeting on September 25, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files her Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

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

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked

"Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4-1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: September 26, 2018

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
ELYSA SANCHEZ	:	
PLEASANTVILLE SCHOOL DISTRICT, **ATLANTIC COUNTY**	:	**RESOLUTION ADOPTING DECISION**
	:	**DOCKET NO.: D01-18**

WHEREAS, Respondent is a "school official," as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), at the Pleasantville School District; and

WHEREAS, as a returning school official, Respondent was required to file her Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2018; and

WHEREAS, Respondent failed to file her Disclosure Statements within the statutorily required timeframe; and

WHEREAS, at its meeting on August 28, 2018, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file her Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1; and

WHEREAS, Respondent failed to file her Disclosure Statements following issuance of the OTSC; and

WHEREAS, Respondent failed to otherwise file a response to the OTSC; and

WHEREAS, at its meeting on September 25, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by failing to file her Disclosure Statements; and

WHEREAS, at its meeting on September 25, 2018, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files her Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

WHEREAS, at its meeting on September 25, 2018, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on September 25, 2018.

Kathryn A. Whalen

Kathryn A. Whalen, Director

E.S. ON BEHALF OF MINOR CHILDREN, E.S., E.S., K.S., AND T.S.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of E.S., E.S., K.S. and T.S., challenging the determination of the respondent Board that his children are not entitled to a free public education in Elizabeth schools. The respondent Board contended that the results of a residency investigation showed that petitioner and his children are no longer domiciled in Elizabeth. The matter was transmitted to the OAL as a contested case, and a hearing was scheduled for September 12, 2018; petitioner failed to appear and offered no explanation for his non-appearance.

The ALJ found, *inter* alia, that: pursuant to *N.J.S.A.* 18A:38-1, a petitioner has the burden of proof in a determination of residency ineligibility; in this matter, a hearing was scheduled for September 12, 2018 and petitioner received appropriate notice thereof; petitioner failed to appear at the hearing; the Board's residency investigator appeared at the hearing and provided proofs for a counterclaim for tuition. The ALJ concluded that based on the uncontroverted testimony of the residency investigator and proofs presented, as well as E.S.'s own admission at an earlier Board hearing that he lived in Edison with his children, E.S. was not domiciled in Elizabeth from May 7, 2018 through the end of the 2017-2018 school year. Accordingly, the Board's counterclaim for tuition was granted, and petitioner was ordered to reimburse the Board in the total amount of $ 12,643.40 for the period of ineligible attendance by petitioner's four children.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and the Initial Decision was adopted as the final decision in this matter. Petitioner was ordered to reimburse the Board in the amount of $ 12,643.40, 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.

November 9, 2018

OAL DKT. NO. EDU 07901-18
AGENCY DKT. NO. 128-5/18

E.S. ON BEHALF OF MINOR CHILDREN, E.S., E.S., K.S., AND T.S.,	:	
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) have been reviewed. The Administrative Law Judge's (ALJ) recommended decision in this matter dismissed petitioner's residency appeal as consequence for his failure to appear at the scheduled hearing without providing any explanation for the non-appearance. The ALJ further concluded that petitioner should be assessed tuition costs in the amount of $12,643.40. The parties did not file exceptions to the Initial Decision. [1]

In accordance with *N.J.A.C.* 1:1-14.4(d), an ex parte hearing was held during which the Board presented the testimony of Vito Tropeano, the district's residency investigator, regarding the investigation into E.S.'s domicile and tuition due for the minor children's ineligible attendance in Elizabeth schools. Based upon Mr. Tropeano's undisputed testimony and the Board's supplemental submission, the ALJ found that the minor children were ineligible to attend school in Elizabeth for a total of 35 days, from May 7, 2018 through the end of the 2017-

[1] The Commissioner was not provided with a transcript of the September 12, 2018 hearing at the OAL.

2018 school year.[2] Accordingly, petitioner was ordered to pay the Board tuition in the amount of $12,643.40 ($79.22 per day for E.S.; $96.14 per day for E.S.; and $92.94 per day each for K.S. and T.S.) for the period of the minor children's ineligible attendance in Elizabeth's schools.

The Commissioner fully concurs with the ALJ's determination and recommendation that petitioner's failure to prosecute this matter necessitates its dismissal and the award of tuition to the Board. Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter and petitioner is hereby directed to pay the Board $12,643.40 in tuition for his minor children's ineligible attendance in Elizabeth during the 2017-2018 school year.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: 11/09/18

Date of Mailing: 11/09/18

[2] The Commissioner notes that, pursuant to *N.J.S.A.* 18A:38-1, the burden is on petitioner – not respondent – to demonstrate that he is domiciled in the district.

[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 07971-18
AGENCY DKT. NO. 128-5/18

E.S. ON BEHALF OF MINOR CHILDREN,
K.S. & T.S.,
Petitioner(s),
v.
ELIZABETH BOARD OF EDUCATION,
UNION COUNTY
Respondent.

E.S., petitioner, pro se

Christina DiPalo, Esq. for respondent (LaCorte, Bundy, Varady & Kinsella)

Record Closed: September 20, 2018 Decided: September 26, 2018

BEFORE: **JOANN LASALA CANDIDO**, ALAJ:

Petitioner E.S. challenges the residency determination made by the Elizabeth Board of Education ("Board") with regard to his minor children E.S., E.S., K.S. and T.S. On May 31, 2018, respondent submitted an Answer, which was filed with the Commissioner of Education on June 4, 2018. Respondent's demand included a request that the Commissioner dismiss the petition, that the children be removed from the district, and that the petitioner be assessed a tuition charge for each day of the four

children's' ineligible attendance in the Board's schools commencing May 7, 2018 and ending in June 2018 for a total of thirty-five days.

The matter was transmitted to the Office of Administrative Law (OAL) on June 5, 2018, 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 September 12, 2018, and the record closed on September 20, 2018, upon receipt of tuition cost. Petitioner failed to appear for the hearing.

The issues in this matter are whether E.S., E.S., K.S. and T.S. are 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 the children should be granted.

Based upon the papers submitted as of the hearing date and the supplemental submission by respondent as well as the testimony of Elizabeth Board of Education Investigator Vito Tropeano, I **FIND** the following **FACTS**, which are essentially undisputed. A guidance counselor at School 6 advised the Board of Education that she was told by a teacher's assistant that the children were on the train in the morning and afternoon commuting from Edison to Elizabeth and back to Edison. Elizabeth Public Schools requested a residency investigation of petitioner and Residency Investigator Tropeano was assigned the investigation. Tropeano went to the address provided by E.S. in Elizabeth in April and was told by the first-floor tenant that E.S. moved out three months ago.

An eligibility hearing was scheduled for April 27, 2018 and then rescheduled for May 7, 2018. E.S. attended the hearing and confirmed that he lived in Edison with his children and requested that the Board permit the children to finish the school year. This request was denied.

The respondent is seeking tuition for E.S. at School No. 6 at a daily rate of $79.22 for thirty-five days for a total cost of $2,772.70; tuition for E.S. at School 6 at a daily rate of $96.14 for thirty-five days for a total cost of $3,364.90; tuition for K.S. at Hillcrest School at a daily rate of $92.94 for thirty-five days for a total cost of $3,252.90 and tuition for T.S. at School No. 6 at a daily rate of $92.94 for thirty-five days for a total cost of $3,252.90.

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 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. 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.S.A.. 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).

According to N.J.A.C. 6A:22-6.3(a), "[t]uition assessed pursuant to the provisions of this section shall be calculated on a per student basis for the period of a student's ineligible enrollment, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23-3.1. The individual student's record of daily attendance shall not impact on such calculation." However, "[n]othing in this chapter shall preclude an equitable determination, by the district board of education or the Commissioner, that, when the particular circumstances of a matter so warrant, tuition shall not be assessed for all or part of any period of a student's ineligible attendance in the school district." N.J.A.C.6A:22-6.3(b).

Based on the uncontroverted testimony of Investigator Tropeano and proofs presented, I **CONCLUDE** that the respondent has met its burden under N.J.S.A. 18A:38 b(2) that E.S., E.S., K.S. and T.S. were not domiciled in Elizabeth from May 7, 2018 to the end of the school year and therefore are not entitled to a free education in the Elizabeth school district.

I further **CONCLUDE** that E.S., E.S., K.S. and T.S. were educated in the district for a period of thirty-five days calculated as follows: E.S. at School No. 6 at a daily rate of $79.22 for thirty-five days for a total cost of $2,772.70; E.S. at School 6 at a daily rate of $96.14 for thirty-five days for a total cost of $3,364.90; K.S. at Hillcrest School at a daily rate of $92.94 for thirty-five days for a total cost of $3,252.90 and T.S. at School No. 6 at a daily rate of $92.94 for thirty-five days for a total cost of $3,252.90. The total cost for all four children is $12,643.40 for which the district is entitled to reimbursement.

ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's determination that E.S. and his four children, E.S., E.S., K.S. and T.S., are not residents and domiciliary in Elizabeth, New Jersey, and were not domiciled within its school district during the period of May 7, 2018 to the last day of school in June 2018, 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 $12,643.40.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 26, 2018
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: Sept 26, 2018

Date Mailed to Parties:
ljb

EXHIBITS

For petitioner:

None

For respondent:

R-1 Residency Investigation Communication Log

R-2 Eligibility Hearing Notice

R-3 Notice of Final Determination of Ineligibility

R-4 Tuition Rates

363-18+

E.S. ON BEHALF OF MINOR CHILDREN, E.S., E.S., K.S., AND T.S.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of E.S., E.S., K.S. and T.S., challenging the determination of the respondent Board that his children are not entitled to a free public education in Elizabeth schools. The respondent Board contended that the results of a residency investigation showed that petitioner and his children are no longer domiciled in Elizabeth. The matter was transmitted to the OAL as a contested case, and a hearing was scheduled for September 12, 2018; petitioner failed to appear and offered no explanation for his non-appearance.

The ALJ found, *inter* alia, that: pursuant to *N.J.S.A.* 18A:38-1, a petitioner has the burden of proof in a determination of residency ineligibility; in this matter, a hearing was scheduled for September 12, 2018 and petitioner received appropriate notice thereof; petitioner failed to appear at the hearing; the Board's residency investigator appeared at the hearing and provided proofs for a counterclaim for tuition. The ALJ concluded that based on the uncontroverted testimony of the residency investigator and proofs presented, as well as E.S.'s own admission at an earlier Board hearing that he lived in Edison with his children, E.S. was not domiciled in Elizabeth from May 7, 2018 through the end of the 2017-2018 school year. Accordingly, the Board's counterclaim for tuition was granted, and petitioner was ordered to reimburse the Board in the total amount of $ 12,643.40 for the period of ineligible attendance by petitioner's four children.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and the Initial Decision was adopted as the final decision in this matter. Petitioner was ordered to reimburse the Board in the amount of $ 12,643.40, 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.

December 14, 2018

363-18+

OAL DKT. NO. EDU 07971-18
AGENCY DKT. NO. 128-5/18

E.S. ON BEHALF OF MINOR CHILDREN, E.S., E.S., K.S., AND T.S.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	CORRECTED 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) have been reviewed. The Administrative Law Judge's (ALJ) recommended decision in this matter dismissed petitioner's residency appeal as consequence for his failure to appear at the scheduled hearing without providing any explanation for the non-appearance. The ALJ further concluded that petitioner should be assessed tuition costs in the amount of $12,643.40. The parties did not file exceptions to the Initial Decision. [1]

In accordance with *N.J.A.C.* 1:1-14.4(d), an ex parte hearing was held during which the Board presented the testimony of Vito Tropeano, the district's residency investigator, regarding the investigation into E.S.'s domicile and tuition due for the minor children's ineligible attendance in Elizabeth schools. Based upon Mr. Tropeano's undisputed testimony and the Board's supplemental submission, the ALJ found that the minor children were ineligible to attend school in Elizabeth for a total of 35 days, from May 7, 2018 through the end of the 2017-

[1] The Commissioner was not provided with a transcript of the September 12, 2018 hearing at the OAL.

2018 school year.[2] Accordingly, petitioner was ordered to pay the Board tuition in the amount of $12,643.40 ($79.22 per day for E.S.; $96.14 per day for E.S.; and $92.94 per day each for K.S. and T.S.) for the period of the minor children's ineligible attendance in Elizabeth's schools.

The Commissioner fully concurs with the ALJ's determination and recommendation that petitioner's failure to prosecute this matter necessitates its dismissal and the award of tuition to the Board. Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter and petitioner is hereby directed to pay the Board $12,643.40 in tuition for his minor children's ineligible attendance in Elizabeth during the 2017-2018 school year.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: 12/14/18

Date of Mailing: 12/14/18

[2] The Commissioner notes that, pursuant to *N.J.S.A.* 18A:38-1, the burden is on petitioner – not respondent – to demonstrate that he is domiciled in the district.

[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).

AGENCY DKT. NO. 262-9/18

IN THE MATTER OF CORYNDA HAGAMIN.	:	
CAMDEN'S PROMISE CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY.	:	DECISION

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC) – finding that respondent violated the School Ethics Act for failure to timely file her Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent failed to file her Disclosure Statements despite the issuance of its August 28, 2018 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty, nor has she instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

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

Accordingly, respondent is hereby removed – effective from the date of this decision – as a school official found to have violated the School Ethics Act for failure to file her Disclosure Statements.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 11/09/18

Date of Mailing: 11/09/18

[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)

IN THE MATTER OF	:	BEFORE THE SCHOOL ETHICS COMMISSION
CORYNDA HAGAMIN	:	DECISION FOR FAILURE TO FILE PERSONAL/RELATIVE AND FINANCIAL DISCLOSURE STATEMENTS
CAMDEN'S PROMISE CHARTER SCHOOL, CAMDEN COUNTY	:	
	:	DOCKET NO.: D03-18

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on August 28, 2018, and mailed on August 29, 2018, through regular and electronic mail (e-mail), directing Respondent, a "school official" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1.

The OTSC issued by the Commission provided notification to Respondent that she had twenty (20) days to respond to the OTSC, and that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. Annually, on or before April 30th of each year, all school officials, as defined in N.J.S.A. 18A:12-23, must file Disclosure Statements with their local board secretaries or charter school designees. N.J.A.C. 6A:28-3.1(a). In addition, after the April 30th filing date, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. N.J.A.C. 6A:28-3.1(c), (d), (e) and (f).

Respondent is a returning school official and, therefore, was required to file her Disclosure Statements by April 30, 2018. Respondent failed to file her Disclosure Statements within the statutorily required timeframe.

By correspondence dated July 23, 2018, from the Camden County Office of Education, Respondent was reminded that her Disclosure Statements had not yet been filed with the Commission. This correspondence further advised Respondent that if she failed to file her

Disclosure Statements by July 31, 2018, the Commission had the authority to issue an OTSC, find her in violation of the Act, and recommend a penalty up to and including removal for her non-compliance.

When the correspondence from the Camden County Office of Education failed to cause Respondent to file her Disclosure Statements, the Commission sent her another letter dated August 2, 2018, and informed Respondent that failure to file her Disclosure Statements by August 17, 2018, would result in the Commission voting to issue an OTSC. The Commission further advised that, if an OTSC issued, Respondent would be assessed a penalty, up to and including removal.

When Respondent failed to file her Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by August 17, 2018, and despite receiving multiple reminders and opportunities to file her Disclosure Statements, an OTSC was issued by the Commission at its meeting on August 28, 2018. After having been served with the OTSC, Respondent still failed to file her completed Disclosure Statements, or to otherwise respond to the OTSC.

DECISION/PENALTY RECOMMENDATION

Based on the record as set forth above, at its meeting on September 25, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files her Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

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

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked

"Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4-1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the 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 (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: September 26, 2018

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
CORYNDA HAGAMIN	:	**RESOLUTION ADOPTING DECISION**
CAMDEN'S PROMISE CHARTER SCHOOL, **CAMDEN COUNTY**	:	**DOCKET NO.: D03-18**

WHEREAS, Respondent is a "school official," as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), at the Camden's Promise Charter School; and

WHEREAS, as a returning school official, Respondent was required to file her Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2018; and

WHEREAS, Respondent failed to file her Disclosure Statements within the statutorily required timeframe; and

WHEREAS, at its meeting on August 28, 2018, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file her Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1; and

WHEREAS, Respondent failed to file her Disclosure Statements following issuance of the OTSC; and

WHEREAS, Respondent failed to otherwise file a response to the OTSC; and

WHEREAS, at its meeting on September 25, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by failing to file her Disclosure Statements; and

WHEREAS, at its meeting on September 25, 2018, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files her Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

WHEREAS, at its meeting on September 25, 2018, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on September 25, 2018.

Kathryn A. Whalen

Kathryn A. Whalen, Director

365-18LM

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

November 8, 2018

Sabino Valdes
P.O. Box 463
Paramus, New Jersey 07652

Board Secretary
Board of Education of the City of Union
3912 Bergen Turnpike
Union City, New Jersey 08087

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

Dear Parties:

I have reviewed all documents and correspondence filed in connection with Sabino Valdes' eighth motion to reopen this matter.[1]

Based upon my review of the present motion and the arguments set forth therein, Mr. Valdes' eighth motion to reopen is denied as he has not demonstrated good cause to reopen this matter.

Accordingly, the eighth motion to reopen the above referenced matter is hereby DENIED.[2]

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner of Education

c: Susanne Lavelle, Esq.
County Superintendent
State Law Library

LOR/SLP/ATA
VIA REGULAR MAIL

[1] The procedural history of this matter has been fully set forth in the January 11, 2018 and March 30, 2018 decisions and is incorporated herein by reference.

[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).

366-18

OAL DKT. NO. EDU 12931-18
AGENCY DKT. NO. 206-8/18

L.I.S., ON BEHALF OF MINOR CHILD, J.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the Superintendent and Business Administrator of the Pequannock Township Board of Education signed the agreement on behalf of the Board. The file does not contain a copy of the Board's resolution approving the settlement and designating the Superintendent or Business Administrator to sign the agreement on its behalf – as required by *N.J.A.C.* 6A:3-1.13 under these circumstances – nor is the resolution attached to the settlement agreement itself. In the alternative, the settlement agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation. Without either the Board attorney's signature or the appropriate Board resolution designating the Superintendent or Business Administrator to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

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.



COMMISSIONER OF EDUCATION

Date of Decision: 11/08/18

Date of Mailing: 11/09/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION APPROVING SETTLEMENT

OAL DKT. NO. EDU 12931-18

AGENCY DKT. NO. 206-8/18

L.I.S. ON BEHALF OF MINIOR CHILD, J.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,

Respondent.

Jessica Weinberg, Esq., for petitioner (Manes & Weinberg, attorneys)

Amy Canning, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: September 24, 2018 Decided: September 26, 2018

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 30, 2018 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof. A copy of the Stipulation of Settlement is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

September 26, 2018

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency:

Mailed to Parties:
sej

FOGARTY & HARA, ESQS.
21-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
(201) 791-3432 Facsimile
Attorneys for Respondent,
Pequannock Township Board of Education
Our File No.: 8/161

L.I.S. o/b/o J.S.,	:	BEFORE THE COMMISSIONER
	:	OF EDUCATION OF THE
Petitioner	:	STATE OF NEW JERSEY
	:	
v.	:	
	:	OAL Dkt. No.: EDU 129-31-18
Pequannock Township	:	Agency Ref. No.: 206-8/18
Board of Education,	:	
	:	**SETTLEMENT AGREEMENT**
Respondent	:	
	:	
	:	

This Settlement Agreement (the "Agreement") is entered into by and between the Pequannock Township Board of Education, which has offices located at 538 Newark Pompton Turnpike, Pompton Plains, NJ 07444 (the "Board"), and L.I.S. on behalf of her minor child, J.S., who are domiciled at 24 West Sunset Road, Pompton Plains, New Jersey 07444 (the "Petitioner") (collectively, the "Parties"); and

WHEREAS, Petitioner owns a home within the Pequannock Township School District (the "District"), which Petitioner considers to be her "domicile," as that term is understood under the New Jersey regulations governing school attendance (*N.J.A.C.* 6A: 22-1 *et seq.*), and which the Board does not challenge or dispute; and

WHEREAS, J.S. is presently enrolled in the District and eligible to attend Pequannock Township High School as a general education tenth grader; and

WHEREAS, Petitioner recently advised the District that Petitioner and J.S. temporarily relocated to New Orleans, Louisiana on or around August 28, 2018 for approximately three months, in connection with Petitioner's work responsibilities. However, Petitioner further advised that Petitioner and J.S. have every intention of returning to their Pequannock Township home and the Pequannock Township High School during the 2018-2019 school year; and

WHEREAS, Petitioner requested that the Board arrange for and provide online instruction to J.S. during their temporary stay in New Orleans; or, in the alternative, and if Petitioner paid for such online services, that the Board agree to release to the online provider all relevant assessment materials, and subsequently to accept all of the online course work completed by J.S. upon her return to the District; and

WHEREAS, the Board declined to pay for the online services or to release its assessment materials, but advised Petitioner that J.S. remained eligible to attend Pequannock Township High School, and further advised Petitioner that any course work completed through a public school district in New Orleans would be reviewed upon J.S.'s return to the District, with credit assigned accordingly; and

WHEREAS, Petitioner filed a Petition of Appeal with the Commissioner of Education, together with an Application for Emergent Relief, which were assigned Agency Reference No. 206-8/18 and OAL Docket No. EDU 129-31-18; and

WHEREAS, the Parties are desirous of resolving this matter without the time and expense associated with litigation.

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the Parties agree as follows:

1. J.S. will be withdrawn from the District effective upon the execution of this Agreement by Petitioner because she is temporarily residing in New Orleans, Louisiana, without prejudice to Petitioner's right to re-enroll J.S. in the District after their return to their Pequannock residence. It is expressly understood by the Parties that once J.S. is withdrawn from the District, and until such time as she is re-enrolled by Petitioner, the Board will have no educational responsibility for J.S.

2. Petitioner has advised the Board that she intends to independently contract with the FlexSchool, a private school located in Berkeley Heights, New Jersey that also provides online instruction to qualified students where necessary and appropriate. Petitioner has agreed to assume all financial responsibility for the courses completed by J.S. through the FlexSchool, and the Board will not be required or expected to oversee this program, or to release to Petitioner or the FlexSchool any of its assessment materials, such as tests, quizzes, homework assignments, PowerPoints, etc.

3. However, assuming Petitioner and J.S. return to Pequannock Township and J.S. is re-enrolled in the District, the District expressly agrees to accept all credits completed through the FlexSchool in the same manner it would otherwise accept the online and/or transfer credits of any student entering the District in the middle of a school year. Namely, the credits will be reviewed and, assuming the courses and related work were completed and that the District offers a corresponding course in District, the credits will be accepted. It is understood that if J.S. elects to take any online courses for which the District does not have a corresponding course (such as cooking), the District will be unable to accept or convert the credit.

4. It is expressly acknowledged by the Parties for purposes of this Agreement that the online courses offered by the FlexSchool and delineated in Paragraph 6 below align with the New Jersey Core Curriculum content standards, such that they are consistent with the curriculum of Pequannock Township High School. To

that end, should the FlexSchool contact the Board to inquire whether the Board intends to accept the credits J.S. earns for those online courses through the FlexSchool, the Board agrees to confirm that: (1) the credits will be reviewed and, assuming the courses and related work are completed and the District offers a corresponding course in District, the credits will be accepted; and (2) the courses delineated in Paragraph 6, which are to be taken by J.S. during the first semester of the 2018-2019 school year, align with the New Jersey Core Curriculum content standards such that they are consistent with the curriculum of Pequannock Township High School.

5. In addition to accepting the credit for all courses completed through the FlexSchool, the Parties also agree that the District will review the coursework completed by J.S. in order to issue grades for each completed course. It is expressly understood, however, that the grades awarded by the FlexSchool will not necessarily be the grades provided by the District once the credit is reviewed and converted. This means that if J.S. receive an "A" in American Literature from the FlexSchool, there is no guarantee that the District would also award J.S. an "A." However, the District will not unreasonably withhold awarding J.S. an "A" simply because the work was not completed at Pequannock Township High School and will review the coursework completed by J.S. through the FlexSchool in the same manner in which the District would typically review the online coursework of any student entering the District in the middle of a school year. It is expressly understood that Petitioner's right to challenge any converted grade awarded by the District is governed by the procedures set forth in Board Policy 2624, Grading System, which provides that "the final decision on any contested grade will be the responsibility of the Principal."

6. It is understood and agreed by the Parties that J.S. will complete the entire first semester of tenth grade online through the FlexSchool, even if Petitioner and J.S. return to their Pequannock residence during the first semester. Assuming J.S. and

Petitioner return to Pequannock Township, J.S. will be re-enrolled in order to begin the second semester of tenth grade on Monday, January 28, 2019. In order to ensure that J.S.'s online credits and grades from the FlexSchool for the first semester will be timely accepted by the District, and in order to facilitate her transition back into Pequannock Township High School for the second semester, it is anticipated that J.S. will complete the following courses online through the FlexSchool:

- First semester of Spanish 3 (2.5 credits)
- First semester of Algebra 2 (2.5 credits)
- First semester of American Literature (2.5 credits)
- First semester of American History 1 (2.5 credits)
- First semester of Chemistry (2.5 credits)
- Health & Physical Education, including Driver's Education (2.5 credits)
- Digital Arts (2.5 credits)
- First semester of Psychology (2.5 credits)

7. Assuming J.S. completes the courses listed in Paragraph 6 above through FlexSchool and is re-enrolled in the District to begin the second semester of tenth grade on January 28, 2019, J.S. will take the following second semester courses at Pequannock Township High School.

- Second semester of Spanish 3 (2.5 credits)
- Second semester of Algebra 2 (2.5 credits)
- Second semester of English 2 (2.5 credits)
- Second semester of U.S. History 1 (2.5 credits)
- Second Semester of Chemistry (2.5 credits)
- Health & P.E. and/or Physical Education (2.5 credits)
- Elective 1 that fits into schedule: Financial Literacy or Criminal Law (2.5 credits)
- Elective 2 that fits into schedule: The District agrees to place J.S. in its second semester Psychology class *only if* the class fits into her schedule. As the course is only offered to juniors and seniors, there is no guarantee that the District will be able to make the placement work for J.S. If J.S. cannot be placed in Psychology, she will take Financial Literacy, Criminal Law or History of Sports in American Society.

8. It is expressly understood by the Parties that J.S. is required to take Financial Literacy as a sophomore. Therefore, if J.S. elects not to take Financial Literacy through the FlexSchool, she will be required to take it during her second semester at Pequannock Township High School. This may impact her ability to be placed in a Psychology class in the District.

9. It is also expressly understood that if J.S. is unable to complete any of the first semester courses listed in Paragraph 6 above through FlexSchool for any reason, she will be ineligible to proceed into the second semester of any related or corresponding course at Pequannock Township High School.

10. It is also expressly understood that J.S. will not be eligible to take the AP Capstone course, in which she had previously been enrolled at Pequannock Township High School during the 2018-2019 school year, because AP Capstone is a year-long course that is not offered through FlexSchool.

11. Petitioner's signature on this Agreement shall serve as her request to withdraw with prejudice her Petition of Appeal to the Commissioner, and her Application for Emergent Relief, which were assigned Agency Reference No. 206-8/18 and OAL Docket No. EDU 129-31-18. Any Party may submit a fully executed copy of this Agreement to the Commissioner of Education and/or the Office of Administrative Law as notification in accordance with *N.J.A.C.* 1:1-10.2 that Petitioner withdrew with prejudice her petition of appeal and related emergent relief application. It is expressly understood, however, that the Parties retain the right to enforce any provision of this Agreement, and Petitioner retains the right to challenge any grade awarded to J.S. by the District that differs from the grade awarded to J.S. by FlexSchool, in accordance with Board Policy 2624. Additionally, the parties will submit a fully executed copy of this Agreement to an Administrative Law Judge ("ALJ") for approval, but the parties will

perform, implement and adhere to this Agreement immediately upon execution and in advance of ALJ approval.

12. It is understood and agreed that all Parties shall bear their own attorneys' fees and costs in connection with this matter, except that in the event an action is brought to enforce this Agreement, the prevailing Party in the enforcement action shall be entitled to attorneys' fees and costs in connection therewith.

13. The terms of this Agreement represent the compromise of disputed claims between the Parties. This Agreement shall not constitute, be interpreted, construed, or used as evidence of any admission of fact, law, responsibility, or liability on the part of any Party.

14. This Agreement shall be construed and enforced in accordance with the laws of the State of New Jersey.

15. The undersigned represent that they have the requisite authority to sign this Agreement on behalf of the respective Party.

16. The Parties may execute this Agreement via electronic signature and in counterparts, each of which is deemed an original and all of which only constitute one original.

17. This Agreement constitutes the entire understanding of the Parties hereto and shall supersede any prior agreements between the Parties with respect to its subject matter. Further, there are no representations, warranties, covenants or undertakings other than those expressly set forth herein. The Parties acknowledge and agree that they are not relying upon any oral statements, representations, promises, or expectations which are not expressly and explicitly set forth in this Agreement, which alone fully and completely expresses all agreements between the Parties.

18. The terms of this Agreement shall remain strictly confidential and shall not be divulged to any third party, except the Parties' attorneys, unless such disclosure is required under applicable law and/or legal process. In response to any direct inquiry

about the outcome of the above-described action, the Parties shall indicate only that the matter has been concluded.

19. The terms and conditions set forth herein shall be deemed severable. If any clause or provision contained herein shall be held unenforceable by a court of competent jurisdiction, it shall not affect the validity of any other clause or provision, all of which shall continue in full force and effect.

20. The Parties recognize that each had the opportunity to be represented by legal counsel if they so choose, that they sign this within Agreement as their own voluntary act and deed, and that they understand the duties and obligations enumerated herein. The Parties further state that if represented by counsel they are fully satisfied with the legal representation provided.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth.

WITNESS:

KATERYNA BECHTEL
Business Administrator

DATED: 9/24/18

WITNESS:

DATED: 9-21-18

O/B/O PEQUANNOCK TOWNSHIP
BOARD OF EDUCATION

BY:
DR. BRETT CHARLESTON
Superintendent of Schools

DATED: 9/24/18

J.S., Parent of J.S.

DATED: 9-21-18

368-18E

OAL DKT. NO. EDU 14775-18
AGENCY DKT. NO. 254-10/18

BOARD OF EDUCATION OF THE TOWNSHIP OF TEWKSBURY, HUNTERDON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
GAIL GRUBE,	:	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 for such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/08/18
Date of Mailing: 11/09/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 14775-2018
AGENCY DKT. NO. 254-10/18

BOARD OF EDUCATION OF THE TOWNSHIP OF TEWKSBURY, HUNTERDON COUNTY,
Petitioner,
v.
GAIL GRUBE,
Respondent.

Marc H. Zitomer, Esq., for petitioner (Schenck Price Smith & King, LLP

Edward A. Cridge, Esq. for respondent (Mellk O'Neill)

BEFORE **JUDITH LIEBERMAN**, ALJ:

This matter was opened on the filing of a petition for Emergent Relief, submitted by petitioner, Board of Education of the Township of Tewksbury, Hunterdon County (Board). Appearing were Marc H. Zitomer, Esq., for petitioner, and Edward Cridge, Esq. for respondent, Gail Grube. The undersigned having considered the moving papers, and exhibits submitted by the petitioner, and opposition papers submitted by

respondent, and having heard the arguments of counsel[1], and for good cause shown, has determined from the proofs that petitioner has failed to meet the standards to grant emergent relief as set forth in N.J.A.C. 6A:3-1.6, pursuant to Crowe v. DeGioia, 90 N.J. 126 (1986), as more particularly set forth herein.

FACTUAL BACKGROUND

The respondent is employed by the Board as an elementary basic skills teacher for kindergarten through fifth grade. On May 31, 2017, while employed by the Board, the respondent was under the influence of alcohol on school grounds, during the school day. The respondent submitted a blood sample on May 31, 2017, which was tested for alcohol content by LabCorp Raritan Forensic Toxicology in Raritan, New Jersey. (P-A.) While the result of the blood test was pending, counsel for the respondent and counsel the Board engaged in discussions concerning a "Last Chance Agreement" (LCA). On June 29,2017, counsel for the respondent forwarded her blood test results to counsel for the Board. The blood test indicated a BAC of 0.235%, which exceeded the threshold for legal impairment. Ibid.

On August 2, 2017, the Board and respondent entered into a LCA. It provided that, on May 31, 2017, the respondent was under the influence of alcohol during the school day; the LCA was "offered to [the respondent] in lieu of the Administration taking more serious action against her, up to and including the filing of tenure charges"; and her "continued employment by the Board is subject to the provisions of this [LCA]." (P-B.) The respondent agreed to provide documentation from her doctor confirming her fitness to return to work; submit to random drug and alcohol testing for one year following the execution of the LCA; and that, if she were present on Board property while under the influence of alcohol or any controlled dangerous substance at any time, the Board would have "just cause" to terminate her. Ibid.

[1] At the close of the hearing on October 17, 2018, counsel for both parties represented they would supplement the record with any additional relevant material or information. Counsel responded on October 18, 2018.

On October 1, 2018, the respondent was suspected of being under the influence of alcohol or drugs while on school property, during school hours. School staff reported their observations concerning the respondent to the school principal. The principal advised the respondent's union representative and the interim superintendent. The respondent was asked to report to LabCorp to submit a blood sample for testing. The respondent went to LabCorp and provided a blood sample that was tested for drugs and alcohol.

The following day, October 2, 2018, counsel for the respondent directed LabCorp to not release the test results to the Board. (P-C.) On October 3, 2018, counsel for the respondent advised the Board that it did not have the "constitutionally-necessary prerequisite to conduct a search of Respondent in the form of a drug test[.]" (P-E.) To date, LabCorp has not released the results of the October 1, 2018, blood test. The respondent is suspended with pay, pending the results of the blood test.

The Board sought emergent relief in the form of an order directing counsel for the respondent to rescind its directive to LabCorp and, thus, permit the release of the October 1, 2018, blood test results to the Board.

The respondent contends that the Board must demonstrate that it had "reasonable, individualized grounds" to suspect that the respondent was intoxicated, and a neutral arbiter must determine that the Board met its burden, before it may gain access to the blood test results. The respondent acknowledges that, given the fleeting nature of the evidence at issue, the blood test needed to be administered promptly, without a prior demonstration of reasonable cause. However, the respondent contends the Board must now make this showing, before a neutral arbiter, and be deemed to have met the requisite burden of proof, before it may receive the test results.

LEGAL STANDARD TO ADDRESS EMERGENT RELIEF

An application for emergent relief may be granted only upon a showing of the following, 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.]

The petitioner bears the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132-34

A party that contends it will suffer irreparable harm must make 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.'" Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980)(citations omitted.) Further, the inadequacy of money damages is insufficient to support a finding of irreparable harm. Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). See also New Jersey Dep't of Environmental Protection v. Circle Carting, Inc., 2004 N.J. AGEN LEXIS 968 (April 2, 2004) (finding no irreparable harm in connection with the revocation of respondent's solid waste license in that financial loss is generally insufficient to demonstrate this requirement). "Because the moving party carries such a heavy burden, it is proper to deny relief solely upon a finding that irreparable harm has not been demonstrated." Judice's Sunshine Pontiac, Inc., 418 F. Supp. at 1218.

The Board contends that it will suffer irreparable harm if the relief it seeks is not granted because it is in an "untenable position" to the extent that it cannot take action

against the respondent until it has her blood test results. The Board's ability to act would be unduly delayed if some form of judicial or quasi-judicial review were required, as such proceedings often progress very slowly. Until then, the respondent must be on a paid leave of absence, which could continue indefinitely. Also, as the respondent was assigned to teach basic skills to students, the Board has needed to identify substitute teachers who are qualified to teach basic skills. This has proven to be difficult.

The Board further argues it will suffer greater harm than the respondent if the requested relief is not granted. The long-term impact to the Board would be significant, as teachers would be able to prevent their employers from addressing suspected intoxication by simply withholding their blood test results pending a due process hearing. These teachers would be on paid leaves of absence while they impede the prosecution of the charges against them. The Board surmises that this approach could be adopted by students and their parents, thus further thwarting the Board's legitimate interest in addressing intoxication by employees and students. Conversely, the Board argues that the respondent could easily resolve the matter by authorizing the release of the test results, while preserving her legal challenges. If the test results were to indicate that she was not intoxicated, she could immediately return to work and could still challenge the basis for the Board's directive that she provide a blood sample. Similarly, she could challenge the basis for the Board's directive if the test result were to indicate that she was intoxicated. She could also initiate a challenge now to the Board's demand for a blood sample. The respondent should not, however, be able to engage in "self-help" by indefinitely stalling the proceedings and extending her paid leave of absence.

The Board acknowledged that it could proceed with an action against the respondent if it did not have the blood test results. While its proofs would not be as robust, it could rely upon the testimony of the staff and administrators whose observations formed the basis for the Board's reasonable suspicion in the first place. If the Board were to initiate such an action against the respondent, and if the respondent were to challenge that action, the Board could seek the blood test results through the discovery process.

The respondent argues that the Board must demonstrate its reasonable suspicion before it may receive blood test results and take action in response to the results. She contends that the need for immediate action extends only to the taking of the blood sample, not the use of the results of the sample, as the emergency is resolved by the removal of the teacher from the school, by way of a leave of absence. She argues that this process is mandated by the Fourth Amendment, regardless whether it is mandated by N.J.S.A. 18A:16-2.

In evaluating the likely harm to be suffered by the Board, it must be noted that the respondent has been separated from the workplace since the incident at issue, which occurred October 1, 2018, and remains so indefinitely. Thus, the risk of harm to the students and respondent's colleagues has been eliminated. Further, the evidence at issue, which the parties agree must be collected quickly, has been collected and may be accessible to the Board at a future date. Moreover, the Board acknowledged that it could proceed with charges against the respondent absent the blood test results. The Board would not be prevented from seeking the blood test results in the course of discovery.

That the respondent's paid leave of absence will be extended if emergent relief is not granted does not compel a finding of irreparable harm. The Board's counsel conceded that there are multiple circumstances in which paid leaves of absence have been required. There is no indication that respondent's leave of absence will be considerably longer than that of other employees. Regardless, the fiscal impact of her leave is insufficient to compel a finding of irreparable harm.[2]

The Board's other arguments concerning irreparable harm require speculation about long-term implications. Whether other teachers or students would opt to proceed in the same manner as the respondent is unknown. The likelihood of this outcome is speculative and, thus, an inadequate basis for a finding of irreparable harm.

[2] Insufficient evidence was offered to support the Board's contention that it would suffer irreparable harm because it has had difficulty locating substitute teachers qualified to replace the respondent.

Accordingly, I **FIND** that, while the respondent's actions complicate this matter for the Board, it has not demonstrated a likelihood of irreparable harm sufficient to permit a grant of emergent relief.

It should be noted that this order does not addresses the respondent's arguments concerning the process that is due to her and whether a proceeding concerning the Board's reasonable suspicion must be conducted before it may avail itself of her blood test results. The Board noted the New Jersey Administrative Code does not address the process a board must follow when it suspects an employee is intoxicated on the job and the Board did not promulgate its own regulations setting forth a procedure. It contends its authority was confirmed by Bayonne Teachers' Association v. Board of Education of the City of Bayonne, OAL Dkt. No. EDU1409-03 Initial Decision (October 9, 2003), adopted Comm'r (January 8, 2004). The Board suggests that, in Bayonne, the Commissioner held that due process protections do not apply, given the need to procure the evidence quickly as well as the need to eliminate the risk posed by the intoxicated teacher, if the blood test confirms intoxication. The Board distinguishes its obligation in this matter from those circumstances governed by N.J.S.A. 18A-6-2, which addresses how a board must proceed when there is reason to believe an employee's health has been compromised such that he cannot perform his work duties.

As noted above, the respondent argues that the Board must demonstrate its reasonable suspicion, by way of a formal process, before it may receive blood test results and before it may take action in response to the results. The respondent contends that the need for immediate action extends only to the taking of the blood sample, not the use of the results of the sample, as the emergency is resolved by the removal of the teacher from the school, by way of a leave of absence. She argues that this process is mandated by the Fourth Amendment, regardless whether it is mandated by N.J.S.A. 18A:16-2.

IT IS therefore on this 19th day of October 2018,

ORDERED that petitioner's application for Emergency Relief is **DENIED**, for the reasons set forth above.

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.

October 19, 2018
DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency: October 19, 2018

Date Mailed to Parties: October 19, 2018

vj

APPENDIX

LIST OF EXHIBITS

For Petitioner:

P-A through F	Exhibits to Petition for Emergent Relief
P-G	Board policies

For Respondent

None

GAIL MIRDA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE UNION COUNTY EDUCATIONAL SERVICES COMMISSION, UNION COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner asserted that she achieved tenure through her many years of employment as a bedside instructor with the respondent, Board of Education of the Union County Educational Services Commission (Commission) and is therefore entitled to a full-time position within the district, as well as back pay and emoluments. The Commission contended that petitioner's work assignment as an hourly Bedside Tutor was exempt from tenure accrual. The parties filed cross motions for summary decision and submitted a joint stipulation of facts. Oral argument took place in August 2018, and the record closed.

The ALJ found, *inter alia*, that: there are no material facts in dispute here, and the matter is ripe for summary decision; respondent provides a variety of services to twenty-one school districts in Union County, including one-to-one bedside instruction at Trinitas Regional Medical Center and Children's Specialized Hospital, for students enrolled in Union County schools; petitioner was employed by respondent as an hourly Bedside Tutor, under the Teacher of the Handicapped endorsement, from October 13, 1999 to November 2013; as a Bedside Tutor, petitioner worked with five to seven students per day, and her work schedule varied widely since she was employed on an as-needed, hourly basis; the Commission asserted that bedside instructors have never been afforded tenure by New Jersey courts, and the law on this subject is well settled; the services provided in the bedside instructor position fall squarely within the "substitute" or "temporary employee" exception to the Tenure Act, *N.J.S.A.* 18A:16-1.1; since November 4, 2013, petitioner has been employed by the Commission in salaried, tenure track positions, and is currently assigned to a four-fifths position as an Auxiliary Services Teacher in the Commission's Non-public Services Department; petitioner attained tenure with the Commission in or around November 2017 as a result of her combined employment as a Title 1 and Auxiliary Services Teacher, subsequent to her time as a Bedside Tutor; at issue here is whether her employment as a Bedside Tutor carried with it eligibility to attain tenure status. The ALJ concluded that the substitute teacher exception, *N.J.S.A.* 18A:16-1.1 of the Tenure Act, applies to petitioner's employment as a Bedside Tutor, and such employment is not eligible for tenure accrual. Respondent's motion for summary decision was granted, petitioner's cross motion was denied, and the petition was dismissed.

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

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

November 9, 2018

OAL DKT. NO. EDU 18412-16
AGENCY DKT. NO. 286-11/16

GAIL MIRDA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE UNION COUNTY EDUCATIONAL SERVICES COMMISSION, UNION COUNTY,	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner adopts the Administrative Law Judge's recommended decision for the reasons expressed therein. Accordingly, respondent's motion for summary decision is granted and petitioner's motion for summary decision is denied. The matter is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 11/09/18
Date of Mailing: 11/09/18

[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
SUMMARY DECISION
OAL DKT. NO. EDU 18412-16
AGENCY DKT. NO. 286-11/16

GAIL MIRDA,
Petitioner,
v.
BOARD OF EDUCATION OF THE UNION COUNTY EDUCATIONAL SERVICES COMMISSION, UNION COUNTY,
Respondent.

Gail Oxfeld Kanef, Esq., for petitioner (Oxfeld Cohen, attorneys)

Eric Harrison, Esq., and **Brett Pohlman**, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: August 27, 2018 Decided: October 11, 2018

BEFORE **SUSANA E. GUERRERO,** ALJ:

STATEMENT OF THE CASE

Petitioner Gail Mirda asserts that she achieved tenure through her employment as a bedside instructor with the respondent, Board of Education of the Union County

Educational Services Commission (Commission or respondent), and is entitled to a full-time position with the district, as well as back pay and other emoluments commensurate with that position.

PROCEDURAL HISTORY

On November 1, 2016, Gail Mirda (petitioner or Mirda) filed a complaint with the New Jersey Department of Education (DOE) alleging that respondent Commission failed to grant petitioner tenure through her position as a bedside instructor. She seeks an order finding that she achieved tenure in that position; finding that respondent violated her tenure and seniority rights; and directing that respondent appoint petitioner to a full-time position in the district, and pay back pay and other emoluments commensurate with her position as a full-time tenured teacher. Respondent filed an Answer to the Petition on December 7, 2016, denying petitioner's claims. The Department of Education, Bureau of Controversies and Disputes, transmitted petitioner's claim to the Office of Administrative Law (OAL), where it was filed on December 7, 2016. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

The matter was initially assigned to the Honorable Joan Bedrin Murray, ALJ, but was reassigned to the undersigned in December 2017.

On March 12, 2018, respondent filed a Motion for Summary Decision. Petitioner filed a Cross-Motion for Summary Decision on May 29, 2018, following two extensions. Respondent filed a response to petitioner's Cross-Motion on or around June 4, 2018, and oral argument took place on August 27, 2018, at which time the record closed.

FACTUAL DISCUSSION

The parties submitted a Joint Stipulation of Facts and agree that there is no dispute as to any genuine issue of material fact in this matter. Based on the submissions presented and oral argument on the motions, I rely on the following **FINDINGS of FACT**:

Respondent is a public school district that provides services to the twenty-one school districts in Union County. The Commission provides child study team and transportation services to these districts; operates several schools in the County that serve students with disabilities; and provides basic skills and supplemental instruction to nonpublic school students in the County. The Commission also provides one-to-one bedside instruction at Trinitas Regional Medical Center and Children's Specialized Hospital to students enrolled in the Union County school districts, nonpublic schools in Union County, and the Commission's schools.

Bedside instruction is provided by Commission employees who serve under the title of Inpatient Teacher (Teacher) or Bedside Tutor (Tutor). All bedside instruction is provided on a one-to-one basis. While Teachers are full-time, salaried ten-month employees, Tutors are paid at an hourly rate. Teachers accrue pension through the Teachers' Pension and Annuity Fund (TPAF), while Tutors accrue pension through the Public Employees' Retirement System (PERS). Unlike Teachers, Tutors do not receive benefits or paid holidays, nor are they guaranteed a certain number of work hours/days or yearly salary. Teachers are tenure-track employees, and respondent maintains that the position of Tutor is not, and has never been, tenure eligible.

Teachers and Tutors shared teaching/educational responsibilities. Once a student is assigned to a bedside instructor, it is the instructor's responsibility to contact the Home District to obtain the student's work. The instructor completes a short initial assessment of the student's skills in reading and math; however, they do not formally develop lesson plans. Instead, they utilize work provided by the Home District or, in the event that no work is provided, they utilize previously created packets to work on specific skill deficits.

Teachers, however, have additional responsibilities not shared by Tutors, including scheduling, reporting, organizational, and liaison responsibilities. Teachers also review and submit for processing Tutors' attendance logs and hours, and they submit students' discharge and progress reports, monthly reports, and Tutors' spreadsheets of instructional sessions to the business administrator. Teachers also identify new students for services and contact the Home Districts to obtain billing approval, and they notify Tutors of initial start and discharge dates of instructional services. Finally, Teachers, not

Tutors, serve as the primary liaison among Trinitas Hospital, the Commission, and Home Districts.

During the relevant time period, the Commission employed as few as fifteen and as many as thirty-four Tutors per year. The number of students receiving bedside instruction varied from year to year, month to month, and week to week, and this affected the number of Tutors retained and the number of hours Tutors worked.

Mirda was employed by respondent as an hourly Bedside Tutor, under the Teacher of the Handicapped endorsement, from October 13, 1998, to November 2013. For those fifteen years, petitioner worked at Trinitas Hospital, where she was assigned to approximately five to seven students per day. While Mirda's work hours varied, respondent does not dispute that she may have worked six to eight hours per day from 2006 to 2013. Respondent maintains that the number of hours she worked is of no import. Mirda was never guaranteed those hours, which were a product of the districts' need for bedside-instruction services, and she worked for the Commission on an as-needed basis.

On November 4, 2013, petitioner was assigned to work at the Union County Juvenile Detention Center as a full-time teacher, where she served as a salaried, tenure-track Title I Teacher. At the conclusion of the 2015–2016 school year, the Commission terminated its contractual relationship with the Detention Center. Effective September 1, 2016, petitioner was assigned to a four-fifths position as an Auxiliary Services Teacher in the Commission's Non-public Services Department, and she continued to serve in this capacity as of at least January 2018 (when the parties submitted the Joint Stipulation of Facts). Petitioner attained tenure with the Commission in or around November 2017, as a result of her combined employment as a Title I and Auxiliary Services Teacher, and is still employed by respondent.

Respondent's Motion for Summary Decision

Respondent asserts that home/bedside instructors have never been afforded tenure by New Jersey courts, and the law on this subject is well settled and has been the precedent for at least the past thirty-five years. Respondent maintains that such services

fall squarely within the exception[1] to the Tenure Act, codified in N.J.S.A. 18A:16-1.1. N.J.S.A. 18A:16-1.1 provides:

> In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officers or employees subject to the provision of N.J.S.A. 18A:17-13.
>
> The act of any person so designated shall in all cases be legal and binding as if done and performed by the officer or employee for whom such designated person is acting but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.

While teachers who provide remedial and supplemental instruction to educationally disabled students may acquire tenure if they meet the qualifications set forth in the Tenure Act, N.J.S.A. 18A:28-5, teaching staff members who function akin to substitutes or temporary replacements are acting in place of a regular classroom teacher and are not entitled to tenure. Here, petitioner was acting in place of the students' regular classroom teachers, who were disqualified from providing bedside instruction at Trinitas during the students' medical absence from school. As such, petitioner's assignments, which she carried out on an as-needed basis, were exempt from tenure accrual.

Respondent primarily relies on two decisions, which it maintains are dispositive of the issue here: Hyman v. Teaneck Bd. of Educ., 1983 S.L.D. 699, modified on other grounds, 1983 S.L.D. 722 (Comm'r), rev'd on other grounds, 1985 S.L.D. 1940 (State Bd.), aff'd in part, remanded in part, No. A-3508-84T7 (App. Div. 1986), and Donvito v. N. Valley Reg'l High Sch., EDU 5877-02, Initial Decision (July 22, 2003), rejected, Comm'r (Dec. 4, 2003), rev'd, State Bd. (June 1, 2005), http://njlaw.rutgers.edu/collections/oal/, aff'd, 387 N.J. Super. 216 (App. Div. 2006).

In Hyman, 1983 S.L.D. 699, the petitioner claimed that the periods she served as a home instructor should have been credited towards tenure. "Home instruction" was described by the petitioner as being "given at home or in a hospital when a child is unable

[1] This exception is referenced herein as the "substitute exception" or the "temporary employee exception."

to attend school," as requiring appropriate certification, as occurring when "the student's regular classroom teacher assigned his or her work," and when "some students needed only a week, others as much as six weeks of home instruction." Hyman testified that her work hours varied depending on the needs of the students, and the administrative law judge (ALJ) determined that the time Hyman served as a home instructor was not tenure eligible. The ALJ explained that "a home instructor is a substitute for a regular classroom teacher where substitution is necessitated by the inability of a student to attend class at school." The Commissioner of Education adopted the findings and conclusions of the ALJ.

In Donvito, the petitioner served as a "home instructor" between the 1995–1996 and 2001–2002 school years. In this position, Donvito was "instructing students who were absent from school due to illness or other reason." For the 2001–2002 school year, Donvito was appointed by contract to the position of a part-time special education teacher. Her contract was not renewed for the following school year, and Donvito filed a Petition with the Commissioner of Education contending, in part, that she was entitled to a full-time position of a non-tenured or less senior employee teaching in her area of certification and endorsement. The matter was transmitted to the OAL, and the ALJ, relying on Hyman, issued an initial decision granting the Board of Education's motion for summary decision. The Commissioner of Education reversed the ALJ's decision, finding that N.J.S.A. 18A:16-1.1 did not apply to home instructors, and because Donvito was not filling in for an absent, disabled, or disqualified teacher. The State Board of Education, however, reversed the Commissioner's decision and reinstated summary decision in respondent's favor. The State Board held that service as a home instructor did not accrue towards the acquisition of tenure. While home instructors may hold appropriate certifications to serve in that capacity, they "are acting in the place of classroom teachers, [and therefore] they fall within the exception set forth in N.J.S.A. 18A:16-1.1, and cannot acquire tenure on the basis of such employment . . . ." Donvito, EDU 5877-02, State Board (June 1, 2005), http://njlaw.rutgers.edu/collections/oal.

Respondent maintains that this matter is analogous to Donvito, where the State Board and the Appellate Division held that the petitioner's employment as a home instructor was akin to a substitute teacher, and fell within the exception to the tenure

statute as outlined in N.J.S.A. 18A:16-1.1. In both instances, the petitioners were acting in the place of the students' regular classroom teacher during the students' absence. As in Donvito, Mirda's services would not have been needed but for the regular classroom teachers' inability to provide the students with instruction during the students' absence. Also, bedside tutors, like home instructors in Donvito, did not formally develop their own lesson plans. The fact that Mirda provided instruction in a hospital setting, rather than in a home (as in Donvito), does not alter the analysis. Home instruction and inpatient hospital instruction are treated the same in the regulations, as both are contemplated for students who cannot attend class due to a need for treatment that precludes participation in the usual classroom setting. N.J.A.C. 6A:16-10.1.

Also, as in Donvito, a bedside instructor's assignments are intermittent, temporary, and scheduled with minimal advance notice. The number of students receiving bedside instruction fluctuates every year and within the school year itself, as instruction is necessitated by a health condition, or a need for treatment, that precluded a student's participation in their regular classroom setting. The number of students assigned to each instructor during the year, and in turn the number of hours worked per year, varies among instructors. Finally, the length of each student's inpatient stay, and in turn the duration of each bedside-instruction assignment, varies on a student-by-student basis.

Respondent also asserts that affording tenure to bedside tutors would undermine the Commission's ability to control its costs, and would interfere with the flexibility and cost-effectiveness of the Commission's delivery of bedside instruction. Moreover, as home instructors, Tutors are not formally evaluated, and conferring tenure on the basis of such service would deprive the Commission of the ability to evaluate these employees to ensure the educational quality of the instructional services provided.

Finally, in further support of its position that Tutors are exempt from tenure eligibility, respondent points to regulations that expressly exclude "compensation paid for serving as a bedside instructor" from earnings that are eligible for pension credit in the TPAF. N.J.A.C. 17:3-4.1(a)(1)(xviii). Tutors, including Mirda, accrue pension through PERS.

Petitioner's Cross-Motion for Summary Decision

Petitioner contends that she earned tenure as a Tutor pursuant to the express terms of N.J.S.A. 18A:28-5, because she worked the requisite period of time to acquire tenure (i.e., more than three years), and she served continuously in a position for which she holds the appropriate educational certification. The fact that she was paid an hourly rate and did not receive benefits or paid holidays is irrelevant, according to petitioner, because tenure is not determined by contract, but by the Tenure Act, N.J.S.A. 18A:28-1 to -18, which should be liberally construed.

Petitioner asserts that the "substitute exception" to the tenure statute, codified in N.J.S.A. 19:16-1.1, does not apply here because, as a Tutor, Mirda was not serving as a "replacement" for an absent Commission employee. Petitioner interprets N.J.S.A. 19:16-1.1 to apply only to situations in which a district appoints a substitute for an absent employee of that district. Since the Commission did not appoint Mirda as a substitute for another Commission employee, Mirda asserts that she is not a replacement/substitute and should accrue tenure.

Petitioner argues that Donvito is distinguishable from her case because Donvito was a bedside tutor working within the Northern Valley school district who was filling in for the classroom teacher employed by the same district. Mirda, on the other hand, was not replacing any Union County Educational Services staff member when she served as a Tutor, and was therefore not a substitute. Petitioner also asserts that Hyman is outdated, not binding, and distinguishable from this matter because Mirda, unlike the petitioner in Hyman, is not replacing another employee within her same school district, and Mirda worked a regular full-time schedule, whereas Hyman's work as a home instructor was variable.

Petitioner references Sayreville Education Association v. Board of Education of Sayreville, 193 N.J. Super. 424 (1984), and Weigand v. Marlboro Township BOE, 84 S.L.D. 534, adopted, 84 S.L.D. 549, both of which address the substitute-teacher exception to the tenure statute and maintain that the exception is limited to employees who take the place of a temporarily absent teacher. Mirda argues that she was not acting

in place of another Commission employee; she worked a "regular schedule with ostensibly full-time hours, every school day"; and she was, therefore, not a substitute.

Petitioner also relies on Platia v. Hamilton Board of Education, 434 N.J. Super. 382 (App. Div. 2014), where the petitioner worked as a Long-Term Substitute for one year. While the district claimed that Platia could not accrue tenure because she was a substitute, the court held that, despite her job title of "Long-Term Substitute," Platia was not actually replacing anyone and, therefore, could not be denied tenure. Mirda argues that she too was not actually replacing an absent employee, and, despite her title, could not be denied tenure.

Respondents' Opposition to Cross-Motion for Summary Decision

In its reply to petitioner's cross-motion for summary decision, respondent argues that two cases cited by petitioner, Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63 (1982), and Sayreville Educ. Ass'n, 193 N.J. Super. 424, do not apply here, as they fail to address the question of whether instruction provided by a bedside/home instructor falls within the exception to the tenure statute, as codified in N.J.S.A. 18A:16-1.1. Platia, 434 N.J. Super. 382 does not "instruct" the within matter as petitioner contends because Platia was not a home/bedside instructor but a long-term substitute functioning as a classroom teacher, and Platia, therefore, did not address whether the substitute exception applies to bedside instruction provided due to a medical condition that precludes class attendance.

Respondent also maintains that, despite petitioner's contention, the fact that Mirda was not replacing an absent Commission employee is of no moment. Mirda, like the petitioner in Donvito, was "acting in the place of the students' regular classroom teacher" during the students' absence, as contemplated by N.J.S.A. 18A:16-1.1. As in Donvito, Mirda's services as a Tutor would not have been necessary but for the regular classroom teacher's inability to provide the student with instruction during the student's absence. It is of no import that the District's classroom teacher was not absent or disabled. Also, petitioner's argument that the substitute exception only applies to District employees acting in the place of a classroom teacher from the same school district is not supported by any case law, and this construction is not supported by the holding in Donvito, where

the State Board of Education held that the exception applies to any individual acting in the place of the student's regular classroom teacher.

While the legal responsibility to provide bedside instruction is left to the school district, the services performed by Mirda were financed by the districts paying the classroom teacher. While Mirda was not technically employed by the district, she was providing those services (at the district's expense) that a district employee would provide if such services had not been contracted out to the Commission. Therefore, it is of no moment that petitioner worked for the Commission, and for purposes of N.J.S.A. 18A:16-1.1, she was acting in the place of a Home District employee much the same way she was acting in the place of a classroom teacher.

Finally, the number of hours petitioner actually worked between 2006 and 2013 is irrelevant, as it is undisputed that those hours were not guaranteed from month to month or year to year, and were a product of the districts' need for bedside-instruction services, which is the very essence of "as-needed" employment. The number of students assigned to each instructor during the year, and the number of hours worked per year, varies among instructors, and the length of each student's inpatient stay, and in turn the duration of each bedside instruction assignment, also varies.

Oral Argument

At oral argument, respondent argued that petitioner is attempting to improperly expand tenure rights beyond the tenure statute. Respondent stressed that this case is comparable to Donvito, with the only difference being that instruction here was provided in a hospital setting rather than a home setting for a child who could not attend a regular classroom. Respondent asserts that summary decision is appropriate here because, given the facts, petitioner was acting in place of other teachers on an as-needed basis, and her position was, therefore, not tenure eligible, as it fell within the substitute-teacher exception to the tenure statute. Petitioner worked on an as-needed basis since she did not have a regular and set schedule; she was never guaranteed a certain number of work hours or annual income, and her hours fluctuated based on the number of students requiring services. The Commission maintains that Mirda did not serve as a "regular

teacher," but was acting in place of the children's regular classroom teachers, and for purposes of applying the "substitute exception," the fact that she was employed by the Commission rather than the children's Home District is irrelevant.

Petitioner argued that she is eligible for tenure as a bedside instructor because she (1) worked in a position that required teacher certification; (2) she held a Teacher of the Handicapped certification; and (3) she held that position for over three years and a day. She argues that the "substitute exception" to the tenure statute does not apply here because Mirda was not a "substitute"—she was not replacing anyone employed by the Commission, nor is she replacing any teacher from the Home District. Also, the exception to the tenure statute should be read narrowly, and N.J.S.A. 18A:16-1.1 does not expressly state that the exception applies specifically to "bedside tutors."

ANALYSIS

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." N.J.A.C. 1:1-12.5(b). To survive a 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/decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995).

Here, based on the Joint Stipulation of Facts, briefs, and affidavits submitted, as well as oral argument on the motion and cross-motion for summary decision, I **CONCLUDE** that there is no genuine issue of material fact and the matter is ripe for summary decision.

The purpose of teaching-staff tenure laws is "to aid in the establishment of a competent and efficient school system by affording teaching staff members 'a measure of security in the ranks they hold after years of service.'" Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528–29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949)). In order to acquire tenure,

a teaching staff member "must comply with the precise conditions articulated in the [tenure] statute." Zimmerman v. Bd. of Educ. of Newark, 38 N.J. 65, 72 (1962). Thus, a teaching staff member "is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time." Spiewak, 90 N.J. at 74. Under N.J.S.A. 18A:28-5(a), "teaching staff members,"[2] including teachers, principals, and vice principals, who hold appropriate certificates acquire tenure after employment for:

> (1) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (2) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (3) The equivalent of more than three academic years within a period of any four consecutive academic years.

The only applicable exception to the Tenure Act is codified in N.J.S.A. 18A:16-1.1, which states:

> In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee subject to the provisions of section 18A:17-13.
>
> The act of any person so designated shall in all cases be legal and binding as if done and performed by the officer or

---

[2] 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.]

These timeframes apply to "[t]he services of all teaching staff members employed prior to the effective date of P.L.2012, c.26 (C.18A:6-117 et al.)," which was August 6, 2012. N.J.S.A. 18A:28-5(a).

> employee for whom such designated person is acting but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.

The issue here is whether the petitioner's employment as a Bedside Tutor is one which carried with it eligibility to attain tenure status. While no case law specifically addresses the tenure status of "Bedside Tutors," Donvito and Hyman are instructive. In Donvito and Hyman, the petitioners were home instructors who were determined not to be tenure-eligible because their positions and responsibilities fell within the substitute exception to the Tenure Act. "Home instruction" is defined in the regulations as "the provision of one-to-one, small-group, or online instruction in the student's place of residence or other appropriate setting due to a health condition, need for treatment, court order, or exclusion from general education for conduct or safety reasons." N.J.A.C. 6A:16-1.3. The regulations, therefore, equate home instruction with bedside instruction, in that home instruction is defined to include one-to-one instruction in an "appropriate setting," which reasonably includes hospitals, due to the student's medical condition or need for treatment. The Home District is responsible for providing, and paying for, instructional services to the student when he/she is confined to the home "or another out-of-school setting [such as a hospital] due to a temporary or chronic health condition or a need for treatment that precludes participation in their usual education setting." N.J.A.C. 6A:16-10.1(a). The district may provide these services through contract with an educational services commission, as was done here. N.J.A.C. 6A:16-10.1(b).

In Hyman, which is referenced in Donvito and useful to this analysis, the ALJ equated home instructors not with regular teaching staff members, but with substitutes for a regular classroom teacher where the substitution was necessitated by the student's inability to attend class at school. In Donvito, the ALJ determined that, as a home instructor, petitioner Donvito fell within the exception to the Tenure Act. In that case, the State Board of Education held: "a Home Instructor is acting in the place of a student's regular classroom teacher when he or she provides instruction in a student's home as a result of the student's absence from school. Since Home Instructors are acting in the place of classroom teachers, they fall within the exception set forth in N.J.S.A. 18A:16-1.1 and cannot acquire tenure on the basis of such employment . . . ." See Donvito, EDU

5877-02, State Bd. (June 1, 2005), http://njlaw.rutgers.edu/collections/oal/. As a Tutor, Mirda too was acting in the place of the classroom teachers as a result of the students' absence from the classroom. Tutors, like home instructors, are only needed because the regular classroom teachers are unable to provide the student with instruction during his or her absence. The fact that Mirda provided her services/instruction in a hospital setting rather than in the students' homes is of no moment.

In examining the nature of her work, Mirda's employment as a Tutor is practically identical to that of a home instructor, as described in both Hyman and Donvito. Like home instructors, Tutors must be certified, and they do not carry all of the responsibilities typically held by teachers—i.e., Tutors do not, for example, develop their own lesson plans and they are not subject to the same evaluations as teachers. Tutors, like home instructors (and unlike regular teachers), provide instruction on a one-to-one basis for variable periods of time; their assignments are temporary, intermittent, and entirely dependent on a varying need for bedside instruction. It is irrelevant that Mirda may have worked between six and eight hours a day for several years because, ultimately, she worked on an "as-needed" basis in that she was never guaranteed those hours of employment, nor a certain yearly salary. Instead, she was compensated at an hourly rate (like home instructors), was not paid for sick days or vacation days, and did not receive those benefits typically afforded to full-time, tenure-track, teaching staff. The idea that Tutors are not part of the regular teaching staff for purposes of the N.J.A.C. 18A:28-5 is further supported by the fact that the regulations specifically exclude "compensation paid for serving as a bedside instructor" from earnings that are eligible for pension credit in TPAF. See N.J.A.C. 17:3-4.1(a)(1)(xviii).

Petitioner argues that she cannot be denied tenure because, despite her title, she was not replacing an absent Commission employee and, therefore, the substitute-teacher exception to the Tenure Act does not apply. Petitioner interprets N.J.S.A. 18A:16-1.1 to be limited to employees hired to substitute, or take the place of, absent teachers from that district only, and Mirda was not replacing an employee of the Commission. Petitioner's interpretation of N.J.S.A. 18A:16-1.1 is unsupported by case law and is inconsistent with the statute's plain meaning. N.J.S.A. 18A:16-1.1 clearly states that a board of education "may designate **some person** to act in place of **any officer or employee** during the

absence, disability or disqualification of any such officer or employee." (Emphasis added.) It does not indicate that this exception applies only to employees who substitute for "any officer or employee" of *the same* school district. Petitioner's interpretation of the statute's unambiguous language is unduly restrictive and unsupported by any case law. I **CONCLUDE**, therefore, that the substitute-teacher exception, N.J.S.A. 18A:16-1.1, of the Tenure Act applies to Mirda's employment as a Tutor because she was acting in the place of classroom teachers as a result of the students' absence from the classroom.

Finally, the cases relied on by petitioner involve long-term substitutes (which Mirda is not) and provide no guidance in determining whether instruction provided by bedside instructors, or to students who cannot attend their classroom due to medical reasons, falls within the exception codified in N.J.S.A. 18A:16-1.1.

While Mirda held the appropriate teaching certification while working as a Tutor for approximately fifteen years, based on my review of the record, including the caselaw cited and a plain reading of the statutory exception to the Tenure Act, I **CONCLUDE** that petitioner's former position as a Bedside Tutor is not eligible for tenure accrual.

CONCLUSIONS

Petitioner did not acquire tenure in the Bedside Tutor position because that position is one that falls within the exception to the Tenure Act, as codified in N.J.S.A. 18A:16-1 to -18.

Accordingly, I **CONCLUDE** that the petitioner has not met her burden of proof and demonstrated that she is entitled to judgment as a matter of law. Petitioner's cross-motion for summary decision, therefore, shall be denied, and her petition shall be dismissed.

I further **CONCLUDE** that respondent has met its burden of proof that it is entitled to judgment as a matter of law, and therefore, its motion for summary decision shall be **GRANTED**.

ORDER

It is, therefore, **ORDERED** that the cross-motion for summary decision filed by the petitioner, Gail Mirda, is **DENIED** for the reasons stated herein.

It is, therefore, **ORDERED** that the motion for summary decision filed by the Union County Educational Services Commission is **GRANTED** for the reasons stated herein.

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

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

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

October 11, 2018
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: October 11, 2018

Date Mailed to Parties:

jb

In the Matter of the Tenure Hearing of Pablo Olivera, State Operated School District of the City of Newark, Essex County, Agency Dkt. No. 287-12/17

OPINION AND AWARD

Before
Robert C. Gifford, Esq.
Arbitrator

Appearances:

For the School District:
Christina M. Abreu, Esq.
Weber Gallagher

For Pablo Olivera:
Nicholas Poberezhsky, Esq.
Paul W. Tyshchenko, Esq.
Caruso Smith Picini

The State Operated School District of the City of Newark ["District" or "Petitioner"], pursuant to N.J.S.A. 18A:6-10 *et. seq.*, certified tenure charges with the Commissioner of Education, alleging that the Teacher Pablo Olivera ["Respondent"] committed acts of conduct unbecoming and/or other just cause. The District seeks to remove the Respondent from his tenured teaching position based upon the charges that were sworn to by Principal Margarita Hernandez:

CHARGE ONE: CONDUCT UNBECOMING

During the period from September 1, 2015 to the present, Respondent has demonstrated an inability to completely and responsibly execute his duties as a teacher in the following manner:

1. In May of 2016, the Respondent was verbally and physically abusive towards student in his class.
2. The Respondent used profanity towards his students and threatened to physically harm them.
3. The Respondent told his students that he was going to "f*** them up."
4. The Respondent improperly used physical force against his students:
   i. The Respondent grabbed a student (B.L.) by the head and slammed it into a wooden table.
   ii. The Respondent grabbed a student (A.F.) by her arms, pushed her to the side and pushed her into a wall.
   iii. The Respondent violently slammed a book on a student's (D.G.) hand and caused injury to the student's fingers.
   iv. The Respondent pushed a desk into a student (A.F.) and tried pushing her into a wall.
   v. The Respondent grabbed his students by their shirts and pulled them off of their chairs.

5. The District conducted an internal investigation and found sufficient evidence of conduct unbecoming a teacher.
6. The students' allegations against the Respondent were corroborated.
7. The Respondent's actions were highly egregious.
8. The Respondent was removed from the classroom due to his inappropriate behavior and violations of the District's policies.
9. The Respondent has failed to create an environment of respect and rapport.
10. The Respondent has failed to manage student behavior.
11. The Respondent has failed to engage students in learning.
12. The Respondent has failed to contribute to the School and District.
13. The Respondent has failed to implement curricular goals and objective(s).
14. The Respondent has failed to manage classroom procedures.
15. The Respondent has failed to establish a culture of learning.
16. The Respondent has failed to contribute to the School and District.

CHARGE TWO: OTHER JUST CAUSE

During the period from September 1, 2015 to the present, Respondent has demonstrated unbecoming conduct in the following manner:

1. The District restates the allegations contained in Charge One and re-alleges and incorporates them by reference as if fully set forth at length herein.
2. The Respondent has failed to properly adhere to the District's policy for overseeing students and improving students and classroom management.
3. The Respondent has consistently failed to follow instructions and violated the District's policies and procedures.
4. The Respondent has engaged in corporal punishment and/or physical contact in violation of the District's policies and N.J.S.A. 18A:6-1.

5. The cumulative effect of Respondent's misconduct and inappropriate actions against his students as set forth above constitutes other sufficient cause to warrant dismiss. [Ex. SD-1].

By letter dated January 12, 2018, I received notice from M. Kathleen Duncan, the Director of the Bureau of Controversies and Disputes, New Jersey Department of Education, that this matter was referred to me pursuant to *N.J.S.A.* 18A:6-16 as amended by *P.L. 2012, c. 26* and *P.L. 2015 c. 109*. On January 15, 2018, the District provided discovery documents to the Respondent notwithstanding the fact that it had yet to receive Director Duncan's letter in the regular mail. The District's discovery comprised of documents Bates-stamped 1-94 that included the Notice of Tenure Charges, the Statement of Evidence that accompanied the Notice of Tenure Charges (including a May 6, 2016 Incident Report from Principal Margarita Hernandez, correspondence from four (4) students, and a letter from Compliance Manager Rene Henderson dated July 14, 2017), the Respondent's mid-year review ratings and review summary form for 2015-2016, the Respondent's teacher short observation ratings for 2015-2016, the Respondent's teacher long observation ratings and summary form for 2015-2016, the Respondent's IPDP (individualized professional development plan for 2015-2016, a letter from Principal Margarida Carrasco dated March 13, 2001, a letter from Principal Margarida Carrasco dated March 12, 2001, an internal investigation findings report from Compliance Manager Henderson dated July 14, 2017, a letter from the Respondent dated August 26, 2016, and the District's

rules and code of conduct. In addition to the above, the District provided the Respondent with a witness list on January 15, 2018 that included Principal Hernandez, Assistant Superintendent Roger Leone, Vice Principal Kenneth Amparbin, Compliance Manager Henderson, Michelle Takyi – Senior Manager of Compliance and former Compliance Manager, Miguel Robles – Investigator to Child Protection, Institutional Abuse Investigations Unit, and Peter Nzekwu – Assistant Regional Supervisor for Investigative Authority Child Protection.

On January 15, 2018, I notified the parties that an informal settlement conference was scheduled for January 17, 2018. Settlement/pre-hearing conferences were held on January 17, January 19 and March 6, 2018. Although the conferences were productive, the parties were unable to reach a resolution to this matter.

The evidentiary proceedings were held at the State Board of Mediation in Newark, New Jersey on March 19, March 23, April 30, May 15, June 6 and August 14, 2018.[2] A stenographic recording of the proceedings was taken. During the proceedings, the parties were given the opportunity to argue orally, examine and cross-examine witnesses and submit documentary evidence into the

[1] On January 17, 2018, the District supplemented its discovery with a September 1, 2015 memorandum from Principal Hernandez entitled "Law Refresher." Counsel for the District notified Respondent's Counsel that she had yet to receive the Director's referral letter. The Law Refresher was Bates-stamped 95-99.

[2] The transcripts for the hearing dates shall be referred to in chronological order as T1 through T6.

record.[3] Testimony was received from several witnesses during the tenure proceedings. Testifying on behalf of the District were Principal Hernandez; Compliance Manager Henderson; Compliance Manager Takyi; Ken Amparbin – Vice-Principal; Miguel Robles – Investigator for Child Protection, Institutional Abuse Investigations Unit; Peter Nzekwu – Assistant Regional Supervisor for Investigative Authority Child Protection; and Student DG who testified on rebuttal.[4] Respondent Olivera testified on his own behalf. Time extensions to hear and decide this matter were timely requested and granted. The parties submitted post-hearing briefs on September 25, 2018, whereupon the record was declared closed.

[3] Respondent's motion for summary dismissal was denied. [T1:5]. Respondent's motion for directed verdict was denied. [T5:381]

[4] Hernandez's testimony is located at T1:5-136. Henderson's at T2:141-209. Takyi's at T3:215-292. Amparbin's at T4:297-331. Robles's at T4:331-366. Nzekwu's at T4:366-376. Respondent Olivera's at T5:382-407, and Student DG's at T6:417-445.

RELEVANT PROVISIONS OF THE NEW JERSEY STATUTES

N.J.S.A. 18A:6-10. **Dismissal and reduction in compensation of persons under tenure in public school system**

No person shall be dismissed or reduced in compensation,

(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or

(b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner;

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

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

N.J.S.A. 18A:6-17.1. **Panel of arbitrators**

* * *

22. b. (3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

ISSUE

I have framed the issue as follows:

Whether the State Operated School District of the City of Newark has proven that Pablo Olivera, a tenured teaching staff member, is guilty of conduct unbecoming and other just cause sufficient to warrant his dismissal from employment by the District? If not what shall be the appropriate remedy?

Respondent Olivera is a tenured teaching staff member who has been employed by the District for approximately 16 years. During the 2015-2016 school year, the Respondent was assigned to the Wilson Avenue School as a 6th Grade Math and Science Teacher. In April 2016, Respondent was reassigned to teach special education students at the Wilson Avenue School because he was having classroom management issues. [T4:312]. During the 2015-2016 school year, the Principal at Wilson Avenue School was Margarita Hernandez and the Respondent's immediate supervisor was Vice-Principal Kenneth Amparbin. Hernandez and Amparbin testified that the Respondent has difficulties with classroom management, but the record lacks sufficient supportive evidence to suggest or show that Respondent has been disciplined in the past beyond a letter back in 2001 that the District described as a written reprimand.[2] [Ex. SD-18].

On May 6, 2016 Principal Hernandez filed an incident report with the District based upon written complaints she received from four (4) of the Respondent's students:

> On Friday, May 6, 2016 I received several written complaints from 6th grade students who alleged that Mr. Olivera was verbally and physically abusive towards them on Wednesday,

[2] Amparbin testified to an incident earlier in the 2015-2016 in which a student alleged that the Respondent grabbed a student's arm to move him out of a doorway. Amparbin testified that the Respondent did not leave a mark on the student's arm. Amparbin told the Respondent to avoid putting his hands on students. [T4:313-316]

> May 4, 2016, when he covered their class in the absence of their teacher, Mrs. Mitchell. They stated that he cursed at them, grabed them by the arm and one child indicated that he slammed a History book on her hand. Another student, [AF] stated "that the teacher pushed a desk into her, smashing her against the wall". Students also informed Mr. Amparbin of what had occurred. Principal Hernandez, informed Mr. Leon of the incident and No DCPP was called. [Ex. SD-2]

Attached to the incident report are the written complaints Hernandez received from Students "AF" "DG", "RG" and "BL". [Exs. SD-3 through 6]. Student DG was only student who testified during the evidentiary proceedings. Student DG's written complaint provides:

> This letter is in regards to Mr. Oliveira's unacceptable behavior in the classroom. Mr. Oliveira slammed a large book down onto my hands, but my hands were visibly on the desk so I don't understand how it could have been a mistake. He was also looking down at my hands, while doing this.
>
> After he slammed the book down on my hands, I began to bleed, nothing serious just a bit of blood. I raised my [hand] to go rinse off the blood. When I asked him if I could go to the bathroom, he replied with no. I told him I was bleeding and he acted as if it was my fault.
>
> Another incident was with my friend [ ] was passing by a desk. She was between a wall and the desk. Mr. Oliveira pushed the desk towards her, pushing her against the wall, almost getting hit on her side.
>
> Mr. Oliveira also grabs children by their shirts, pulling them off the chair. The student could have either been asking to sharpen their pencils or sharing a book with someone who doesn't have one. I don't believe a teacher should be able to put their hands on a student. [Ex. SD-5].

Hernandez testified that she commenced an investigation into the May 4th incident by interviewing the four (4) students who filed the written complaints:

> [Hernandez, On Direct]
>
> Q. [By District Counsel Abreu] What was your investigation?
>
> A. Asking the students. I brought them down to my office. I wanted to know what transpired in the class and why this occurred. They couldn't tell me why it occurred. They just told me it happened, the teacher was very aggressive. He was angry, he was yelling, and they were just frightened and scared.
>
> They said that they didn't want him in the classroom as a teacher, that they were afraid to go back, and I also knew that putting their hands on a student is against board policy against district policy. [T1:32].

Hernandez testified that rather than interviewing the entire class (the average class size at the school being between 28 and 30 students) she only interviewed the students who submitted written complaints. [T1:53-54].

The District reported the incident to the State of New Jersey Department of Children and Families Institutional Abuse Investigation Unit ["IAIU"]. There are four (4) levels of finding determinations for allegations of child abuse or neglect: substantiated, established, not established and unfounded. [T4:369]. A finding determination of "unfounded" is the most favorable outcome for the accused. IAIU Investigator Miguel Robles conducted an investigation into potential child physical abuse and neglect. By letter dated August 4, 2016, IAIU notified the

District that the allegations were unfounded. During the evidentiary proceedings, Robles testified that he interviewed some of the students who were in the Respondent's classroom on May 4, 2016:

> [Robles, On Direct]
>
> Q. [By District Counsel Abreu] Did you meet with other students in the class other than those that had made allegations of physical contact with Mr. Olivera?
>
> A. Yes. I interviewed random witnesses and I believe some direct witnesses, given like a total of ten kids including the victims I spoke with.
>
> Q. Why did you meet with only ten kids and not the entire classroom?
>
> A. Usually the number is five and I went ahead and spoke with another five because of the inconsistencies that were being said.
>
> Q. And based on your conversations with the additional witnesses in the classroom, what determination did you make?
>
> A. You mean at the end of the investigation or?
>
> Q. Well, I guess let me back track, what were some of the statements that these other witnesses made to you regarding the incident that occurred in the classroom that day?
>
> A. Well, some didn't see, they said they did not witness the desk being pushed at one of the children. Others said they did not hear Mr. Olivera using profanity, others said that they -- what was the other ones they didn't hear the other kids complaining to go to the nurse or something like that. It was just a lot of inconsistencies going on with their statements.
>
> Q. There's no corroboration from any other witnesses concerning the incident that took place?

A. From the witnesses right, and just in general there was a few inconsistencies. [14:340-341].

Robles testified that when he interviewed to Student "AF" her account differed from her written complaint:

[Robles. On Direct]

Q. [By District Counsel Abreu] Can you please describe what student AF told you about the incident between the student and Mr. Olivera?

A. Right, that is the report that after reading it because it was so well written I asked the child if she can because what she was explaining to me wasn't exactly what she wrote. So then I said can you please describe to me what occurred. So she stood up and described what occurred and made the motion but it wasn't the same as what she wrote.

Q. How did she describe it to you differently?

A. She said that when she came into throw something away at the trash can Mr. Olivera was going through to get to another child and at the same time pushed a desk, pushing the desk away out not to hit her intentionally, so she moved back so that the desk wouldn't hit her and she hit the wall and I believe she said here it was a bookcase or something, no, she did say wall. But she made the gesture that she hit the wall. I said well, did you hit the wall, tap the wall or smash the wall, she said I went like this and I touched the wall (indicating). I said that's not what you wrote here. You said you were smashed against the wall.

Q. And so what did she say to that?

A. She just looked at me and looked at the principal.

Q. But she remained -- she did describe that she moved out of the way?

A. Right.

Q. To not be hit by Mr. Olivera's desk; is that true?

A. Yes, she did say that, she said that Mr. Olivera did not notice when the desk went towards because his back was turned. So he couldn't tell whether the desk hit her or not. [T4:338-339].

Robles also testified to his recollection of his interview with Student "DG":

[Robles, On Direct]

Q. [By District Counsel Abreu] What do you recall from your interview with DG?

A. She said that Mr. Olivera had grabbed her book from her table, her desk, went through it to see what assignments they were going to work on and after that closed the book and went, instead of placing it down, he dropped the book, according to her and that it hit her, her finger. And then she said that her cuticle started to bleed, she asked to go to the bathroom, she did not ask to go to the nurse and that she was told that she had to wait because other students were using the restroom. [T4:339-340].

Robles testified that he also interviewed the Respondent who denied the students' allegations. Robles indicated that the Respondent denied using the words "marcus" and "stupid", but he admitted that he sometimes used the word "knucklehead". [T4:342, 354-355]. Robles concluded that the allegations were unfounded but he had concerns about the Respondent's behavior.

[Robles, On Direct]

> Q. [By District Counsel Abreu] And why did you feel it important to address these issues with the administrator?
> A. Based on the statements of the children, even the witnesses that there was some kind of - - how do I put it, classroom management skills going on that wasn't really effective because the kids were - - the way they described everything everybody was all over the place. There was no control of the room, even after he had asked them several times to stop and listen to him, stop and listen and they wouldn't because he was serving as a substitute teacher that day, he wasn't their teacher, so the kids took advantage of that basically. [T4:346].

In or around October 2016, the District commenced an internal investigation into the allegations against the Respondent. Michelle Takyi, the District's Compliance Manager at that time, was responsible for conducting the investigation.[1] Takyi reviewed the IAIU report and Hernandez's incident report. Then, similar to Hernandez, Takyi interviewed only the students who submitted the written complaints. Takyi took notes of the interviews.[2] Takyi's testimony concerning the information that the students provided her during their interviews was relatively consistent with the contents of the students' written complaints. Takyi acknowledged that there was a discrepancy between DG's written complaint where DG indicated that she asked to go to the bathroom and RG's written complaint where RG indicated that DG asked to go to the nurse.

[1] Takyi is now the Senior Manager of Compliance in the Office of Student Support Services.
[2] Takyi's notes were not included in the Bates-stamped documents that the District provided to the Respondent upon the referral of the case for arbitration.

[T3:248-251]. Takyi testified that she did not attempt to reconcile the difference between the students' accounts. [T3:251].

Takyi testified that she attempted to meet with the Respondent after she completed the student interviews but they were never able to meet due to scheduling conflicts. Takyi then transferred to a new position with the District in November 2016. Takyi testified that the investigation file was transferred to Rene Henderson who succeeded Takyi as the Compliance Manager.

Henderson testified that subsequent to receiving the investigation file she reviewed Takyi's notes, the IAIU report, Hernandez's incident report, and the student's written complaints. Then on May 31, 2017, Henderson interviewed the Respondent in the presence of his attorney, Eugene Liss, and Eric Frazier who served as counsel for the District. Henderson indicated that the Respondent admitted that he placed a book on a student's desk, but he denied all of the other claims asserted by the students in their written complaints. [Ex. SD-7].

Henderson testified that she did not re-interview the students "because [Takyi] had already done the interviews and it was decided that we would read the report in conjunction with her notes and my interview with Mr. Olivera." [T2:147]. On July 14, 2017, Henderson completed an internal investigation

findings Report that included a summary of the investigation. Henderson's report summarized her interview with the Respondent:

> Mr. Olivera was temporarily assigned to cover Ms. Mitchell's class in her absence. Mr. Olivera described the classroom atmosphere as *"disruptive, not conducive to learning"*, the students were *"talking very loud, laughing, joking getting out of their seats."* He explained this was the behavior he encountered the three days he covered Ms. Mitchell's class. When questioned on his classroom management techniques he stated, *"the student were told several time to sit down, I told them that he was going to call their parents."* When asked if he called security, he stated *"No, it wasn't to that point."* When asked if he notified any parents or the child study team he replied that he had not. Mr. Olivera did say that he spoke to VP Amparbin on two separate occasions during lunch to explain his concerns with Ms. Mitchell's class. He said the VP told him that he stopped by the class (while in session with a different teacher) to address the class's behavior. At one point Mr. Olivera stated, *"I had a difficult year because of the behavior problems."*
>
> When asked if he recalls an incident where a student had a bloody finger, he replied that he read about it in IAIU but *"that never happened, I would never harm a student."* When asked if he dropped a book onto a student's hand he recalled that *"he placed a book on a desk"* but doesn't recall who the student was. In regards to the allegations that he pushed a student's head onto a desk, he claimed that he *"never made any physical contact with a student's head."* When asked if he has ever physically redirected students, he stated that he would only ever physically touch students to break up a fight.
>
> When asked if he had ever had any interactions with these students before he was assigned to their classroom as a substitute, he said, *"No, never any interaction with the students before that day."* When questioned as to why students would make up these allegations he said *"someone pushed them to do this, maybe the teacher"* (Ms. Mitchell). When asked why he believed that Ms. Mitchell would

encourage the student to concoct allegations about him, he provided no explanation. Another explanation that Mr. Olivera offered to explain the students allegations was as a *"way to cover themselves"* and *"children tend to make up stories and pass the blame"* so they don't get in trouble. Lastly he stated that the students were afraid he would call their parents about their behavior because *"they know I would do home visits they know I have done them in the past."* When asked how the students would know this information being he is a temporary substitute he said *"because children talk."*

When questioned if he was ever accused of inappropriate physical contact with any student, initially he denied ever being accused of any similar allegations. However, after being probed by his lawyer he admitted to one written reprimand, seventeen years ago, due to him physically redirecting a student back into her seat.

Additionally, Mr. Olivera disputed the IAIU investigators report in which the investigator wrote that Mr. Olivera *"conceded to referring to the students as stupid or knuckleheads"*, claiming that he never admitted that to the IAIU investigator. Mr. Olivera claimed that he never called a student stupid in Spanish, saying that he doesn't even know what the work "naco" or "naca" means. [Ex. SD-7].

Based upon the internal investigation, Henderson recommended that the District pursue the termination of the Respondent's employment for unbecoming conduct. Henderson wrote the following letter to the Respondent on July 14, 2017:

On or about May 8, 2017, an allegation of inappropriate conduct was made against you.

You were interviewed by Compliance Manager, Rene Henderson. Based on the evidence collected, the District

> finds that there was inappropriate conduct between you and students and exhibited conduct unbecoming a teacher while in the classroom.
>
> You will receive a separate communication which outlines any disciplinary measure taken by the District regarding this matter. [Ex. SD-1].

During the tenure dismissal proceedings, Respondent Olivera denied the specification allegations against him. [T5:382-384, 405]. Olivera also denied receiving one-on-one coaching or mentoring during the 2015-2016 school year. [T5:386]. Olivera confirmed that he is familiar with the District's policy on using physical force on students. [T5:388]. Olivera denied admitting to Robles that he referred to the students as "stupid" or "knuckleheads". [T5:401, 403].

Student DG testified as a rebuttal witness for the District. DG was in sixth grade at the time of the May 4, 2016 incident. During direct examination, DG provided her account of the incident:

> [DG, On Direct]
>
> Q. [By District Counsel Abreu] And do you recall an incident that occurred in May of 2016 in Mr. Olivera's classroom?
>
> A. Yes.
>
> Q. And what do you remember happening that day?
>
> A. Okay for me he - - my hands were on top of a desk and he had a thick book. I think it was a history book and he

just either he let go of it and fell on top of my hand or he slammed it onto my hand. I am not sure because I wasn't looking at him, which made me bleed a little bit. It wasn't serious or anything and I raised my hand to go to the nurse but he said, no, and that it was my fault that I was bleeding.

Q. Now when Mr. Olivera dropped the book on your hands, did it hit both your hands?

A. Yes.
Q. And which hand was bleeding?

A. I'm not sure.

Q. Do you not remember which hand was bleeding?

A. Huh-huh.

Q. Was it both hands that were bleeding?

A. No, just one.

Q. Were you bleeding at your nail and your cuticle?

A. Uh-huh.

* * *

Q. Do you remember what the classroom was like that day in Mr. Olivera's class?

A. It was loud and chaotic.

Q. Was Mr. Olivera raising his voice at the students?

A. Uh-huh, yes.

Q. Did you witness Mr. Olivera being violent towards any of the students that day?

A. Only one of them.

Q. What did you witness?

A. I witnessed my friend she was in between a desk and a bookshelf and he pushed the desk towards her which made her be pushed against the bookshelf. I don't believe she got hit. I know she was like upset.

Q. When you say you don't believe she got hit, what don't you believe she got hit with?

A. The desk, like being pressed against the desk and the bookshelf. I don't think it was fully forceful.

Q. Do you recall if she hit the bookshelf?

A. Yes.

Q. Do you recall if Mr. Olivera used the term knucklehead, Narco or Norca that day?

A. Yes. [T6:417-419].

DG testified that she wrote her written complaint at the direction of her teacher, Ms. Mitchell, but she not receive any assistance. [T6:420, 425-426].

During cross-examination, DG testified that some of the students in the classroom may have exaggerated their accounts:

[DG: On Cross]

Q. [By Respondent Counsel Paperezhsky] Now which are the things that you can remember that you think may have been exaggerated?

A. Him pulling out a student from a chair and lifting them up by their shirt. I don't remember seeing that.

Q. Do you remember who made that allegation?

A. His name was AA. [T6:427]

DG also indicated that she asked to go to the bathroom rather than to see the nurse "because it wasn't serious, so I wanted to wash it off". [T6:428, 434, 438]. DG admitted that she was not certain if the Respondent intentionally slammed or dropped the book on her because she "wasn't looking directly at him, my friends were". [T6:429]. DG testified that she "wasn't paying attention". [T6:429]. DG also clarified that the book did not hit her hand directly, but rather a paperclip that she was holding. [T6:431].

DG then conceded that she did not directly observe the Respondent push a desk towards AF or pull a student out of a seat by his shirt. [T6:435, 438, 444-445]. DG acknowledged that she was simply repeating the accounts of other students. [T6:437-438]. DG indicated that the only direct observation she had was that a book held by the Respondent hit her paperclip that caused her finger to bleed. [T6:435-436, 445].

The parties presented the following arguments in support of their respective positions.

The District's Position

The District provides the following legal argument in its post-hearing brief:

POINT I

THE RESPONDENT HAS DEMONSTRATED CONDUCT UNBECOMING WHICH IS JUST CAUSE FOR DISMISSAL

A. Standard for Conduct Unbecoming

"Unbecoming conduct," one of the grounds listed in N.J.S.A. 18A:6-10 on which a tenured employee may be dismissed or reduced in compensation, need not be heinous, unlawful, or even willful conduct. As the New Jersey Supreme Court explained, "unbecoming conduct" "need not 'be predicated upon the violation of any particular rule or regulation, but may be based merely upon the 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." Bound Brook Bd. Of Educ. v. Ciripompa, 228 N.J. 4, 13-14 (2017), quoting Karins v. City of Atlantic City, 152 N.J. 523, 555 (1996). The Court in Ciripompa stated:

> A charge of unbecoming conduct requires only evidence of inappropriate conduct by teaching professionals. It focuses on the morale, efficiency, and public perception of an entity, and how those concerns are harmed by allowing teachers to behave inappropriately while holding public employment.

Id. at 13-15.

In other words, the standard of conduct required of a tenured employee 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). Thus, a charge of unbecoming conduct focuses which is inappropriate in any way, which harms morale or distracts from the image of the school in the eyes of the public.

Tenure charges are to be evaluated under the long-established standard of a preponderance of the credible evidence. In Re Polk, 90 N.J. 550 (1982). The

tenure charge of "unbecoming conduct" is a broadly defined, elastic concept, encompassing any conduct that has a tendency to destroy public respect for government employees and competence in the operation of public services. Karins v. Atlantic City, 152 N.J. 532, 554 (1998). A finding of unbecoming conduct does not require a violation of any specific rule or regulation, but rather may be based 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). Public school educators 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 for each child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.

In re Sammons, 1972 S.L.D. 302.

It has long been understood that the charge of unbecoming conduct relates to a teacher's fitness to discharge his or her duties and functions. Laba v. Newark Bd. of Educ., 23 N.J. 364, 384 (1957). Tenure protections may be evoked based upon a single incident of poor behavior or of a pattern of such conduct. In re Tenure Hearing of Castro, No. A-4875-10T3, 2012 N.J. Super. Unpub. LEXIS 923, (App. Div. Apr. 25, 2012). There the Appellate Division reviewed tenure charges brought under the New Jersey Education laws reasoning that:

> The tenure of education personnel is authorized by the Education Tenure Act N.J.S.A. 18A:28-1 to-18. Pursuant to N.J.S.A. 18A:6-10, no person under tenure of office, position, or employment shall be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause...
>
> While tenure was designed to protect education personnel "from dismissal for 'unfounded, flimsy or political reasons,'" Wright v. Bd. of Educ. of East Orange, 99 N.J. 112, 118, 491 A.2d 644 (1985) (quoting Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72, 183 A.2d 25 (1962)), tenured employees must act in a professional manner and serve the welfare of the students in their care. Tenure charges may be sustained based on a pattern of unprofessional conduct, In re Riddick, 93 N.J.A.R.2d (EDU) 345 (1993), or on a single

> incident, if found to be "sufficiently flagrant." In re Fulcomer, 93 N.J. Super. 404, 421,226 A.2d 30 (App. Div. 1967).

Id. at 9.

The Court went on to state that:

> Unbecoming conduct" is an elastic phrase encompassing conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl City, 152 N.J. 532, 554, 706 A.2d 706 (1998); see also In re Emmons, 63 N.J. Super. 136, 140, 164 A.2d 184 (App. Div. 1960). "It is sufficient that the complained-of conduct and its attending circumstances be such as to offend publicly accepted standards of decency. Karins, supra, 152 N.J. at 555 (internal quotations omitted).
>
> Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the 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 Police Dep't of Ridgewood, 258 N.J. Super. 32, 40, 609 A.2d 61 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429, 111 A.2d 625 (1955)).
>
> In the context of school tenure cases, "the touchstone is the 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, 316 A.2d 39 (App. Div.), certif. denied, 65 N.J. 292, 321 A.2d 253 (1974).

Id. at 10-11.

This is an arbitration proceeding where the question before the arbitrator is: did the District produce credible evidence that would lead a reasonably prudent person to conclude that the statements were true. I/M/O Zinznewski, School District of Tw. of Edison, Middlesex County, OAL Dkt. No. EDU 4727-08 (May 5, 2010). The rules of evidence are not applicable to arbitration proceedings. Local Union 560 v. Eazor Express, Inc., 95 N.J. Super. 219, 227 (App.

Div. 1967); and Livingston v. Combs, 1 N.J.L. 50 (Sup. Ct. 1790). Evidence that might otherwise be considered hearsay is admitted in arbitration proceedings in this state. See Grover v. Universal Underwriters Ins. Co., 151 N.J. Super. 403, 409 (App. Div. 1977).

Here, the District's Tenure Charges for Conduct Unbecoming and Other Just cause are based on the Respondent's actions for the entire school year while he was assigned to Wilson Avenue School. Count 1 for Conduct Unbecoming contains several allegations against the Respondent that regard his failure to create environment of respect and rapport; he to manage student behavior; to engage students in learning; to contribute to the School and District; to implement curricular goals and objective(s); to manage classroom procedures; to establish a culture of learning; and to contribute to the School and District. Count 1 also contains specifically allegations to the incident that occurred on May 4, 2016, which stated as follows:

The Respondent improperly used physical force against his students:

i. The Respondent grabbed a student (B.L.) by the head and slammed it into a wooden table.
ii. The Respondent grabbed a student (A.F.) by her arms, pushed her to the side and pushed her into a wall.
iii. The Respondent violently slammed a book on a student's (D.G.)hand and caused injury to the student's fingers
iv. The Respondent pushed a desk into a student (A.F.) and tried pushing her into a wall.
v. The Respondent grabbed his students by their shirts and pulled them off of their chairs.

Moreover, Count 2 for Other Just Cause provides that from September 1, 2015 to the present, the Respondent has failed to properly adhere to the District's policy for overseeing students and improving students and classroom management; consistently failed to follow instructions and violated the District's policies and procedures; engaged in corporal punishment and/or physical contact in violation of the District's policies and N.J.S.A. 18A:6-1. As such, Count 1 and 2 of the District's Tenure Charges are based on the District's internal investigation and the Respondent's conduct throughout the entire school year of 2015-2016.

B. Pattern of Physical and Verbal Abuse of Students

It is undisputed that teachers have been entrusted with the care and custody of children and it is their duty to exercise self-restraint and controlled

behavior in the performance of their job duties." I/M/O the Tenure Hearing of Barbra Emri, School District of the Township of Evesham, Burlington County, OAL DKT No. EDU 4579-00, Dkt. No. 18-6/00 (January 2002) (finding termination warranted for inappropriate language towards students); citing In re Lucarelli, 97 N.J.A.R. 2d (EDU) 537; In re Sammons, 1972 S.L.D. 302.

Further, uncontrolled outburst in front of students, other educators and visitors to the school has demonstrated a pattern of unbecoming conduct sufficient to revoke tenure. Redcay v. State Bd. of Educ., 130 N.J.L. 369 (Sup. Ct. 1943), aff'd. 131 N.J.L. 326 (E. & A. 1944) (holding that charges of such conduct have been clearly proved the removal should be easy and prompt); see also In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967) ("unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant", finding that an unjustified use of discipline was sufficient grounds to revoke tenure).

In Emeri, the Administrative Law Judge, who was charged with fact finding under the predecessor to the TEACHNJ Act, reviewed In the Matter of the Tenure Hearing of Johnston, 95 N.J.A.R. 2d (EDU) 439,443, aff'd. Comm'n 95 N.J.A.R. 2d (EDU) 444, quoting:

> Children are entitled to a supportive and nurturing classroom environment in which to develop their intellectual capacities and bolster their self-esteem. Adolescents are especially vulnerable to the influences of their teachers, who serve as role models and help to shape how youngsters actually view themselves. **Constant negativity and insensitivity in dealing with students is a serious deficiency which constitutes conduct unbecoming a teacher.** In re Tenure Hearing of Ernest E. Gilbert, 1982 S.L.D. 274, 326 (Comm'r April 5), aff'd. 1982 S.L.D. 328 (St. Bd. Nov. 3). See In re Tenure Hearing of John Birch, 1978 S.L.D. 63 (Comm'r Feb. 9), wherein a teacher was dismissed for displaying a negative attitude toward students, including making disparaging remarks about students in class. **Being a teacher requires an intense dedication to civility and respect for people as human beings.** Morris Sch. Dist. v. Brady, 92 N.J.A.R. 2d (Vol. 4) 419 (Comm'r of Educ.).

Although teachers often face high levels of frustration in dealing with difficult students, it is imperative that educators must retain control of their actions and their classrooms. This is especially true when dealing with vulnerable populations. In Randolph Township Bd. of Educ. v. DiPillo, 93 N.J.A.R. 2d (EDU) 13, 17, modified and adopted, Comm'r 93 N.J.A.R. 2d (EDU) 24, modified and adopted, State

Bd., 95 N.J.A.R. 2d (EDU) 20; I/M/O Carter and State-Operated School District for the City of Paterson, 51-3/13 (June 2013)(Dismissal warranted for teacher that failed to create a nurturing environment in the classroom, refusal to listen or empathize with others, bad attitude and insubordination).

Failure to follow required protocols in the event of a student's injury also has been found to constitute unbecoming conduct. In re Tenure Hearing of Pariano-Keyser; In re Tenure Hearing of V.R., Docket No. EDU1525-04 (April 27, 2005), affirmed St. Bd. 05; November 2. Here, Respondent refused to allow DG to go the bathroom when she was bleeding on her hand from an injury, which he caused when he slammed a book on both of her hands. (See Exhibit SD-5). He ignored her request and made her feel as if it was her own fault that she got injured, even though Mr. Olivera slammed the book on her hand. Mr. Olivera should of sent her to the nurse, but failed to do so.

I/M/O Sall State-Operated School District of the City of Paterson, Passaic County, the District established that the teacher's reaction to an aggressive student was grounds for termination and the arbitrator stated "by reacting intemperately to an aggressive student in defiance of clear caution, [the teacher] gave the district ground for doubting his self-control. Thus taking all the circumstances into account, the district has shown cause for removing the respondent from his tenured teaching position." I/M/O Sall, Agency Docket No. 305-10/14 (May 13, 2015).

Similar to Sall, here Mr. Olivera received several warnings regarding his classroom management. Mr. Olivera consistently displayed a lack of self-control on numerous occasions to the extent that on several occasions where he put his hands on his students in an aggressive manner. In Sall, when a teacher is provoked by a student, the teacher is "obliged to act with restraint and emotional control." Id. at 10. This conduct is especially egregious given the length of time and support the Respondent had been given in seeking effective methods of classroom management.

Even the calling of students names, like "you're ugly"; "why are walking with that ugly face;" "I would pop you in the face;" and "if there wasn't a law stating teachers can't hit students, I would" were deemed "unprofessional, outrageous, constituted harassment, intimidation and bullying" conduct which constituted conduct unbecoming. See I/M/O/ Deering, Hackensack Board of Education, 36-2/18. The Arbitrator disciplined this tenured teacher with a 120 day unpaid suspension, loss of step and increment and the requirement to attend anger management. Id. Here, Mr. Olivera was violent and verbally abusive towards his students. The testimony clearly provided that Mr. Olivera's classroom was chaotic and he became frustrated by his students. Not only did he

become physically violent with this students, he also called them stupid, knuckleheads, naco narco as well as threaten to "f** them up."

Moreover, the Tenure Charges against Mr. Olivera also include an allegation of corporal punishment and inappropriate physical contact with his students on May 4, 2016. N.J.S.A. 18A:6-1 prescribes the use of physical force against students in educational settings. The statute states as follows:

> No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:
>
> (1) to quell a disturbance, threatening physical injury to others;
>
> (2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;
>
> (3) for the purpose of self-defense; and
>
> (4) for the protection of persons or property;
>
> and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section. Every resolution, bylaw, rule, ordinance, or other act or authority permitting or authorizing corporal punishment to be inflicted upon a pupil attending a school or educational institution shall be void.

In other words, teachers are prohibited from corporal punishment and physical contact with students unless the incident falls within the above exemptions. In this case, there was no testimony or evidence from the Respondent that satisfies the exemptions set forth in N.J.S.A. 18A:6-1.

I/M/O Yarborough, State-Operated School District of Newark, 259-9/15-12/14 (May 24, 2016), the District's tenure charges were sustained against the tenured teacher for conduct unbecoming for shoving a student and using undue force on a kindergarten student. Yarborough received a penalty of a 120 days suspension. Similarly, I/M/O Hawkins, State-Operated School District of

Newark, #243-10/13 (March 10, 2014), where the District's tenure charges were sustained the removal of a Vice Principal. The Vice Principal used corporal punishment when he grabbed a student by the collar and dragging him across the playground into the principal office.

I/M/O Demarco, Wayne Board of Education, 320-12/16, the school district sought termination of a tenured student for improperly confining pre-school students to a bathroom as a means of punishment and /or behavioral control and calling the student "little assholes" and/or little douchebags" to other teachers in the teacher lounge. She admitted to placing children in the bathroom as a means to discipline/deescalate the children s benavior and referred to the students in a derogatory manner. It should be noted that no student's testified in this hearing regarding the incidents in the teacher's classroom.

The Arbitrator determined that use of confining the student's in the bathroom was a form of corporal punishment in violation of the District's policy. The Arbitrator provided that "given the severity of her misconduct, the potential harm to her students and the inability of the District to place trust in her stewardship," termination was the appropriate penalty.

I/M/O Iman Jones, State-Operated School District of the City of Newark, 92-5/17, the Arbitrator issued a 60 day unpaid suspension for her failure to supervise her students in her classroom. A razor in the classroom cut one of the tenured teacher's students while the teacher was on her cell phone. The teacher failed to maintain her classroom and oversee the proper safety of her students.

The Tenured Teacher argued that that the school district didn't meet its burden because it failed to provide student witnesses and relied solely on hearsay testimony. The Arbitrator held that the District established the truth of its unbecoming conduct charges against the tenured teacher which warranted disciplinary action. The Arbitrator held that the tenured teacher failed to adequately manage her classroom by allowing her students to engage in horseplay and thereby exposing students to potential foreseeable harm, which is constitutes conduct unbecoming.

Here, the District established that Mr. Olivera made physical contact with three separate students. The District's witnesses established that the student's made the following complaints against Mr. Olivera:

- B.L.- Mr. Olivera told him to go to sleep after B.L. asked for more work. Mr. Olivera then grabbed B.L.'s head and slammed it down on the table.

- A.F.- As A.F. was walking towards the trash can, Mr. Olivera pushed a desk into her, which caused her to smash into the wall. He also called them knuckleheads, stupid in Spanish, the b-word (Bitch) and to shut up or he was going to Fu**them up.
- D.G.- Mr. Olivera slammed a large book onto the D.G.'s hands and she began to bleed. Mr. Olivera would not let her go to the bathroom to rinse the blood from her finger. He did not send her to the nurse.
- R.G.- Observed the physical contract between Mr. Olivera and A.F. and D.G. Mr. Olivera called the student's stupid in Spanish (*nacos* and *narcos*). He also said he was going Fu** up the students.

As such, the District has established that Mr. Olivera had inappropriate physical contact with his students in violation of the District's policies and Title 18A. The Respondent should be terminated from the District as he violated the District's policy against corporal punishment and his conduct was unbecoming conduct of a teacher.

Finally, it is well established that unbecoming conduct can arise from just one incident. "Unfitness to hold a post might be shown by one incident, if sufficiently flagrant." Redcay v. State Bd. of Ed., 130 N.J.L. 369, 371 (1943); In re Fulcomer, 93 N.J. Super. 404, 412 (App. Div. 1967); Karins v. City of Atlantic City, 152 N.J. 523, 555 (1996). Therefore, the allegations set forth in the Tenure Charges against Mr. Olivera are sufficient to warrant his termination. Although the incidents that occurred in May of 2016 in Mr. Olivera's classroom were egregious and placed his student sin great harm, he also has a history of using physical contact against his students. In March of 2001, Mr. Olivera was reprimanded and disciplined for tying a student to his chair with a belt as a form of punishment for the student. (See Exhibit SD-18).

Further, in the 2015-16, Vice Principal Amparbin verbally counseled Mr. Olivera about an incident where he forcibility moved a student that was standing in the doorway. Vice Principal Amparbin specifically told Mr. Olivera to keep his hands off of his student. Then on May 4, 2016, Mr. Olivera became physical with three separate students, causing one to bleed. He also became verbally abusive and used offense and foul language towards his students. Therefore, the District has established by the preponderance of credible evidence that the Tenure charges should be sustained and Mr. Olivera should be terminated.

C. The District Submitted Credible Evidence at the Hearing

The District has submitted credible evidence during this proceeding to sustain its Tenure Charges. The Respondent has previously argued that the

District has only relied on hearsay. However, the District presented the testimony of student D.G. who was present in the classroom. In addition during the cross-examination of Ms. Takyi, Respondent's counsel acknowledged that the witness statements were direct evidence. 3T285:286:1-3.

The AAA Labor Arbitration Rules, statutorily applicable pursuant to N.J.S.A. 18A:6-17.1(c), state that "parties may offer such evidence as is relevant and material to the dispute," the arbitrator "may exclude evidence deemed by the arbitrator to be cumulative or irrelevant" (but not evidence determined to be hearsay), and "conformity to legal rules of evidence shall not be necessary." AAA Labor Rule 27. The Arbitrator is required to admit and consider any evidence pertinent and material to the controversy presented. Manchester Twp. Bd. of Educ. v. Thomas P. Carney, Inc., 199 N.J. Super. 266, 274 (App. Div. 1985).

Moreover, the residuum rule also allows inadmissible hearsay is admissible in support of a finding in an administrative law matter. N.J.A.C. 1:1-15.5 provides that hearsay evidence is admissible and provides:

> Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.

The residuum rule requires a finding of fact or legal determination to be supported by competent evidence in the record. Weston v. State, 60 N.J. 36, 51 (1972); In re Tenure Hearing of Cowan, 224 N.J. Super. 737 (App. Div. 1988). Per the residuum rule, the ultimate finding of determination must be so supported, but not each individual fact leading to it. The residuum rule does not require that each fact be based on a residuum of legally competent evidence but rather focuses on the ultimate finding or findings of material fact. Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338, 359-60 (2013); Mayflower Sec. Co., Inc. v. Bureau of Sec., 64 N.J. 85, 92-93 (1973). Applying this principal here, the ultimate finding of unbecoming conduct must be supported by "a residuum of legal and competence evidence." Id. See also I/M/O Ratiba Ahmed, State-Operated School District for the City of Newark, Agency Dkt. 281-9/15; I/M/O Ehert, State-Operated School District for the City of Newark, Agency Dkt. 169-15 (May 21, 2015). In this matter, the District presented eye-witness testimony and documentary testimony to support its charges.

Here, the District presented the testimony of student D.G. who was an eye-witness to support its charges. D.G. was present in the classroom and a

victim of the Respondent's temper. The District's witnesses also testified that it conducted its own investigation at the school level by Principal Hernandez and at the District level by Ms. Takyi and Ms. Henderson. The Principal Hernandez and Ms. Takyi both met with the students that were victims of the Respondent's violent behavior. There were four student that prepared written statements that described the Respondent's inappropriate physical contact and use of name calling and threatening, vulgar words used towards the students. The District's witnesses will also describe their observations of Respondent's lack of classroom management that escalated over the course of the school year and resulted in the Respondent physically attacking the students.

In addition, the District presented the testimony of Mr. Robles, the IAIU investigator. His testimony corroborated the student's statements that Mr. Olivera made physical contact with students B.L., A.F., and D.G. He also confirmed that many of the students that he spoke with corroborated that Mr. Olivera used abusive and foul language towards them including calling them knuckleheads, narcos/nacos and stupid in Spanish.

Lastly, the District presented the testimony of student D.G. regarding the incidents that occurred in Mr. Olivera's classroom. She provided credible testimony that Mr. Olivera slammed. She was an eye-witness of the incident and testified that he caused her to bleed on her hand. Therefore, the District met its burden and the Tenure Charges against Mr. Olivera should be sustained.

In contrast, the Respondent's testimony was dishonest and not credible. He categorically denied all of the incidents in his class. He stated that he did not have any physical contact with the students, B.L, D.G. A.F. and R.G. which was clearly dishonest based on the testimony of the District's witnesses. He also stated that he never raised his voice towards his students, threatened them or used derogative names towards them.

He clearly provided dishonest testimony while on the stand. For example, the Respondent testified that he was never counseled by his superiors at the school on his lack of classroom management and he was warned not to be physical with his students. He was also dishonest about whether he ever received a mentor/coach at the beginning of the school level and that he was assigned Ramapo Coaching for additional support.

The Respondent also stated that he only heard of the incidents after he was interviewed by the IAIU investigator. This is clearly false as he was questioned by the Principal and then placed in a separate room assignment away from students. He unequivocally denied that he slammed the book on D.G.'s hand, which caused her to bleed. D.G. was very honest and stated that this incident did occur and that the Respondent made physical contact with

her hand. Simply put, the Respondent's testimony was completely dishonest and lacked any credibility. Therefore, the District sustained its charges of conduct unbecoming and the Respondent should be terminated.

D. The Respondent's Request for an Adverse Inference against the District Should Be Denied

In the State v. Clawans, 38 N.J. 162, 183 (1962), the Court set forth the governing standard that a trial court should apply to determine to give an adverse inference jury charge when a party fails to call a witness. In the event a party fails to produce a witness who it is within that party's power to produce and who should have been produced, the factfinder may invoke the adverse inference rule to infer that the witness's evidence is unfavorable to the party's case. See Washington v. Perez, 219 N.J. 338, 352, (2014). "The mere failure to produce a witness does not of itself permit the jury to infer that" the witness would have contradicted the testimony of other prosecution witnesses. State v. Cooper, 10 N.J. 532, 566 (1952)(the Court held that the charge was inappropriate when the absence of the disputed witness was explained by his confinement to his home following surgery).

The jury is instructed that it may draw an adverse inference from a party's failure to call a witness only if it appears "that the person was within the power of the party to produce and that his testimony would have been superior to that already utilized in respect to the fact to be proved." Clawans, supra, 38 N.J. at 171.

The Washington Court explained that provided that this was a case-by-case analysis for the application of an adverse reference and provided:

> [The] failure of a party to produce before a trial tribunal proof which, it appears, would serve to elucidate the facts in issue, raises a natural inference that the party so failing fears [that] exposure of those facts would be unfavorable to him. But such an inference cannot arise except upon certain conditions and the inference is always open to destruction by explanation of circumstances which make some other hypothesis a more natural one than the party's fear of exposure.

See Washington v. Perez, 219 N.J. 338, 352, (2014)(citing Clawans at 170-71). The Court stated that an adverse inference charge would be improper if the witness were unavailable, if the witness were biased against the party who would otherwise be expected to call him or her, or if the witness's testimony

"would be cumulative, unimportant or inferior to what had been already utilized." Clawans at 171.

The Respondent has failed to establish that an adverse inference is appropriate in this matter. On June 6, 2018, the Respondent decided to testify on his own behalf at the hearing. During his testimony of the Respondent categorically denied the allegations set forth in the Tenure Charges. He provided dishonest testimony that was not credible in light of the testimony of the District's credible witnesses.

In accordance with N.J.S.A. 18A:6-17.1(b)3, which provides as follows, in part: "The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses." During the Respondent's testimony he denied that any of the incidents occurred between him and the students in May of 2016. He further testified that we should ask the student why they made their complaints. Therefore, the District was authorized by TEACHNJ to present additional evidence and witnesses to impeach the Respondent's testimony. This request was granted by the Arbitrator on June 19, 2018. The District was prepared to present the testimony of D.G. and A.F. on June 21, 2018.

However, Counsel for the Respondent argued that Mr. Olivera would be away on vacation out of the State starting on June 21, 2018 (June 20, 2018 was the last day of school). The District argued that it would be prejudice if it could not present B.G. and A.F. as it would difficult to produce them during the summer vacation and at the very beginning of the school year. In addition, Mr. Olivera refused to appear for the hearing during the summer and failed to present a Certification indicating where he was during the Summer that caused him to be unable to appear at the hearing.

Notwithstanding these obstacles, the District was able to confirm the appearance of B.L. on August 14, 2018. Unfortunately due to A.F.'s summer schedule, she was unable to appear on August 14th as she was away. Further, during this hearing, the District stated on the record that student B.L. was no longer a student in the school district and that student R.G. failed to respond to District's several communications regarding the hearing. The Respondent did not object to this statement. The Arbitrator provided the District with an additional hearing date of September 6th to present student A.F. However, this was the third day of school for the 2017-2018 school year, so it was very difficult to coordinate with A.F. for her testimony.

The Respondent has failed to establish that the standard of Clawans applies to this matter. The Court provided that an adverse inference charge would be improper if the witness were unavailable, if the witness were biased

against the party who would otherwise be expected to call him or her, or if the witness's testimony "would be cumulative, unimportant or inferior to what had been already utilized." Clawans at 171. Here, the A.F. was unavailable to testify at the hearing and her testimony would have been cumulative.

The District tried its best to contact A.F.'s parents and new school administrators, however, A.F. was unavailable and ultimately could not be confirmed to provide testimony at the September 6th date. The District made multiple attempts to contact A.F. and was unable to get in contact with her. The Arbitrator denied the District's request to reschedule a hearing for another date. The District was prepared to present this witness at the June 21st hearing date and the Respondent adjourned that hearing. As such, the District would prejudice to apply an adverse inference because the District was unable to produce student A.F. and the Respondent's request should be denied.

CONCLUSION

For the foregoing reasons, the District has established that the Respondent has demonstrated Conduct Unbecoming and Other Just Cause to revoke his tenure as a teacher within the District, and therefore he should be terminated. [District Brief, pp. 37-54].

The Respondent's Position

The Respondent provides the following legal argument in his post-hearing brief:

LEGAL ARGUMENTS

Here, the tenure charges filed against Mr. Olivera must be dismissed with prejudice for one simple reason: the District failed to meet its burden of proof as to any of the allegations levelled against him. Some preliminary legal points must be addressed, however, as follows:

Point I: The Only Component Of The Tenure Charges That Is Ripe For Consideration Is Mr. Olivera's Alleged Conduct Unbecoming on May 4, 2016.

As previously discussed in Mr. Olivera's May 25, 2018 *Motion for a Directed Verdict*, the only allegations of conduct unbecoming that may be considered for a determination of the tenure charges is the series of incidents that supposedly occurred while he was substituting Ms. Mitchell's classroom on May 4, 2016. These are the only specific accusations he was put on notice of and, consequently, had an opportunity to defend against. The records included in the *Statement of Evidence* section of the tenure charges, mandated by N.J.S.A. 18A:6-11, pertained to the incidents that allegedly occurred on May 4 and nothing else.

None of the generalized allegations stated in the charges, related to vague concerns about Mr. Olivera's teaching performance and classroom management, are fair game. After all, it has long been held by our courts that tenured employment is entitled to the safeguards associated with procedural due process. Emf. v. Evesham Tp. Bd. of Educ., 327 F.Supp.2d. 463, 472 (D.N.J. 2004) (quoting Nicholas v. Pa. State Univ., 277 F.Supp.3d. (3d Cir. 2000)). Chief among those safeguards is notice "appropriate to the nature of the case" and an opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

Our state legislature expanded the due process rights of tenured employees through the Tenure Employees Hearing Law and its 2012 amendment, the Teacher Effectiveness and Accountability for the Children of New Jersey ("TEACHNJ") Act. N.J.S.A. 18A:6-117 et seq.; N.J.S.A. 18A:6-10 et seq.

One fundamental protection provided by TEACHNJ is that an employee facing tenure charges must be served with notice of the charges and a statement of evidence in support of each charge. N.J.S.A. 18A:6-11. In other words, vague charges or accusations that lack a factual predicate and evidentiary support are legally defective, violating the provisions of TEACHNJ.

A great example of a tenure case that focused on this notice and due process issue is In re: Frank King, COE 117-4/07, final decision, (September 18, 2007).[5] In King, the respondent was served with tenure charges that "lack[ed] specificity and [were] so general in nature that respondent [was] unable to defend against them." Id. slip. op. at 1. The tenure charges were, accordingly, dismissed by the arbitrator on motion by the respondent.

Here, the only accusations Mr. Olivera was specifically put on notice of, as described in the tenure charges, were his alleged actions on May 4, 2016, consisting of: (1) being verbally and physically abusive to his students; (2) using profanity towards his students and threatening to physically harm them; (3) telling his students he was going to "f*** them up;" (4) improperly using physical force against his students by (i) grabbing student B.L. by his head and slamming it into a wooden table; (ii) grabbing student A.F. by her arms, pushing her to the side and into a wall; (iii) violently slamming a book on student D.G.'s hands, causing injury to the student's fingers; and (iv) pushing a desk into student A.F.

The remaining allegations contained in the charges are far too vague to be considered for a determination of the charges. Moreover, they speak to Mr. Olivera's teaching effectiveness, which, by law, requires the filing of inefficiency charges predicated on two consecutive "ineffective" or "partially effective" summative evaluations. N.J.S.A. 18A:6-17.3. Here, there is no evidence that Mr. Olivera received a summative evaluation less than "effective" or its equivalent at any point during his thirteen-year career with the District.

Accordingly, the only allegations that may be considered for a determination on the charges are those pertaining to the May 4, 2016, incidents in Ms. Mitchell's classroom. All other tenure charge counts must be dismissed with prejudice.

Point II: The Tenure Charges Must Be Dismissed With Prejudice Because No Direct Evidence Was Presented In Support Of The Charges

This point, which was also previously raised in Mr. Olivera's *Motion for a Directed Verdict*, still applies, and must be reiterated. It has been established, through prior TEACHNJ decisions, that conduct unbecoming cannot be proven

[5] Copies of both King decisions (initial and final) are attached hereto as Exhibit A.

if the only evidence presented in support of the tenure charges is uncorroborated hearsay. See In re. Thomas Strassle, Agency Dkt. No. 131-5/16, final decision, (October 5, 2016); In re. Lydia Wilson, Agency Dkt. No. 174-6/16, final decision, (February 1, 2017). State law also provides that while hearsay evidence may be admissible in administrative proceedings, under the Residuum Rule, legally competent evidence must exist to support it. N.J.A.C. 1:1-15.5(b). The New Jersey Supreme Court reaffirmed this notion by holding that a final agency decision may not be entered if it is based solely on hearsay evidence. Weston v. State, 60 N.J. 36 (1972).

The decisions in Strassle and Wilson warrant close consideration because the relevant tenure charges in both matters were dismissed based on the same legal principle that compels a dismissal of the charges filed against Mr. Olivera. In Strassle, a tenured teacher was accused of requesting sexual favors from a female student in exchange for money that he allegedly gave the student. Strassle, supra, at 3. These accusations were based on a complaint made by the student which was referred to the police and investigated by the district. Although the school district called a number of witnesses that investigated the student's claims, including a detective and school administrators, and presented sworn statements prepared by the student, because neither the student nor any other witnesses with direct knowledge of facts that would support the student's claims testified at the hearing, this charge was dismissed at the conclusion of the District's case-in-chief. Strassle, supra, at 4-5.

The arbitrator's rationale for this decision – predicated entirely on principles of due process – was sound. "Because N.C. [the student accuser] did not testify at the hearing, N.C. could not be cross-examined to test the veracity of her claims... Further, Respondent was unable to question N.C. about possible bias, improper motivation or any other facts that might indicate that the allegations were fabricated and should not be believed. Further, because N.C. did not testify at the hearing, I did not have any opportunity to assess her credibility." Id.

In Wilson, tenure charges were filed against a teacher after a number of her students allegedly engaged in sexually-explicit behavior in her classroom while under her supervision. As was the case in Strassle, the school district failed to call any of the alleged student victims as witnesses during the tenure hearing. The written statements provided by the students – and the testimony of investigators and staff members that fielded the initial complaints made by the students – was insufficient to satisfy the district's burden of proof, thereby warranting a dismissal of the charges. Wilson, supra, at 34-45.

The foregoing jurisprudence is rooted in the simple premise that an individual facing tenure charges "has a fundamental due process right to face

his accusers at trial." In re. Richard Vencenti, Agency Dkt. No. 255-14, final decision, (June 11, 2014). That was a right Mr. Olivera was deprived of in the case at bar. That is because none of the District's witnesses – including D.G. – directly observed any of the alleged incidents that occurred in Ms. Mitchell's classroom on May 4, 2016. There was also no direct, physical, evidence supporting the truth of any of the underlying allegations.

The District's case, in terms of any tangible evidence entered into the record, relied entirely on written hearsay statements provided by four sixth grade students, B.L., A.F., D.G., and R.G., over two years ago. B.L., A.F., and R.G. did not appear at the hearing. D.G. testified, but admitted that she did not directly observe any of the incidents in question. She testified that the events depicted in her statement were mere reiterations of what other students in the classroom told her, whom she was admittedly friends with, and doubted their accuracy, noting that at least one of the students was prone to "exaggerations," and agreed with Mr. Amparbin's assessment that if the allegations were true, the matter would reverberate throughout the entire school (it did not). Evidentially, D.G. does not even credit the allegations contained in her own statement.

By her own admission, D.G. was not a witness to the incident she herself was involved in. She testified that when Mr. Olivera dropped the book on her hands, she was not looking at him or in his direction. Because of this, she acknowledged that it could have been an accident (after all, she testified on direct that there was no reason for Mr. Olivera to discipline her) and had no interest in pursuing the matter further. She even clarified, for the first time on cross, that it was not the book that caused her to bleed, but a paperclip she was holding in her hand at the time.

To be sure, no direct evidence supporting any of the outrageous allegations against Mr. Olivera was presented by the District at any point over the course of the six-day hearing. There were no medical reports. There were no photographs. There was no eyewitness testimony. Even supplementary hearsay evidence that one would typically expect in a case like this, like police reports, law suits, guidance counselor memos or nurse records were never produced. Every District witness, including Ms. Hernandez, Ms. Henderson, Ms. Takyi, Mr. Amparbin, Mr. Robles, and Mr. Nzewku, acknowledged that they did not observe any of the incidents in question, and were unaware of any physical or direct evidence backing the students' claims.

In summary, because the District failed to produce any direct or physical evidence in support of the allegations made against Mr. Olivera, relying exclusively on uncorroborated and unreliable hearsay statements, the tenure charges must be dismissed with prejudice.

Point III: The Tenure Charges Must Be Dismissed With Prejudice Because The District Failed To Meet Its Burden Of Proof.

It cannot be argued, in good conscious, that the District met its burden of proving the charges by a preponderance of the relevant evidence. In fact, it is much easier to make the case that the District is guilty of a frivolous prosecution resulting in a defamatory smearing of Mr. Olivera's reputation. At some point along the way, whether upon receipt of IAIU's "unfounded" Findings Report or in preparation of the hearing, the District should have done the right thing and moved to withdraw the charges. The fact that we have reached the summation stage of the proceeding, over two years since the date of the incident, and the charges are still pending, is a travesty.

The truth is that the District's so-called investigation into the students' shocking accusations against Mr. Olivera was unimaginably deficient. Even though the lead investigators for the District had little-to-no investigatory training, the sheer lack of effort to even attempt to corroborate the students' claims was downright shocking. Ms. Takyi and Ms. Henderson both admitted that the "investigation" was limited to collecting statements from the four student-accusers, asking those students if their statements were truthful, and conducting an interview of Mr. Olivera. No other substantive steps were taken to verify the truth of the students' claims.

Some of the logical, and readily-apparent, steps that *could* have been taken by the District's investigators include conducting interviews of randomly-selected students in Ms. Mitchell's classroom to determine what, if anything, they observed, checking in with the nurse's office to determine whether any of the students-accusers were treated there, and contacting IAIU to inquire about their own investigatory findings, which severely contradicted the student statements. It is concerning that the District rushed to file tenure charges under these circumstances, particularly considering the high costs and resources associated with prosecuting tenure charges. The likely explanation, given Ms. Hernandez's and Mr. Amparbin's obvious displeasure with Mr. Olivera's teaching performance, as made clear during their lengthy testimonies, is that the District wanted him out, and the student-accusers gave the District the ammunition it needed to do so. The District should, however, be reminded that tenure charges may not be brought for "unfounded, flimsy or political reasons." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982).

Turning to the heart of the matter - the evidence presented at the hearing relative to the May 4, 2016, incidents in Ms. Mitchell's classroom - the analysis must begin with D.G.'s written statement and testimony because she is the only District witness who was actually there at the time. In D.G.'s written statement, prepared the next day, on or about May 5, 2016, she accused Mr. Olivera of

slamming a large book on her hands causing her to bleed. She raised her hand and asked to go to the bathroom to rinse the blood off, but Mr. Olivera did not allow her to leave. In her statement, D.G. also reported that Mr. Olivera pushed a desk towards another student, causing her to be pushed against the wall, while almost getting hit on her side. Finally, D.G. asserted, in her statement, that Mr. Olivera "grabs children by their shirts, pulling them off the chair." See Cert. Tenure Charges ("TC"), Ex. 2.

D.G. was subsequently interviewed by no less than four individuals and was asked, on each occasion, whether the contents of the statement she provided were accurate. All four individuals – Ms. Hernandez, Ms. Takyi, Mr. Robles and the attorney for the District, Christina Abreu – approached her in an official capacity, and it should have been obvious to D.G., a subordinate, that it was a serious matter and that she had to tell the truth. However she did not. It was not until the eleventh hour, during cross-examination, that D.G. finally admitted that she did not directly observe any of the incidents described in her statement; she merely repeated what she heard other students say. She also waited until she was questioned on cross-examination to reveal that she was friends with the other student-accusers, and that it was a paperclip – not the history book – that punctured her finger, supposedly causing her to bleed. Perhaps if D.G. revealed these details in any of her prior interviews, Mr. Olivera could have been spared the indignity of having to go through a tenure hearing.

Obviously the statement prepared by D.G. lacks any semblance of credibility. This is particularly true since she admitted to discussing the incidents with other students both during and after class, but prior to drafting her statement. Her testimony during the hearing, particularly on direct, is also unreliable. She testified on direct that she asked Mr. Olivera to go to the nurse, but changed her story on cross, revealing that she asked to go to the bathroom. She testified that she never actually went to the bathroom, even after class, to wash the blood off her finger because it had already dried up at the time, which is not particularly believable, and contradicts what she told Ms. Takyi.

The most significant discrediting of D.G.'s account came from the testimony of Mr. Robles. He revealed that D.G. was, in fact, permitted to leave Mr. Olivera's classroom, but went to neither the bathroom nor the nurse; her actual destination was the cafeteria, where she presumably met up with friends, and failed to disclose the incident that had just occurred to the vice principals who were in the cafeteria. In fact, Mr. Robles testified that none of the student-accusers reported Mr. Olivera's outrageous conduct to either administration or their guidance counselors on their own volition. In the case of D.G., Mr. Robles interviewed her in the presence of her mother – a fact D.G. failed to recollect – who confirmed that she looked at D.G.'s finger when she arrived home that day, and did not notice any signs of injury. Mr. Robles did support one aspect of

D.G.'s testimony – he confirmed that the students in Ms. Mitchell's classroom who were part of the same clique" seemed to have similar stories, unlike the other students in the classroom. T4 at 360 (13-24). All told, Mr. Robles did not credit the allegations against Mr. Olivera, which is why he issued an "unfounded" Findings Report, which is the best disposition an individual investigated by IAIU could possibly hope for.

If there is some credit due to D.G., it is that she finally had the courage to admit, on cross, that her statement was not a firsthand account, and that she didn't truly believe the allegations against Mr. Olivera. This became apparent when she agreed with Mr. Amparbin's take on the matter, that if the accusations against Mr. Olivera were truly authentic, it would reverberate throughout the school. She agreed that this wasn't the case, insinuating that the students' claims were made up. Earlier on cross, she acknowledged that the students in Ms. Mitchell's classroom tended to exaggerate, particularly the student A.F., who accused Mr. Olivera of pulling him out of his chair by his shirt.

As for D.G., she was only in sixth grade when she prepared her written statement, and probably deserves some slack. She ultimately came clean and, as the old adage goes, better late than never. While it is not Mr. Olivera's contention that D.G. is a bad person or a liar, the record clearly establishes that her testimony and written statement has no credibility. The District cannot rely on either to prove the truth of the charges.

Due to the lack of any direct evidence, including testimony from any reliable witness who was present in Ms. Mitchell's classroom as to any of the allegations Mr. Olivera was directly put on notice of via the tenure charges, there is not much left to evaluate. The District simply has not met its burden of proof. Even the accusation that Mr. Olivera referred to his students as" narcos," or "nacos," or "stupid," was not proven. Mr. Robles confirmed that Mr. Olivera did not admit to using those words during his interview of him, which runs counter to not only what is alleged in the tenure charges, but the Findings Report issued by IAIU. Mr. Robles explained this discrepancy by revealing that the *Investigative Observations* section of the Findings Report was prepared by his supervisor Mr. Nzweku, who did not conduct the investigation of Mr. Olivera.

For his part, Mr. Olivera categorically denied the allegations. There was nothing in his testimony, either on direct or cross, that would question his credibility. The fact that he willingly subjected himself to cross-examination, despite the District's failure to present any direct evidence or eyewitnesses to the allegations, speaks to his integrity and willingness to set the record straight.

Point IV: Mitigating Evidence

Mitigating evidence should not be a factor in this case because the District failed to prove the charges against Mr. Olivera. But, there can be no mistake that there is a litany of mitigating factors here, many of which were laid out in his answer to the tenure charges. These factors include, but are certainly not limited to, Mr. Olivera's discipline-free history, long record of successful teaching performance – having never been issued a negative summative evaluation – and extensive work and involvement in community-related activities that go above and beyond his usual teaching duties.

One mitigating factor that should be considered, in particular, is the District's failure to provide Mr. Olivera with adequate support. We heard Mr. Robles testify to this point. He determined, through his investigation, that Mr. Olivera was not given the assistance he needed to deal with what was a severely misbehaved group of students, despite requesting such assistance on previous occasions. In addition to Mr. Robles, D.G. and even Ms. Takyi acknowledged that the class was out of control on the date in question. Perhaps if Mr. Olivera received more support – for example, in the form of a teacher's aide in the classroom, as suggested by Mr. Robles – this whole situation may have been avoided.

In a tenure arbitration award published just last month, the arbitrator considered the school district's failure to provide support to the respondent reason enough to spare him the loss of his tenure. In re. Eric Deering, Agency Dkt. No. 38-2/18, final decision, (August 9, 2018). In Deering, the arbitrator sustained the district's charges, finding that the respondent called students ugly and other offensive names and threatened to assault them, but didn't take his tenure because the district was "contributorily negligent" for failing to help him deal with unruly students. Id. slip. op. at 38-9. Here, the District's charges cannot be sustained, but even in the extraordinarily unlikely event that one or more of the allegations are credited, its abject failure to provide Mr. Olivera with even a modicum of support should militate against the imposition of a severe penalty.

CONCLUSION

For the reasons stated in the foregoing, the District failed to meet its burden of proving the truth of the tenure charges, and they must be dismissed with prejudice. Mr. Olivera must be further made whole for all compensation lost during the pendency of this proceeding. [Respondent Brief, pp. 12-23].

DISCUSSION

Pursuant to N.J.S.A. 18A:6-10, "[n]o person shall be dismissed or reduced in compensation * * * if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state * * * except for inefficiency, incapacity, unbecoming conduct, or other just cause." I first address the District's claims that its charges against the Respondent extend beyond the allegations that specifically involve the May 4, 2016 incident. In my review of this contention, I note that the only charges that possess sufficient specificity in this proceeding are those that relate to the May 4, 2016 incident. [See T1:15]. The Respondent has been employed by the Board for approximately 18 years. The evidence reflects that although the Respondent may have had some classroom management issues, the Respondent has not received any level of disciplinary action over his career that can be deemed to have been significant. Moreover, the record does not reflect that any of Respondent's prior conduct had ever been categorized by the District, or any other governing body/agency, as having engaged in any physical and/or verbal abuse. In the absence of any such credible evidence that the Respondent has an established pattern of having committed physical and/or verbal abuse towards anyone, I do not sustain any allegations or charges that extend beyond the May 4, 2016 incident. The issue before me is whether the District has established by a preponderance of the credible evidence that the

charges of unbecoming conduct and other just cause should be sustained that relate to the May 4, 2016 incident. [See T5:387].

In respect to the allegations involving the May 4, 2016 incident, I have carefully reviewed the evidence offered in the testimony of Ms. Takyi. Takyi acknowledged that she does not have first-hand knowledge of what transpired in the Respondent's classroom on May 4th. Takyi's understanding of the incident was derived from the written statements and the interviews she conducted with the four (4) students who complained about the Respondent's conduct in the classroom on May 4th. Of these four, Student DG was the only witness who testified during this tenure dismissal proceedings. DG's written account includes a summary of egregious conduct that the Respondent allegedly committed on May 4th. This included some of the conduct that the other three (3) students who did not testify claimed to have observed. However, DG acknowledged during her testimony that, notwithstanding her initial account to the contrary, she did not actually observe the Respondent engage in the specific conduct that forms the basis for the most serious allegations the Petitioner has made against Respondent. This includes the allegations that he pushed a desk into a student, slammed a student into the wall/bookshelf, or grabbed a student by the shirt. Although the allegations were reduced to writing, the students who made such allegations did not testify and therefore, deprived the Respondent of an opportunity to cross-examine them. The Respondent denied these claims.

and there is insufficient credible evidence that contradicts his denial. Based upon the foregoing, and the entire record, there is insufficient credible evidence to support the District's claims that the Respondent was verbally and physically abusive towards students in his class, used profanity towards his students and threatened to physically harm them, told his students that he was going to "f*** them up, improperly used physical force against his students, grabbed a student by the head and slammed it into a wooden table, or grabbed a student by her arms, pushed her to the side and pushed her into a wall. These allegations are serious but unsupported by credible evidence in the record.

The only allegation that is supported by direct evidence in this case is the claim that the Respondent hit Student DG's hand with a book and caused an injury to her finger. DG testified that her only direct observation of the Respondent was that he was had a thick book that hit a paperclip she was holding and this caused her finger to bleed when the paperclip cut her cuticle. As to this conduct, DG did not visibly observe the circumstances surrounding the incident, including whether the Respondent intentionally slammed the book on her hands, inadvertently dropped the book, or carelessly attempted to place the book on DG's desk and unintentionally hit the paperclip that caused her finger to bleed. The Grievant admitted in his interview with Henderson during the District's internal investigation that he recalled placing a book on a student's desk as he was in the process of attempting to gain control of unruly, disruptive

student conduct. During his testimony, the Grievant denied that he violently slammed a book on DG's desk and there is insufficient credible evidence that contradicts his denial. Having considered the entire record, the totality of the evidence shows that the Respondent did lack proper control over his classroom that allowed for classroom disruptions. This inability to maintain proper control of his classroom formed a basis for some disciplinary action but not removal. The evidence also supports that the Respondent was negligent in causing a book in his hand to make contact with a paperclip that DG was holding that resulted in a minor cut to DG's finger. In the absence of sufficient, supportive evidence showing that the Respondent meant to harm DG or that he intentionally slammed the book on DG's hand or finger, this incident formed a basis for some disciplinary action but not removal.

I am mindful that the charges in this case, if proven, would have served as strong support for the District's position that the Respondent's employment with the District must be terminated. However, for the reasons stated above and the entire record, I conclude that the District's burden to show that termination of employment was based on proper or just cause has not been met. It is noted that the District made efforts to have direct testimony provided by individuals who may have been in a position to provide broader facts than presented herein but its efforts were not successful. Having considered all of the facts and circumstances of this case, the penalty of termination must be modified to be

commensurate with the conduct proven. I modify the penalty to a 30 working day suspension without pay based on the unbecoming conduct and other just cause that the District was proven. The Respondent shall be reinstated to his position with the District and shall be made whole in all others respects less the 30 working day suspension without pay.

AWARD

The District has not met its burden to show that the Respondent's termination from employment was required. However, for the reasons set forth herein, the penalty of termination shall be reduced to a 30 day suspension without pay for the unbecoming conduct and other just cause that was proven. The Respondent shall be reinstated to his position with the District and shall be made whole in all others respects less the 30 day suspension without pay.

Dated: October 24, 2018
Sea Girt, New Jersey

Robert C. Gifford

State of New Jersey }
County of Monmouth }ss:

On this 24th day of October, 2018, before me personally came and appeared Robert C. Gifford to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Linda L Gifford
Notary Public
Expires
1-10-21

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges by	X	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK	X	
"District"	X	Agency Docket No. 294-11/16
-against-	X	
CHARLES COLEMAN	X	
"Respondent"	X	
Pursuant to N.J.S.A. 18A:28-5 and 6-10	X	

APPEARANCES

FOR THE PETITIONER
PURCELL MULCAHY FLANAGAN
By: Robert M. Tosti, Esq.

FOR THE RESPONDENT
STUART BALL, LLC
By: Stuart Ball, Esq.

BEFORE: Earl R. Pfeffer, Arbitrator

DISCUSSION AND FINDINGS

The District filed Sworn Tenure Charges against Respondent Charles Coleman in accordance with N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, and same were served on Respondent with notice of opportunity to submit evidence and argument in opposition. Thereafter, the Commissioner of Education, following review of the Charges and Respondent's answer, found the Charges were sufficient for referral to an arbitrator, and I thereafter was appointed Arbitrator to hear and decide this tenure dispute. A Status Conference was scheduled for March 21, 2017, and then adjourned to March 31, 2017, at which time the matter was held in abeyance pending approval of Respondent's retirement and the settlement of this case. On February 21, 2018, the status conference was reconvened, and the parties advised that Respondent's retirement had been approved, and settlement terms were being discussed. On June 28, 2018, pursuant to N.J.A.C. 6A:3-5.6, the parties forwarded to me for review and approval the Stipulation of Settlement ("Stipulation") fully and finally resolving this matter. A copy of same is attached hereto and incorporated herein.

I have carefully reviewed the Stipulation and I determine it satisfies the statutory requirements for withdrawal and settlement of tenure charges, as set forth in N.J.A.C. 6A:3-5.6. In particular:

1. The nature of the Charges are part of the record of this proceeding and were known to all parties to the Agreement.

2. The circumstances justifying settlement and withdrawal are incorporated into the Agreement. For the Respondent, the Board agreed to withdraw the Charges with prejudice and to recognize he has retired in good standing, effective January 1, 2017. Further, the District has agreed not to pursue the subject tenure charges against him as long as the Stipulation remains in effect. For the District, Respondent has waived, released and discharged and all claims or actions he has or may have against it, its Superintendent, Board and Board members, as well as its officers, employees, agents, successors and assigns, including, without limitation, all claims concerning tenure, increment, alleged discrimination or alleged violations of any federal, state or local laws, as well as alleged violations of the United States and/or the New Jersey Constitutions. Further, the District retains the right to refile these tenure charges if the Stipulation is voided, and Respondent reserves the right to defend same.

3. Notwithstanding the foregoing, Respondent retains his rights concerning a grievance covering the right to any retroactive pay pursuant to the Collective Bargaining Agreement in effect between the District and the Union representing its teachers.

4. The Stipulation advised Respondent of his rights under the Older Workers Benefit Protection Act of 1990, in particular of his right to review and consider the Agreement for a period of up to twenty-one (21) days and of his right revoke and rescind his execution of the Agreement within seven (7) calendar days after he signed it on April 20, 2018.

5. The Agreement contains Respondent's acknowledgment it is the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners, and to advise the Board of Examiners Respondent has retired, and that the District is legally required to participate in proceedings initiated by the Board of Examiners against Respondent's license, and Respondent agrees such participation shall not be considered a violation of

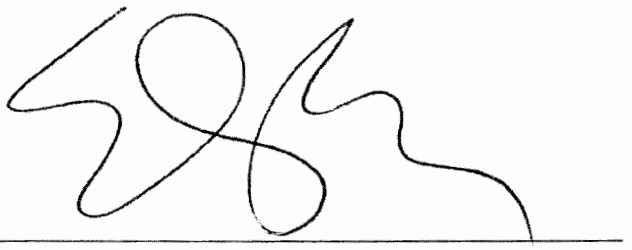
the Stipulation.

6. The District agrees it will not independently seek revocation or suspension of Respondent's teaching certification or license, nor will it seek to prevent him from applying for or receiving pension benefits on any grounds related to the tenure charges or his resignation. In response to any inquiry regarding Respondent, the District has agreed its response will be only to confirm his dates of employment, salary and benefits.

7. Respondent and the District each acknowledged they have entered into the Stipulation freely and voluntarily, without duress, coercion or pressure, and with a full understanding of its terms and conditions, following discussions with and advice from counsel. The District, by certification of its attorney, Robert M. Tosti, Esq., has consented to the terms set forth in the Stipulation. I find it complies with N.J.A.C. 6A:3-5.6(b)

8. The Agreement, I find, does not contain terms which restrict access to information or records deemed public by law, accurately represents the circumstances of Respondent's resignation and is in the public interest.

I approve the Agreement.



September 8, 2018.

Earl R. Pfeffer, Arbitrator

STATE OF NEW JERSEY)
) ss.:
COUNTY OF ESSEX)

On this 8th day of September 2018, before me personally came and appeared EARL R. PFEFFER, Arbitrator, to me known and known by me to be the individual described herein, and who executed the foregoing instrument and who acknowledged to me that he executed the same.

Sworn to and subscribed
before me this 8 day
of September 2018.

Notary Public

JOYCE L RUDIN
NOTARY PUBLIC
NJ Comm. Exp. 10-20-2022
No. 50070820
NEW JERSEY

PURCELL MULCAHY & FLANAGAN, LLC
One Pluckemin Way
Bedminster, NJ 07921
908-658-3800
Attorneys for the State Operated
Attorneys for the Board of Education of the City of Newark, in the County of Essex
Our File No. (650) 22737-ECF

IN THE MATTER OF TENURE CHARGES OF CHARLES COLEMAN	AGENCY REF. NO. 294 – 11/16
and the	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK	**STIPULATION OF SETTLEMENT**

The Board of Education of the City of Newark (the "District"), whose principal office is located at 765 Broad Street, Newark, New Jersey 07102, and its successors, assigns, officers, employees, agents and representatives (collectively, "School District" or "District"), and Charles Coleman, residing at 426 Tompkins Street, Orange, NJ 07050 ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below, and except as it relates to a pending grievance.

WHEREAS Respondent is a tenured teaching staff member employed by the District as a teacher; and

WHEREAS the State District Superintendent of the School District ("Superintendent") certified tenure charges of conduct unbecoming to the Commissioner of Education of the State of New Jersey, captioned *In the Matter of Tenure Charges Against Charles Coleman, State-Operated*

School District of the City of Newark, Essex County ("Tenure Charges"), primarily based upon allegations that Respondent had engaged in misconduct and absenteeism, and such charges were assigned Docket No. 294 – 11/16; and Respondent filed an answer opposing the charges; and the Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator Earl Pfeffer ("Arbitrator") for a hearing; and

WHEREAS, the District is concerned with the uncertainty of the outcome of arbitration as well as the expenditure of resources due to multiple days of hearings with numerous witnesses and that school personnel will be removed from their educational duties and responsibilities during that time; and

WHEREAS, Respondent is seeking prompt and final resolution of this matter; and

WHEREAS, Respondent has submitted a disability retirement application which has been approved by the Division of Pensions; and

WHEREAS, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

WHEREAS the proposed Stipulation of Settlement is in the best interest of the Parties and the public because this agreement will avoid an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Upon final approval of the signed Stipulation by the District, the District shall and hereby does withdraw the instant Tenure Charges with prejudice except as specified in paragraph 3 below.

2. Upon final, legally binding approval of the signed Stipulation, the Respondent agrees to retire in good standing retroactively to January 1, 2017, the effective date of his disability retirement.

3. The District agrees to not pursue the subject Tenure Charges against Respondent as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the Stipulation is voided, the District retains the right to refile and consider for certification the tenure charges that are the subject of this Stipulation under Docket number 294 – 11/16, and Respondent reserves the right to defend same.

4. Except as noted above, Respondent waives all claims of any nature against the District with regard to his employment with the District including fees, or other monetary relief, except as regarding a grievance covering the right to any retroactive pay pursuant to the Collective Bargaining Agreement in effect and governing the parties.

5. Except as to the grievance noted in paragraph 4, above, and except as to any defenses that might be asserted pursuant to paragraph 3, above, Respondent hereby waives, releases and discharges any and all claims or rights that he has or may have against the District, the Superintendent, its Board of Education and its Board members, and any and all other District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the District up to the date of this Agreement. It specifically includes, without limitation, all claims which Respondent may have regarding tenure, withholding of increment, discrimination on any basis,

any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on his employment, including but not limited to any claim for back pay, vacation pay, sick pay, wages, attorneys' fees, costs, and/or future wage loss, except for workers compensation claims.

6. In accordance with N.J.A.C. 6A:3-5.6(a)6, Respondent has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State

Board of Examiners. Additionally, pursuant to N.J.A.C. 6A:9B-4.3(a)1, Respondent has been advised of the Board's duty to notify the State Board of Examiners he has retired. The Board is legally required to participate in proceedings initiated against Respondent's license by the State Board of Examiners resulting from the Commissioner's referral. Such participation shall not be considered a violation of this agreement. Aside from such requirements, pursuant to the above-referenced regulation, the Board agrees to not independently seek the suspension or revocation of Respondent's teaching certification or license or seek to prevent her from applying for or receiving pension benefits on any grounds related to the Tenure Charges or her resignation pursuant to this Stipulation of Settlement.

7. The District agrees that, except as provided in paragraph 6, above, in response to any inquiry regarding Respondent, it will respond that the district's policy is to provide ONLY confirmation of the dates of employment, salary and benefits. And the District agrees that only such information will be supplied in response to any such inquiry.

8. It is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commissioner, or any other federal, state or local law agency. However, should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims herein, Respondent agrees not to seek or accept any resulting relief whatsoever.

9. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that he: (i) fully understands the terms and conditions

of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has 7 days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that he may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the 7 day period.

10. This Agreement shall not constitute a precedent in any matters involving other District employees.

11. This Stipulation, and all of its terms, are and will remain confidential to the maximum extent permitted by law. Respondent is expressly forbidden from discussing this Stipulation with any person, other than his immediate family, accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Stipulation or to which it is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Respondent agrees that it will inform the person to whom it is making the permitted disclosure that the existence and substance of this Stipulation, the settlement giving rise to this Stipulation and the sum of money paid pursuant to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. Respondent specifically agrees not to discuss the nature, terms, conditions of this Stipulation with others, any representative of the media, or any past, present, or prospective employee of the District, or its agents or attorneys. Respondent understands that this provision is not a simple recital but is an important, integral part of this Stipulation. The District agrees that it will keep this Stipulation confidential to the extent permitted by law.

12. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

13. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

14. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

15. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

16. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

17. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

18. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

19. This Stipulation of Settlement is subject to the final approval of the Board of Education of the City of Newark. Further, it will only become effective upon the final approval of the Arbitrator.

Dated: 6/20/2018

CHARLES COLEMAN

SCHOOL DISTRICT OF THE CITY OF NEWARK

Dated: 6/26/2018

By: ~~MARQUES-AQUIL LEWIS~~ Josephine Garcia
Board Chairperson

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):

Dated: 6/28/18

Robert M. Tosti
Attorney for State-operated School District of the City of Newark

APPROVED:

Dated: 9/7/2018

Earl Pfeffer, Arbitrator

CERTIFICATION

I, Charles Coleman, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this 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: 4/20/2018

Charles Coleman

In the Matter of the Tenure Hearing of

Dennis Q. Miguel
Board of Education of the Township of Mahwah
Bergen County, New Jersey

Agency Docket No.103-4/18

Opinion and Award

Tia Schneider Denenberg, *Arbitrator*

APPEARANCES

FOR THE DISTRICT:

Marc H. Zitomer, *Schenck Price Smith & King, LLP*
Matthew J. Donohue, *Schenck Price Smith & King, LLP*

FOR THE RESPONDENT:

Kevin Sisco, *Ricci & Fava L.L.C.*

ISSUE

Whether the tenure charges against the respondent constitute acts of unbecoming conduct or other just cause warranting his dismissal.

BACKGROUND

The respondent, Dennis Miguel, was hired in 2006 as a teacher by the Mahwah, New Jersey Board of Education [Board Exhibit 2]. He became tenured in his position as an English language arts teacher at Mahwah High School in 2009. He was also assigned as an advisor for the Student Government Association (SGA) for the senior class.

- On March 16, 2018, he was suspended with pay from his teaching position.

- On April 5, 2018, District Superintendent Dr. C. Lauren Schoen filed twelve tenure charges, and a statement of supporting evidence [Board Exhibit 1]. The charges span April 2017 through March 2018.

- On April 25, 2018, the board certified the charges to the Commissioner of Education and suspended the respondent without pay for 120 days.

- The respondent submitted an answer, denying the charges and allegations, except for Charges Seven and Eight [Board Exhibit 34]. The matter was assigned to the undersigned arbitrator. Hearings were held on July 9, 10, 24, and August 2, 2018.[1] A transcript was taken.

- Samantha I. Price, Director of the Office of Controversies and Disputes, granted an extension of the award due date until December 3, 2018.

- The parties filed post-hearing briefs on September 25, 2018. The respondent's brief included a motion to dismiss the tenure charges. On October 19, 2018, the district filed a reply brief in opposition.

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[1] At the hearing, the board asserted the respondent had not complied with N.J.S.A. 18A:6-17.1(b)(3) because his evidence disclosures to the board were late. The arbitrator overruled the board's objection [Tr. 411]. Because of the hearing schedule and the dates on which the witnesses, including the respondent, were set to testify, no harm to the board resulted from disclosures that were provided three days late. This determination ensured a fair hearing by allowing for a full presentation of testimony and evidence by both parties.

The following witnesses testified under oath or affirmation:

FOR THE DISTRICT:

Mrs. SB	Mother of JaB
JaB	Mahwah High School student, class of 2018
DL	Mahwah High School student, class of 2018
Maureen Lynch	Mahwah High School English supervisor
John Pascale	Mahwah High School principal
DD	Mahwah High School student, class of 2016
Dr. C. Lauren Schoen	Mahwah Board of Education Superintendent

FOR THE RESPONDENT:

PL	Mahwah High School student, class of 2018
JoB	Mahwah High School student, class of 2016
GK	Mahwah High School student, class of 2018
Dennis Q. Miguel	Mahwah High School teacher

Applicable Legal Standards

In 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. The choice of accepting or rejecting the testimony of a witness or credibility rests with the finder of facts.

Unbecoming conduct is broadly defined as "any conduct which adversely affects the morale or efficiency of the [government unit]...[or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services" [Karins v. Atlantic City, 152 N.J. 532, 554 (1998)]. The touchstone of unbecoming conduct is the teaching staff member's fitness to discharge the duties and functions of one's office or position [Laba v. Newark Bd. of Educ., 23 N.J. 364, 384 (1957)]. A finding of unbecoming conduct "need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the 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" [Bound Brook Bd. of Education v Ciripompa, 228 N.J. 4, 19 (2017) quoting In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960)].

Respondent's Motion to Dismiss

On July 25, 2018, the board voted to withhold the respondent's salary increment. On August 8, 2018, the superintendent informed him that the board "withheld your employment and adjustment increments for the 2018-19 school year based upon your unbecoming conduct as set forth more fully in the Sworn Tenure Charges and Statement of Evidence that were filed against you on April 5, 2018" [Respondent's Brief, Exhibit B; Board's Opposition to Respondent's Motion to Dismiss Tenure Charges Based on Doctrine of Double Jeopardy, Exhibit A].

The respondent asserts the charges must be dismissed. The district has already disciplined him for the same conduct set forth in the tenure charges by withholding his pay increment on July 25, 2018. It is now precluded from imposing any additional discipline based on that conduct.[2]

The board contends it was permitted to contemporaneously withhold his salary increment after filing tenure charges to fill the gap of time until an arbitration decision resolving the tenure charges is issued.

Both parties cite, among others, the decision of Arbitrator Joseph Licata in I/M/O Tenure Charges filed by the School District of the Borough of New Milford, Bergen County, New Jersey Against Lawrence Henchey, Agency Docket No. 322-11/14 (Decision, Jan. 3, 2015) (Henchey). The arbitrator dismissed four charges based on the doctrine of double jeopardy where the board had addressed a teacher's shortcomings in 2012-13 by way of an increment withholding for 2013-14, not leading to the filing of tenure charges shortly thereafter [Henchey at 38]. However, with respect to a fifth charge, the arbitrator did not dismiss the charge. Specifically, he stated:

> I concur with the underscored portion of Arbitrator De Treaux's rationale in IMO River Dell Regional School District and Richard Graffanino, Agency Dkt. No. 223-9/13, distinguishing the doctrine based on the timing of events in the case of an increment withholding followed by the issuance of tenure charges:

[2] The respondent makes an additional double jeopardy argument with respect to Charge Seven.

> Although the District's tactic in withholding the salary increment and filing tenure charges is uncommon, I find that it does not constitute "double jeopardy." Double jeopardy, of course, applies only in criminal cases; but Respondent is arguing duplicative punishments, two separate disciplinary actions for the same offenses. The District's approach was not an attempt to duplicate punishment; but rather, it was an attempt to fill a gap caused by the timing of the tenure charges. In the interval before tenure charges were filed and again before an arbitration decision would issue, the District wanted to ensure that [the teacher's] salary was not increased. It may have been an unnecessary move because the gaps in time were so limited, but it was not inflicting a double penalty on [the teacher].
>
> Henchey at 39-40
> (quoting I/M/O Richard Graffanino,
> Agency Dkt. No 223-9/13 (DeTreux, 2013)

Arbitrator Licata added:

> Indeed, the failure to withhold an increment may be cited by a teacher as evidence that the ensuing tenure charges were not justified based on the implicit recognition that increments are not withheld in the case of satisfactory teaching performance in a given school year.
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> [Id. at 40 n. 12]

The reasoning set forth above regarding the fifth charge in Henchey is compelling. Here, the district filed tenure charges against the respondent on April 5, 2018. Shortly thereafter, on July 25, 2018, the district withheld the respondent's employment and adjustment increments for the 2018-19 school year based on his unbecoming conduct as set forth in the tenure charges. This action was not an attempt to duplicate punishment; it was an effort to ensure that the respondent's salary was not increased in the period between the earlier filing of the tenure charges and the issuance of the arbitrator's decision regarding those charges. As Arbitrator Licata noted above, if the district had failed to withhold the respondent's increment for the 2018-19 school year, that might have been cited as evidence that the existing tenure charges were not justified.[3]

Accordingly, the doctrine of double jeopardy does not apply. The respondent's motion to dismiss the charges is denied.

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[3] Other cases relied on by the respondent are readily distinguishable inasmuch as they involved increment withholdings and/or discipline that occurred years before the filing of tenure charges. Thus, unlike here, they did not constitute contemporaneous discipline.

DISCUSSION AND ANALYSIS OF THE TENURE CHARGES

CHARGE ONE

> On April 7, 2017, Respondent texted a link to a sexually explicit blog that he created to his English Department Supervisor, Maureen Lynch. In the text message accompanying the link, Respondent tells Ms. Lynch, "Ok, so I feel like you won't narc on me, so I am presenting a gift to you. (Also a means to pass time.)." Ms. Lynch thanked him for sending it but, unbeknownst to her, the blog describes in graphic detail Respondent's first sexual encounter with another man in which he has anal sex. Respondent also describes the fact that after he moved his bowels the next day, there was blood all over the toilet paper and in the bowl. This commentary is significant because, as detailed in Charge 2, *infra*, Respondent also told a pupil in his charge that, after the first time that he had anal sex, his anus bled. This lends further credence to the pupil's statement.
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> Respondent's highly inappropriate and unprofessional conduct, as set forth above, falls far below the behavior expected of a teaching staff member. This constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.
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> [Board Exhibit 1]

Beginning in the 2016-17 school year, Ms. Lynch supervised about twenty teachers. She had "friendly, professional relationships with all of [her] teachers," including the respondent who taught digital media classes [Tr. 282, 221].

On April 7, 2017, Ms. Lynch and the respondent were texting while Ms. Lynch was waiting to board a plane to go on vacation [Tr. 222]. They had the following text message exchange:

Respondent:	Ok, so I feel like you won't narc on me, so I am presenting a gift to you. (Also a means to pass the time.) Link to sotherewasthisguy.com It's better to start at the very beginning, when I was attempting to be Sedaris.
Lynch:	Wow! Thank you! I'm impressed that you have your own blog.
Respondent:	It was a short lived dream
Lynch:	Good for you! I haven't gotten far yet b[ecause] my friend just called, but thank you...

[Board Exhibit 8]

Before this exchange, Ms. Lunch did not know that the respondent maintained a blog [Tr. 222].

Ms. Lynch credibly testified that when she clicked on the hyperlink to the blog, no warning screen appeared that indicated the blog was sexually graphic [Tr. 222]. She was "shocked" and "embarrassed" at its "explicit and graphic" nature, and felt that it was "not at all what I would expect to be sent by anyone" [Tr. 224]. It is undisputed that the blog contained explicit and graphic details of his sexual history. One of the blog entries explicitly described anal bleeding after his first sexual experience [Board Exhibit 8].

Ms. Lynch testified that she responded "thank you" to receiving the unsolicited blog because she did not know how to properly convey how uncomfortable she was to the respondent [Tr. 226]. She did not discuss the blog further with the teacher after April 7, 2017 [Tr. 226].

After Ms. Lynch returned from vacation, she discussed the blog with Assistant Principal Dennis Fare [Tr. 227]. She did not show him the blog, but said that the content was "really sexual[,]" "really graphic[,]" "very explicit[,]" and that she felt "uncomfortable" [Tr. 227-28]. Mr. Fare advised her to tell the respondent that she felt uncomfortable and that the blog was inappropriate [Tr. 228]. She did not speak with the teacher because she "was new in [her] position" and "didn't know how to address this" [Tr. 228]. She acknowledged that, "[i]n retrospect," as his supervisor she "should have talked to him face-to-face after to let him know this was inappropriate" [Tr. 263].

The blog did not come up again until March 2018 when Ms. Lynch took part in an investigation by the Division of Child Protection and Permanency regarding the respondent's alleged behavior [Tr. 229]. She testified that, during the investigation, one of the students mentioned that the teacher stated that his anus bled the first time he had sex. When Ms. Lynch heard the student's accusation, she made a connection "[a]bout the first time [the respondent] had sex that his anus bled. In the blog, it's very graphic. It's very descriptive about that" [Tr. 230].

The district asserts that these facts establish that the respondent engaged in unbecoming conduct by sending a sexually offensive, explicit blog to his supervisor. The respondent does not deny that the contents of the blog included explicit descriptions of his sexual activity or that he shared the blog with his supervisor. He contends, however, that the blog always had a warning screen, and that he and Ms. Lynch had developed a friendship that transcended their work-place affiliation.

The record does not support this assertion that the blog had a warning screen. Both Ms. Lynch and Dr. Schoen credibly testified that no such warning screen existed prior to March 2018 [Tr. 224, 448]. The respondent admitted that Ms. Lynch was a truthful person,

and could not explain why his testimony on this point differed from that of Ms. Lynch [Tr. 724], and that if the blog got out into the general domain, his career would "more or less" be jeopardized [Tr. 728].

His contention that he sent the blog to Ms. Lynch as a friend, not a supervisor, is equally unavailing. He was fully aware of the fact that she was his supervisor. His text stating he hoped she wouldn't "narc" on him reflects an acknowledgment of her supervisory status over him. The district's policy plainly states that "[sexually offensive speech and conduct are wholly inappropriate to the harmonious employment relationships necessary to the operation of the school district and intolerable in a workplace to which the children of this district are exposed" [Mahwah Board of Education Policy #3362]. Even in the absence of a policy, sharing a graphic blog with a supervisor that was completely unsolicited constitutes inappropriate behavior.

Accordingly, the district has met its burden of establishing the allegations supporting Charge One by a preponderance of the evidence.

CHARGE TWO

> The factual allegations contained in the foregoing Charge are incorporated by reference as if fully set forth herein.
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> On April 23, 2017, at the Mahwah Education Foundation's "Thunderbird 5K run", which occurred approximately two (2) weeks after Respondent sent his sexually graphic blog to Ms. Lynch, Respondent told pupil [JaB] that, "the first time he had anal sex his asshole bled" or words to that effect.
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> Respondent's highly inappropriate and unprofessional conduct, as set forth above, constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.
>
> [Board Exhibit 1]

In April 2017, the respondent and two students, JaB and PL, were setting up drones for a school event [Tr. 74-75]. JaB testified that while he was setting up the drones, PL, who "was close to Mr. Miguel," was joking with the respondent about the respondent's car being a "stereotypical gay car" [Tr. 76]. JaB testified that shortly after that comment, the respondent said to JaB and PL at "an arms-length distance" [Tr. 77], that "the first time he had sex his asshole bled" [Tr. 76]. JaB said the teacher explained to both minors that he thought he had AIDS after the first time he had sex [Tr. 78]. JaB said he did not notify his mother or school authorities after hearing these comments [Tr. 79].

In March 2018, JaB texted PL and asked him whether PL would "be willing to confirm the time he [the respondent] told us about his anus bleeding after sex" [Board Exhibit 3]. PL responded "[n]o" and "[h]e's "never said that to me" [Board Exhibit 3]. Later in the same exchange, the two students texted:

PL: Reporting him about his anus bleeding is attempting to fire him.
JaB: I mean he told us that. I just wanted to consider the evidence I had.
PL: I'm not saying you're lying, but saying that would be you going for his job.
JaB: I'm not lying I remember it distinctively.
[Board Exhibit 3]

PL testified at the hearing that he had no recollection about discussing the respondent's car at the school event [Tr. 547]. He also testified that he had no recollection as to whether or not the respondent made a statement about his anus bleeding [Tr. 549].

The teacher denied having a conversation about his car or discussing his personal sexual history with JaB and PL at the school event [Tr. 734].

Based on the demeanor of the witnesses and the text exchanges quoted above, the arbitrator finds that the respondent discussed his personal sexual history with the two students. JaB's testimony was specific, detailed and consistent with his firm statement in the text exchange. Although PL testified that he did not have a recollection of the alleged event, his text exchange with JaB was equivocal, and evinced more concern with the effect of the respondent's alleged statement on his job security than on whether the statement was made. JaB's testimony is also supported by the timing of the sexual statement about anal bleeding, shortly after the respondent sent his blog to his supervisor. The respondent's denial that he made the sexual remarks is not credible.

The district has met its burden of establishing the allegations supporting Charge Two by a preponderance of the evidence. The respondent discussed his personal sexual history with the two students at the school event.

Unsolicited sexual conversations, particularly with minors, qualify as unbecoming conduct warranting dismissal. [See, e.g., I/M/O the Certificates of Shellie Mackson, Agency Dkt. No. 1314-251, adopted with modification, State Board (November 1, 2017) ("inappropriate sexual comments to a student or discussion of the teacher's personal experiences or sexual activities can be considered conduct unbecoming. . . a pattern of inappropriate communications with a student can warrant revocation of a teaching certificate.")]

The respondent's comments to the students about his personal sexual history were clearly inappropriate and constitute unbecoming conduct.

CHARGE THREE

The factual allegations contained in the foregoing Charges are incorporated by reference as if fully set forth herein.

At the end of the 2015-16 school year, Respondent attended a graduation party for a graduating Mahwah High School Senior, [JoB]. Respondent was drinking alcohol with the Mahwah students at the party and was visibly intoxicated.

Respondent's highly inappropriate and unprofessional conduct, as set forth above, constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A.6-10, *et seq.* and N.J.S.A. 18A:28-5. Said conduct also violates Board Policy 3230 ("Outside Activities"), or at a minimum, the spirit and intent of this policy, which provides, among other things, that staff members should, "Avoid conduct or associations outside the class room which, if known, could have an adverse or harmful effect upon the pupils or school community." This policy is also incorporated by reference into the Mahwah High School Staff Manual which is distributed to staff at the beginning of each school year.

[Board Exhibit 1]

Charge Three alleges that the respondent attended a graduation party at the end of the 2015-16 school year for a graduating senior, JoB, and that the respondent was drinking alcohol with the students at the party and was visibly intoxicated.[4]

JoB testified that the party was hosted by his family and was attended by about 70 people [Tr. 556]. The respondent was the only teacher invited to the party by JoB, and he invited him because "[h]e made the biggest impact for me in my high school career" [Tr. 559]. JoB testified that during the party the respondent was inside the house with JoB's mother and her friends, having a glass of wine in the kitchen the whole time [Tr. 560]. JoB also testified that at no point in time that evening did he see the respondent intoxicated [Tr. 560]. JoB further testified that he did not invite any underclassmen to the party, and that JaB, an underclassman, was not at the party [Tr. 561].

JaB testified that he was invited to and attended the JoB party [Tr. 82]. JaB testified that approximately 80 to 100 students were at the party, and the respondent was drinking

[4] The record contains testimony concerning other graduation parties as well. That testimony is irrelevant here, because the charge refers only to the party at JoB's house.

outside with students present [Tr. 82-83]. JaB testified that he did not interact with the respondent, but witnessed MB, one of JaB's acquaintances, approach the respondent and take a drink out of the respondent's cup [Tr. 84]. According to JaB, MB then said to the respondent "this is pretty much pure alcohol" [Tr. 84].[5] JaB testified that Mr. Miguel "looked like he was drunk[,]" his face and eyes "were red[,]" and he "was sort of slouched over" [Tr. 84]. JaB could not recall what time he left the party, but believed the respondent was still there when JaB left [Tr. 85].

DD testified that he also attended the party and saw the respondent drinking alcohol there [Tr. 421]. DD testified that no other adults other than the respondent, JoB's mother and her significant other attended the party [Tr. 422]. According to DD, the respondent was consuming alcohol with the other students outside [Tr. 422]. DD described the respondent's behavior as "maybe a little tipsy or a little drunk,...in a party mood, and just relaxing with the kids" [Tr. 422].

The respondent testified that he was invited to the party by JoB and that he had one beer in the kitchen offered by JoB's mother and then walked out [Tr. 687]. He further testified that at no point was he outside with the students drinking and that he was not intoxicated, having had only one beer [Tr. 687, 713-14]. On cross-examination, he testified that he "ha[d] two drinks" and "was having the drink in the presence of parents who gave me the drinks" [Tr. 717].

District Policy #3230 – Outside Activities, cited by the district, states as follows:

3230 OUTSIDE ACTIVITIES

The Board of Education recognizes that members of the staff must enjoy private lives and may associate with others outside of school for political, economic, religious or cultural reasons. The Board and its supervisory staff, however, have a responsibility to evaluate staff members in terms of their faithfulness to, and effectiveness in discharging school duties and responsibilities. Therefore, when non-school activities threaten a staff member's effectiveness within the school system, the Board reserves the right to evaluate the impact of such activities upon a teacher's responsibilities to his or her pupils and to the Board.

The following guidelines are suggested so that staff members may avoid situations in which their personal interests, activities and associations may conflict with the interest of the district.

1. Refrain from making public utterances about private associations if such remarks are likely to violate the community standards of propriety.

[5] MB did not testify at the hearing.

2. Avoid conduct and associations outside the classroom which, if known, could have an adverse or harmful effect upon the pupils or school community.

3. Do not give school time to outside activities when there is no valid reason to be excused from professional duties.

4. Do not use school property or school time to solicit customers for private enterprises without written administrative permission. The Board does not ordinarily endorse, support nor assume liability for any staff member from this school district who conducts outside activities in which pupils and employees of this district may participate.

5. Staff members may not tutor any pupil in their classes after hours at the pupil's expense.

[Board Exhibit 28]

This policy permits teachers to associate with others outside of school for political, economic, religious or cultural reasons, within certain guidelines. Attending a graduation party with students does not fall within the permissible activities as defined by the policy. The respondent should have asked the principal for permission to attend the graduation party in question. Moreover, the respondent admitted that he had either one or two drinks at the party. Drinking with, or in the presence of, students is a slippery slope that exposes the respondent to an allegation of having too much to drink or being intoxicated. While the district has not proven by a preponderance of the evidence that the respondent was intoxicated at the party, the record shows that the respondent did not notify the principal of his intention to attend the party, nor did he have the principal's permission to attend the party. As such, this charge is sustained in part and dismissed in part.

CHARGE FOUR

The factual allegations contained in the foregoing Charges are incorporated by reference as if fully set forth herein.

In or about late August 2017,the SGA officers and representatives were making banners for Freshman Orientation at school. Respondent became angry with the students when they did not clean up after themselves. He referred to the students as "nerds" and then proceeded to tell them that, "he would rather have a group of "C" students that are nice than these "A" student assholes", or words to that effect.

Respondent's condescending conduct in calling the pupils in his charge "nerds" and a profane name is highly inappropriate, unprofessional and it constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.

[Board Exhibit 1]

In August 2017, senior class members of the SGA were creating "Welcome Freshman" banners in an art room [Tr. 85-87]. JaB testified that after the students had not cleaned up the art room, the respondent called them into the digital media room, "yelled" at them, told them that he would "rather have polite C students than rude A students" and called them "nerds" [Tr. 87]. DL testified that, in reprimanding the students for not cleaning up, the respondent "went completely off on us, calling us a bunch of assholes, and that he would rather have C – like a group of kind students who [were] C, like average students but were kind, as opposed to us who were the A student assholes" [Tr. 195]. DL also testified that the respondent called the students "nerds," which is "kind of mean to say to someone" [Tr. 196].

GK testified that the respondent did not refer to the SGA as "nerds" or "assholes" [Tr. 585-86]. GK also testified that, in a text message on September 29, 2017 to JaB, the respondent "talked about how he would rather have C students who are like humble and caring and like willing to do the work, than A students who don't want to do the work and just, like, get away with everything" [Tr. 585, Board Exhibit 33].

The respondent did not deny that he called the students "nerds" [Tr. 666]. He denied saying to the students that they were "assholes," and testified that he said "I'd rather have a group of C students that are nice than A student assholes" to another "teacher at a restaurant during school hours" [Tr. 666].

On or about March 19, 2018, the principal, John Pascale, met with DL and his mother, Mrs. L [Tr. 320]. DL told Mr. Pascale that the respondent referred to the students as "nerds" and "assholes" [Tr. 323-24]. Mr. Pascale began a Harassment, Intimidation, and Bullying ("HIB") investigation pursuant to N.J.S.A. 18A:37-14 [Tr. 339]. In his response to the investigation, the respondent did not deny making the "nerds" comment, but said that he used it as "a non-offensive term of endearment between us, and certainly not a negative or bullying use of the term" [Board Exhibit 25]. He also stated that he only called the students "assholes" in front of another teacher during lunch on a school day, not in front of students [Tr. 740, See Board Exhibit 25].

The arbitrator finds that the record supports the allegation in this charge that the respondent called the students "nerds" and "assholes." The district has met its burden of establishing the allegations supporting Charge Four by a preponderance of the evidence.

Referring to students in derogatory or profane terms to a colleague constitutes unbecoming conduct that warrants discipline. The fact that the students acknowledged that the respondent was rightfully annoyed with them for not cleaning up the art room does not entitle him to act unprofessionally by disparaging the students. A "teacher is obliged to act with restraint and emotional control" even if a student is being disruptive, disrespectful and/or foul-mouthed toward a teacher [I/M/O Tenure Hearing of Lat Sall, Agency Dkt. No. 305-10/14 (Denenberg, 2015) (dismissal of tenured teacher appropriate for unbecoming conduct, which included verbally abusing and spitting on student)].

The respondent defends his use of the term "nerds" on the ground that he did not refer to the SGA members as nerds in a derogatory or mean-spirited way, claiming that he himself was a nerd. This defense is without merit. The students' testimony shows they were upset as having been characterized as nerds. Further, the HIB investigation corroborated this view.

Accordingly, the respondent's statements set forth in Charge Four were inappropriate from a professional standpoint and constitute conduct unbecoming.

CHARGE FIVE

The factual allegations contained in the foregoing Charges are incorporated by reference as if fully set forth herein.

In or about November 2017, pupil D.L. and Respondent completed making the afternoon announcements at the high school. As they were exiting the school, a visiting soccer team and their coach from another school asked them for directions to the gym, which D.L. and Respondent provided to them. After they walked away, Respondent laughed and told D.L. that he "slept with that coach once" or words to that effect.

Respondent's highly inappropriate and unprofessional conduct in discussing his sex life with a pupil in his charge constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.

[Board Exhibit 1]

DL testified that in or about November 2017, he was working with the respondent on a video segment for the school announcements [Tr. 198]. After the two completed the project, they left the school and were approached by a visiting school's soccer team [Tr. 199]. The team asked for directions to the gym, and DL gave the team directions [Tr. 199]. After the visiting team left, DL noticed the respondent had "this very odd look on his face and almost – I think he was chuckling" [Tr. 199]. DL testified that he asked the respondent

"what was up," and the respondent replied that he "previously slept with the coach of that team" [Tr. 200]. DL was "kind of taken aback" and "didn't really know how to respond, because it made m[e] feel uncomfortable" [Tr. 200].

On direct examination, the respondent testified that he remembered walking out of school with DL that day and "a coach or another individual from another town or team approach[ed]" the respondent and DL for directions to the gym [Tr. 677]. He denied saying to DL that "I slept with that coach once" and said that he "would not talk to a student about [his] sex life" [Tr. 676]. On cross-examination, the respondent denied seeing a coach from the other team that day, and also denied that he told DL that "he slept with that coach once" [Tr. 741].

DL's testimony is credible on this matter. The district has met its burden of establishing the allegations supporting Charge Five by a preponderance of the evidence. The superintendent, Dr. Schoen, testified this interaction was a violation of the district's "inappropriate staff conduct" policy [Tr. 458]. Dr. Schoen clarified that she has "no problem if a teacher has a sex life, zero problem with it at all. However, it does not belong in a conversation with students" [Tr. 459].

In sum, this statement from a teacher to a student is inappropriate and constitutes unbecoming conduct.

CHARGE SIX

> During the 2016-2017 [2017-2018, corrected at the hearing on August 2, 2018] school year, Respondent often made inappropriate comments about male genitalia to the SGA officers. Specifically, Respondent would refer to the "Student Officer [Activity] Council- S.O.C. [S.A.C., corrected at the hearing on August 2, 2018]" as the "Sack" and would joke about "holding the sack". He would also refer to the Class Officer Council—C.O.C. as the "cock". Respondent's highly inappropriate, immature and unprofessional conduct in using sexual metaphors and innuendos with the students in his charge constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.
>
> [Board Exhibit 1]

JaB and DL testified that throughout the 2017-18 school year, the respondent made inappropriate jokes in reference to male genitalia about the abbreviations for Class Officers Council ("COC") and the Student Activities' Council ("SAC") [Tr. 92, 202]. GK, the respondent's witness, initially testified that the respondent did not make any inappropriate

comments [Tr. 593-94], but subsequently testified that the teacher referred to "holding the SAC" and "grabbing the COC" and everybody laughing about that [Tr. 604].

The respondent alleged in his testimony that DL would be the first one to make the inappropriate comments, and the respondent would "mock them mocking the acronyms" [Tr. 679]. The teacher did not deny making comments like "holding the SAC" or "grabbing the COC" [Tr. 679], but contends that he was merely mimicking the students' jokes while trying to get them to settle down [Tr. 742-45].

While the respondent's defense as to his use of the terms might apply to one or two isolated situations, the students credibly testified that his use of the terms occurred throughout the year. Such consistent usage of inappropriate comments referencing male genitalia by a teacher to students violates the district's policy concerning appropriate staff conduct. It demonstrates the respondent's failure or inability to recognize appropriate boundaries between a teacher and his students. The district has met its burden of establishing the allegations supporting Charge Six by a preponderance of the evidence. These allegations constitute conduct unbecoming.

CHARGE SEVEN

The factual allegations contained in the foregoing Charges are incorporated by reference as if fully set forth herein.

During the 2017-18 school year Respondent has demonstrated a pattern of chronic dilatory arrivals and unexplained absences, often without a phone call or explanation prior to the contractual work day start time. This has had a negative impact on the pupils in his charge. Supervisor Maureen Lynch issued Respondent a Level 1 Notification of Concern on December 18, 2017. In that memorandum, she expressed her concerns with Respondent's seven (7) tardies/unexplained absences. This included, but was not limited to, Respondent not showing up for his planned observation on December 8, 2017 and Respondent not being present for the departure of his scheduled Broadcast Journalism field trip to NYC on December 15, 2017 which resulted in a delayed departure and another chaperone having to attend in his place.

Ms. Lynch explained that this pattern "cannot continue and will not be tolerated." Ms. Lynch also states, "As a result, I am deeply concerned about the effect your tardy arrivals is having on the instructional program for your students." Ms. Lynch concludes her memorandum by strongly articulating her expectation that Respondent develop strategies to "remedy this unacceptable pattern of behavior."

Notwithstanding Ms. Lynch's stern and unequivocal warning to Respondent, his pattern of tardiness continued in January and February 2018. Ms. Lynch documented her concerns in a February 5, 2018,

> Level 2 Notification of Concern where she notes that he was late to school on January 23, 2018, January 31, 2018 and February 1, 2018. On February 1, in particular, Respondent called the Principal at 8:13 a.m. to tell him that he had overslept and would be late. However, Respondent's tardiness and late notification that day resulted in his first block class being unattended for the first thirty-three (33) minutes of class. Ms. Lynch informed Respondent that" [h]aving your students unsupervised due to your tardiness is a grave safety concern that cannot be repeated and, ultimately, is a dereliction of your duty as a classroom teacher."
>
> Respondent's deplorable record of tardiness during the 2017-18 school year violates the District's "Attendance" Policy, #3212 which provides, in pertinent part, that "[t]he regular and prompt attendance of teaching staff members is an essential element in the efficient operation of the school district and the effective conduct of the educational program." This policy is also incorporated by reference into the Mahwah High School Staff Manual which is distributed to staff at the beginning of each school year.
>
> Respondent's unprofessional conduct, as set forth above, constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.
>
> [Board Exhibit 1]

The record demonstrates, and the respondent does not deny, that during the 2017-18 school year there were numerous occasions on which he was late to work, often without notice to the district before the start of the school day [Board Exhibits 10 and 11]. The teacher's chronic lateness concerned Ms. Lynch because students were being left unattended and missing instructional time [Tr. 242]. Consequently, Ms. Lynch issued him a Notification of Concern – Level 1 on December 18, 2017 [Board Exhibit 10]. That notification discussed the respondent's documented pattern of late attendance to school and stated, in part:

> Essentially, it is your job responsibility to be on time to work so that the supervision of your students in your charge is properly secured. As a result, I am deeply concerned about the effect your tardy arrivals is having on the instructional program for our students. This conduct does not represent the district's expectations for teachers and reflects poorly upon you.
>
> Moving forward, it is my expectation that you will fulfill your contractual obligation of arriving to school on time. I am confident that you will develop strategies in order to remedy this unacceptable pattern of behavior. We discussed being proactive by consulting your physician or a sleep-study specialist in order to see if there is an underlying medical condition causing this behavior.
>
> [Board Exhibit 10]

The pattern of late arrivals continued, resulting in Ms. Lynch issuing a Notification of Concern - Level 2 to the respondent on February 5, 2018 [Board Exhibit 11]. This second notification stated, in part:

> Although we were hopeful that your tardiness would improve starting with the new year, you have now had three incidents in the last 11 days in which you were not on time to school. . . . [S]hould this [pattern of tardiness] continue, we will be forced to take appropriate disciplinary action.
>
> Essentially, as explained to you in previous meetings, it is your job responsibility to be on time to work so that the supervision of your students in your charge is properly secured. As a result, I am deeply concerned about the effect your tardy arrivals is having on the instructional program for our students. This conduct does not represent the district's expectations for teachers and reflects poorly upon you.
>
> Going forward, you are required, instead of signing in at the attendance office, to sign-in at the greeter's desk so that we can ensure your prompt arrival on an everyday basis.
>
> While I recognize your acknowledgment of accountability for your lateness to work, as well as your sincerity in response to supervision of this professional responsibility, it is also important to underscore that being on time to deliver instruction demonstrates diligence and dependability to your colleagues, administrators, and, most importantly, your students. Consequently, being on time indicates a preparedness that is so critical in fostering a classroom foundation that is rooted in a culture for learning and in fulfilling your duty to teach content that is carefully crafted and organized to meet the needs of all students in your classroom.
>
> [Board Exhibit 11]

The respondent's continual lateness violated District Policy #3212, which is referenced in the staff manual that was given to the respondent [Board Exhibits 12 and 13; Tr. 248-49]. That policy provides that "[t]he regular and prompt attendance of teaching staff members is an essential element in the efficient operation of the school district and the effective conduct of the educational program" [Board Exhibit 12].

Here, the respondent does not dispute that he was repeatedly late as charged by the district. Rather, he contends only that the two notifications he received constituted discipline, and he may not be disciplined further under the doctrine of double jeopardy. This contention is without merit. This is not a case of double jeopardy because the two notifications did not impose discipline on the respondent. They do not contain a reprimand or discipline, but rather serve as notice that future excessive or unexplained tardiness may result in discipline [See Board Exhibits 10 and 11]. However, there was no trigger warranting discipline, as the testimony of the superintendent made clear:

> Q: . . . there was no continued pattern of tardiness and absenteeism that you are aware of subsequent to the level two notification; is that correct?
>
> A: The answer to that is correct, however, the opportunity for subsequent tardiness was pretty much removed when Mr. Miguel was suspended on March 14.
>
> Q: Understood.

A: So there was a short period of time between his level two on February 5 and his suspension on the 14th.
Q: Okay. Now, and I agree with you when you say that. Thank you. . . .
[Tr. 498]

Because there was no continued pattern of infractions after the two notifications, there was no "new" lateness to discipline, which would suggest that the notice itself was corrective in the short-term.

Although the testimony and evidence support the district's factual allegations, and the respondent does not contest those factual allegations, the record demonstrates that the district has not met its burden of proving the charge.

CHARGE EIGHT

The factual allegations contained in the foregoing Charges are incorporated by reference as if fully set forth herein.

On February 2, 2018 at 11:22 a.m., during the school day, Respondent took a photo of pupils D.L. and his then girlfriend C.L. sitting at a table in the SGA office without their knowledge or consent. Respondent then inserted a caption over the photo which read, "Why do birds suddenly appear every time you are near?" Respondent also inserted a graphic of two lovebirds over the pupils' heads and texted the photo to approximately five other students in the group chat named "SGA Fam Senior" which was comprised of the SGA officers.

This highly inappropriate and unprofessional conduct by Respondent, which had the effect of greatly upsetting D.L. and which was also a violation of the District's Electronic Communications Policy 3283, *infra*, constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.
[Board Exhibit 1]

The respondent does not dispute the factual allegations set forth in this Charge. On February 8, 2018, DL and his girlfriend, CS, were eating lunch in the SGA office [Tr. 203]. The teacher was also eating his lunch there, and was sitting across from the two students [Tr. 206]. During the lunch period, he took a picture of them without their knowledge or consent [Tr. 206]. He edited the picture to include the words "Why do birds suddenly appear every time you are near?" and sent the picture to the SGA group chat [Board Exhibit 14].

DL testified that he did not know that the respondent was taking his photo at the time [Tr. 206]. On leaving the SGA office, DL saw the edited photo in the SGA group chat and felt "weirded out" and "uncomfortable" [Tr. 206]. DL felt the respondent was "mocking him" and "mak[ing] fun of [him] for talking to a girl" [Tr. 201–02].

The respondent admits that he took the photo of DL and his girlfriend, attached illustrations to the photo, and posted it on the SGA's group chat. At the hearing, the respondent admitted that he knew pupil confidentiality laws prohibit school officials from taking photos of students without parental consent, and that he had violated that law [Tr. 746]. However, he contends there was nothing inherently mean-spirited or hurtful from what he posted, and did not subject DL to any external ridicule or mocking, and his actions do not rise to the level of unbecoming conduct.

The respondent's contention is without merit. The Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. 1232g, affords parents of students, and students 18 years of age or older, rights of privacy regarding the maintenance and disclosure of "educational records," which includes photographs of students. As the respondent properly acknowledges, he violated FERPA when he shared a picture of DL and CS without the appropriate consent. Taking pictures of students without their knowledge or consent is inappropriate and unprofessional in a school environment.

The respondent's claim that he was making a joke, and did not realize he upset anyone, is of no import. Demeaning students is not appropriate conduct for a teacher. In short, the respondent showed a lack of sensitivity for students' feelings and a lack of understanding of societal norms and boundaries, especially for a professional educator who interacts with minors.

CHARGE NINE

The factual allegations contained in the foregoing Charges are incorporated by reference as if fully set forth herein.

On February 8, 2018 at 9:53a.m., during Period 1, Respondent inexplicably transmitted a provocative and sexually suggestive picture of [a] man lying down with his shirt off, and his lower half covered with a blanket, by text message to approximately five other students to the group chat named "SGA Fam Senior" which was comprised of the SGA officers.

This highly inappropriate and unprofessional conduct by Respondent, which also violated the Districts...Electronic Communications Policy 3283, *infra*, constitutes conduct unbecoming a teaching

> staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.
>
> [Board Exhibit 1]

The district asserts, and the respondent does not dispute, that on February 8, 2018, the respondent sent the picture described in the charge [Board Exhibit 4] to five students during the school day.

JaB's mother brought this photo to the district's attention on or about March 19, 2018 [Board Brief 25]. She described it as "look[ing] like a naked man in a sexual position with a blanket over his penis [Tr. 62]." The respondent admitted to texting this picture to the SGA group chat [Tr. 747]. The respondent did not inform the administration that he had texted this picture to the students because he "spoke to the students directly, and they said, 'okay' as if it did not matter to them" [Tr. 748]. However, no student confirmed that the respondent either spoke to them or apologized [Tr. 16-19; 747].

The respondent asserts that he mistakenly forwarded the photo to the SGA's group chat, and that although this action was contrary to district policy on texting, it does not rise to the level of unbecoming conduct.

Unbecoming conduct has been found where a teacher showed his students a sexually suggestive video of the teacher covered by a cloth with his torso exposed [I/M/O Richard Graffanino and River Dell Regional School District, Agency Dkt. No. 223-9/13 (De Treux, 2014)]. Arbitrator De Treux found the teacher's actions in regards to the video constituted unprofessional and unbecoming conduct.

Similarly, in this case the respondent's actions were inappropriate and unacceptable. Even assuming that the photo was sent in error, he did not notify the district administration that he sent the picture to the students during the school day. He admitted he should have informed the principal of his actions, but did not because the students appeared to be "okay" [Tr. 748]. This response is inconsistent with the concept of professional behavior.

The respondent's actions breached the public trust and cast doubt on his ability to perform the responsibilities of a teacher in light of the high standard of morality and self-restraint expected of teachers. His refusal to alert the administration compounds his poor judgment. The respondent's actions constitute unbecoming conduct.

CHARGE TEN

The factual allegations contained in the foregoing Charges are incorporated by reference as if fully set forth herein.

In or about early March 2018, High School Principal John Pascale and class advisors, including Respondent, met with the SGA and class officers to discuss their plans for the national school walkout on March 14, 2018. The walkout was established to honor the lives of the seventeen (17) students and staff killed at Marjory [Stoneman] Douglas High School in Parkland, Florida and to urge lawmakers to pass stricter gun control laws.

The Principal granted the students permission to leave their classes for seventeen (17) minutes to participate in the walkout, but for safety and security reasons, he forbade them from leaving the building. Rather, the students were granted permission to use the high school auditorium and gymnasium as the walkout venue. In fact, on March 12, 2018, the Principal sent a letter to parents/guardians informing them that, "Students who elect to leave school without permission will be subject to school discipline, just as they would if they chose to leave school without permission on any other day."

Despite the Principal's directive for the students not to leave the building, Respondent texted [JaB], the SGA [Vice-]President, in order to goad him and his classmates to leave the building in clear violation of the rules and the Principal's directive. Part of the text exchange between Respondent ("DM") and J.B. [JaB], is as follows:

JB: Ppl are pissed we aren't going outside
DM: Who is stopping them?
JB: Rules
DM: LOL

It means so much to you, you're going to let rules and the unknown stop you...

JB: What I wanted was to be outside but pascal vehemently denied that. There's not much more I can do after that point....

DM: So you're only protesting if MHS and Cornell say it's ok. I see clearly now.

JB: I told you I'm not going outside. I tried to make that happen in meetings, but pascal said no way.

DM: He isn't chaining you down. Do not blame him for your inaction.

JB: Look I have anxiety and if I were to get in trouble it would flare up and I would have panic attacks about Cornell punishing me. I'm supposed to be someone with his own opinion but I'm also representative of the school.

I am conflicted and you will yell at me no matter which way I go.

DM: Then seriously? THAT is what's stopping you. Not Mr. Pascale and not the school rules. Recognize that before you push entities under the bus.

JB: Why did you call

Please don't tell Pascale I said I was upset at the administration I deleted my comments as soon as I realized I was in the wrong.

DM: Haha

JB: Just tell me what you mean instead of being passive aggressive

DM: If you really cared so much about this cause you would walk out regardless of consequence. But you are afraid of that but choose to blame administration or whoever before admitting to that. On top to that you will tell other you tried. Speaking of, besides me, who in administration did you fight with that you got swatted down and denied.

JB: I talked with my mom and told her I wanted to walkout and she said to remain silent

DM: Deleting things does mean it didn't happen.

JB: Please don't hold me ...

Vendetta against me

DM: Again, not taking any blame. I can't help

Please stop texting.

JB: Can you talk then

I don't want to leave the situation like this

And would leaving the building be going against the administration too

Please answer

Not talking to me won't solve anything

Count I

Respondent's actions in coaxing [JaB] and his classmates to leave the school building on March 14, 2018, (which they ultimately did) in violation of the administrative directive and despite the student's stated anxiety and fear of jeopardizing his admission to Cornell University, falls far below the behavior expected of a teaching staff member. Respondent's actions are unprofessional, insubordinate, had the potential to negatively impact student safety, building security and the orderly operation of the school, and constitute conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.

Count II

Mahwah Board of Education Policy 3283 entitled "Electronic Communications Between Teaching Staff Members and Students", which is reviewed with staff at the beginning of every school year, provides in pertinent part that, "text messaging communications between a teaching staff member and an individual student are prohibited." The only exception to this rule is if the teaching staff member obtains the Principal's permission and the need to text is directly related to the teacher's professional responsibilities with a class or co-curricular activity. Respondent never obtained Principal Pascale's permission to text with pupil J.B. This conduct by Respondent, as set forth herein, fails to comply with the requirements contained in District policy and constitutes conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.

[Board Exhibit 1]

Count I

The parties do not dispute the contents of the text message exchange between JaB and the respondent on March 13, 2018. That exchange related to the planned nationwide walk-out that was being held the following day to honor the victims of the shooting at Marjory Stoneman Douglas High School in Parkland, Florida, that killed seventeen students.

Count I of Charge 10 asserts that the respondent's actions in coaxing JaB and his classmates to leave the school building on March 14, 2018, in violation of the district's administrative directive and despite the student's stated anxiety and fear of jeopardizing his admission to Cornell University, falls far below the behavior expected of a teaching staff member.

A review of the undisputed text message exchange leaves no doubt that the respondent encouraged JaB to leave the school building during the walkout, in violation of the clear directive established by the school administration for safety and security concerns and communicated to all relevant individuals. In this regard, JaB testified he felt like the respondent was "baiting me to go against the rules," "attacking [JaB's] character," and that the respondent's text messages were "condescending," "upsetting," "insulting," and "stressful" [Tr. 107].

The text message exchange between the respondent and JaB on March 13, 2018 was inappropriate and unprofessional. JaB went to the respondent as an advisor for advice about a moral dilemma he was facing. Instead of advising JaB to follow the principal's directive, the respondent encouraged JaB to violate that directive [Board Exhibit 5]. Both Principal Pascale and Dr. Schoen quite reasonably interpreted the respondent's text

messages as undermining the principal's authority [Tr. 313, 479]. The respondent's texts belittled the student and encouraged him to violate the principal's directive, possibly jeopardizing his college career.

The respondent argues that Count I should be dismissed because the respondent did not cause JaB's actions at the walkout. This argument misses the mark. The efficacy of the respondent's urgings in the text message exchange is not the issue. The relevant point is that, in direct contravention of the district's clear policy, the respondent encouraged JaB to disregard the district's instructions. As a faculty member, the respondent's action was inconsistent with his professional obligation, insubordinate, and constituted conduct unbecoming. His argument to the contrary—that he was being the type of educator that guided rather than directed, and that his advice came from a good and caring place, neither hurtful nor insubordinate [Tr. 757-59]—is unsupported by the plain words of the text message exchange.

Advising students to circumvent or disobey administrative directives is inappropriate and constitutes unbecoming conduct. The respondent's actions on March 13, 2018, constituted unbecoming conduct by encouraging a student to violate an administrative directive.

Count II

Policy 3283, entitled "Electronic Communications Between Teaching Staff Members and Students," prohibits text-messaging communications between a teaching staff member and an individual student. The only exception to this rule is if the teaching staff member obtains the principal's permission, and the need to text is directly related to the teacher's professional responsibilities with a class or co-curricular activity. There is no doubt that the respondent never obtained the principal's permission to text with JaB.

The respondent acknowledges that he engaged in text communications with JaB and other students and that such action is contrary to the district's policy. Further, the respondent states that, although he did not intend to cause any harm or distress to the students with whom he was communicating, he accepts responsibility for this policy violation. Nonetheless, he contends that this violation of policy is insufficient to sustain a tenure filing and as such should be dismissed.

Despite knowing that texting with students was improper, the respondent repeatedly violated the district's electronic communications policy. This conduct constitutes conduct unbecoming.

CHARGE ELEVEN

Respondent's conduct as set forth in the foregoing charges, collectively and individually, constitutes a violation of Board Policy 3281, which is also incorporated by reference into the Mahwah High School Staff Manual. The pertinent provisions of that policy provide:

In support of this Board's strong commitment to the public's trust and confidence of school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. **Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district**.... (emphasis supplied [in charge]).

School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate language or expression in the presence of pupils. School staff shall not engage in inappropriate conduct toward or with pupils. School staff shall not engage or seek to be in the presence of a pupil beyond the staff member's professional responsibilities....

Therefore, school staff members are advised to be concerned with such conduct which may include, but is not limited to, communications and/or publications using e-mails, text-messaging, social networking sites, or any other medium that is directed and/or available to pupils or for public display. A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety and welfare of school pupils.

By violating Board Policy 3281, Respondent has engaged in conduct unbecoming a teaching staff member and/or other just cause for dismissal pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.

[Board Exhibit 1]

CHARGE TWELVE

Even if any of the foregoing charges individually does not warrant dismissal from Respondents tenured position, all the foregoing charges considered as a whole constitutes a pattern of unbecoming conduct, and/or other just cause for termination pursuant to N.J.S.A. 18A:6-10, *et seq.* and N.J.S.A. 18A:28-5.

[Board Exhibit 1]

The district asserts that the respondent committed conduct unbecoming a teaching staff member by engaging in all of the actions alleged by the board in the tenure charges. According to the district, his inappropriate behavior falls far short of the high standard required of a teaching staff member and violates the implicit standard of good behavior for teachers. Any one action in this regard, taken independently, would constitute unbecoming conduct; all of them, considered together, mandate such a finding.

The respondent contends that these are cumulative charges based on all of the previous charges and do not have any factual allegations set forth therein. The respondent denies that his actions constitute unbecoming conduct. The respondent asserts that he has had an unblemished record with the district until this past school year and that the district's request for his removal from his position as a school teacher for the district should be denied. In lieu thereof, any discipline should be progressive in nature, taking into consideration the respondent's exemplary time with the district.

As set forth above, the district has met its burden of proving the factual allegations of Charges One through Ten, with the exception of Charge Seven.[6] The sustained charges in their totality warrant a finding that the respondent engaged in conduct unbecoming and support a determination that there is just cause for his dismissal.

As this arbitrator has previously stated, "outrageously inappropriate behavior, combined with lack of remorse or contrition and a likelihood of repeating the behavior are factors that may be taken into account in assessing a penalty" [I/M/O Lesley Etheridge and Passaic County Vocational School District, Agency Dkt. No. 120-6/15 (Denenberg, 2016)]. In this instance, the respondent admitted to several of the tenure charges, but offered no apology for repeated and numerous instances of inappropriate behavior or other misconduct.

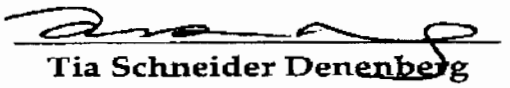
The respondent's documented instances of inappropriate and unprofessional conduct warrant his termination from his position. The record is replete with examples of the respondent failing to recognize appropriate teacher-student boundaries, lacking sensitivity to students' feelings and concerns, and failing to comply with applicable laws, regulations, and school policies. While some of the individual charges would each independently warrant termination, there is no need to make that determination because it is abundantly clear that, taken as a group, the charges demonstrate conduct unbecoming under the applicable legal standards and just cause for the respondent's dismissal.[7]

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[6] The allegations of Charge Three were sustained in part and dismissed in part.

[7] In his post-hearing brief, counsel for the respondent states that he "ha[s] to believe that the Respondent's sexual orientation played a role in this [case]" [Respondent's Brief at 24]. There is no record support for this contention.

For the reasons discussed above, and after considering all arguments and the entire record, the arbitrator concludes that the tenure charges against the respondent constitute acts of unbecoming conduct or other just cause warranting his dismissal.



Tia Schneider Denenberg
Arbitrator

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF FUNDA KAYNAK, CENTRAL JERSEY PREP CHARTER SCHOOL, SOMERSET COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

This matter was opened before the Commissioner of Education in July 2018, by way of an Order to Show Cause served by the petitioner, Central Jersey Prep Charter School (Board) upon the respondent, Funda Kaynak, requiring respondent 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 without giving the notice required by her contract with the petitioner. 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 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.

November 21, 2018

AGENCY DKT. NO. 177-7/18

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF FUNDA KAYNAK, CENTRAL JERSEY PREP CHARTER SCHOOL, SOMERSET COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

For Petitioner, Ashley Higginson, Esq.

No appearance by or on behalf of respondent.

This matter was opened before the Commissioner of Education on July 27, 2018, by way of an Order to Show Cause served by petitioner, the Central Jersey Prep Charter School (Board), upon the respondent, Funda Kaynak, 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 August 31, 2018, the Office of Controversies and Disputes (Office) acknowledged receipt of proof that the Order to Show Cause had been served upon respondent, and directed respondent to answer within 20 days. The notice was sent to the respondent's last known address in Lodi, New Jersey.

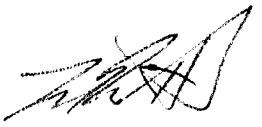
The respondent did not file a response, therefore on October 2, 2018, the Office sent respondent a second notice, via regular and certified mail, directing that she file an answer within ten days. The notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to answer would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the Commissioner. The second notice was sent to the respondent's last known address in Lodi, New Jersey. Both the certified and regular mailings were returned as undeliverable. The Board has

confirmed that the address used for mailing was the respondent's last known address. 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 2017-2018 school year. On April 27, 2018, the respondent informed the district that she was resigning from her position effective immediately. The respondent did not fulfill the terms of her employment and she failed to give 60 days notice prior to her resignation on April 27, 2018. The respondent has not denied the 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 certificate pursuant to *N.J.S.A.* 18A:26-10.

Accordingly, summary decision is hereby granted to petitioner. The respondent's teaching certificate 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.*



COMMISSIONER OF EDUCATION

Date of Decision: 11/21/18
Date of Mailing: 11/21/18

* 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.

W.D. and J.D. on behalf of minor child, G.D.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners challenged the determination of the respondent Board that their minor child, G.D., was not the victim of harassment, intimidation or bullying (HIB) under the provisions of the New Jersey Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 to -32.1 (the Act). Petitioners further alleged that the respondent violated the Act by failing to adhere to the procedures mandated therein. The Board contended that the incident in question constituted student conflict and did not meet the definition of HIB pursuant to the Act.

The ALJ found, *inter alia*, that: the Act applies to any gesture, or any written, verbal or physical act, or any electronic communication – whether it be a single incident or a series of incidents – that is reasonably perceived as being motivated either by an actual or perceived characteristic, such as, *inter alia*: race, color, religion, national origin, gender, sexual orientation, or any other distinguishing characteristic; each school district is charged with adopting a policy that prohibits HIB and provides for a prompt response to any alleged HIB incident; an action by a board of education is entitled to a presumption of correctness and will not be overturned unless it can be shown that the decision was arbitrary, capricious or unreasonable; in the instant matter, although the alleged HIB incident involved the reprehensible use of the "N-word," the facts show that the word was used during an on-line exchange among a group of fifth grade friends, in which all five girls used extraordinarily offensive language towards one another; the exchange included a number of egregious words and sexual references, which the girls excused as "pranking" on each other; G.D.'s own testimony confirmed that she viewed the incident in question as one of mutual "pranking" among a group of friends; G.D. appears to have suffered no detrimental effect from the incident; and the HIB investigation conducted by the District determined that the five students had engaged in a conflict among themselves and that there had been no HIB violation. The ALJ concluded that the petitioners failed to sustain their burden of proof to establish that the Board acted in an arbitrary, capricious or unreasonable manner in finding that HIB did not occur. Accordingly, the ALJ recommended that the petition be dismissed.

Upon comprehensive review, the Commissioner – determining that the petitioner's exceptions were without merit – concurred with the findings and conclusion of the ALJ. Accordingly, the Initial Decision was adopted as the final decision in this matter and the petition was dismissed with prejudice.

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

375-18

OAL DKT. NO. EDU 10587-17
AGENCY DKT. NO. 160-7/17

W.D. and J.D. on behalf of minor child, G.D.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and respondent's reply thereto, filed pursuant to *N.J.A.C.* 1:1-18.4, have also been reviewed and considered by the Commissioner.[1]

Petitioners challenge the Board's determination that their minor child, G.D., was not a victim of an act of Harassment, Intimidation, and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (the Act), *N.J.S.A.* 18A:37-13 *et seq.* Following a hearing in this matter, the Administrative Law Judge (ALJ) concluded that the Board did not act in an arbitrary, capricious, or unreasonable manner when it determined that an incident of HIB did not occur and that the students were engaged in a conflict. Upon review, the Commissioner is in accord with the ALJ's findings and determination.

Petitioners' exceptions – while reflecting their obvious disagreement with the findings and conclusions contained within the Initial Decision – substantially recast and reiterate the arguments made below. Petitioners argue that use of the "N-word" in and of itself is sufficient to constitute HIB. Petitioners further argue that G.D.'s rights were substantially violated when

[1] Petitioners' sur-reply – submitted on October 9, 2018 – was also reviewed.

another student directed the racial slur at G.D., and that the use of the N-word following an interaction where the students were "pranking" each other does not preclude the incident from being an act of HIB. Petitioners also argue that the ALJ applied the incorrect standard of review and failed to find additional undisputed facts that the Commissioner should consider based on the record.[2] In its reply, respondent argues that declaring the use of the "N-word" *per se* as HIB is improper, and circumstances must be considered when making HIB determinations. Respondent contends that G.D. was not a victim of HIB; rather, she was actively engaged in the incident wherein each one of the five students behaved in a "disgusting" manner.

The Act defines HIB as follows:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

N.J.S.A. 18A:37-14.

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[2] The Commissioner has reviewed and considered the "additional" facts presented in petitioners' exceptions and concludes that those facts do not impact the outcome of this matter. Additionally, the ALJ's review of the Board's determination under the arbitrary, capricious or unreasonable standard, was proper.

In other words, the threshold requirement is that the conduct – which may take place on school property, at any school-sponsored function, on a school bus, or off school grounds – is reasonably perceived as being motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic, and that such conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. In addition to this requirement, one of the three criteria enumerated in the Act must also be satisfied. Therefore, use of a derogatory word or racial slur does not automatically constitute an act of HIB; the factors set forth above must be met.

In this matter, the Board found that the student's statement could reasonably be perceived as motivated by either an actual or perceived characteristic of G.D., and a reasonable person should know that under the circumstances it would have the effect of emotionally harming G.D., and had the effect of insulting or demeaning G.D. The Board, however, did not find that the student's use of the "N-word" substantially disrupted or interfered with G.D.'s rights. The Commissioner agrees, for the reasons thoroughly set forth in the Initial Decision. The evidence in the record does not support the petitioners' position that G.D.'s rights were substantially disrupted, and the Commissioner is unpersuaded by petitioners' arguments pertaining to same. When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was "patently arbitrary, without rational basis or induced by improper motives." *See Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960). Furthermore, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration[.]"; the Commissioner will not therefore substitute his judgment for that of the board. *Bayshore Sewage Co. v. Dep't. of Envtl. Prot.*, 131 *N.J. Super.*

37 (App. Div. 1974). Nothing in the record indicates that the Board – in determining that the incident was not HIB – operated in an arbitrary, capricious or unreasonable manner; therefore, the Commissioner finds no basis to reverse the Board's decision.[3]

Accordingly, the Initial Decision is hereby adopted as the final decision in this matter, and the petition is dismissed with prejudice.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 11/26/18

Date of Mailing: 11/26/18

[3] The Commissioner clarifies that just because this incident did not constitute an act of HIB, does not mean that the student's behavior was appropriate; the use of the N-word directed at a fellow student was reprehensible.

[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 10587-17
AGENCY REF. NO. 160-7/17

W.D. AND J.D. ON BEHALF
OF MINOR CHILD G.D.,
Petitioners,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF JEFFERSON,
MORRIS COUNTY,
Respondents.

Steven P. Weissman, Esq. and **Sarai K. King**, Esq., for Petitioners (Weissman & Mintz, attorneys)

Elizabeth Farley Murphy, Esq., for Respondent (Busch Law Group, attorneys)

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

Record Closed: July 3, 2018 Decided: July 13, 2018

STATEMENT OF THE CASE

Petitioners seek a determination that respondent erred in determining that the minor child, G.D., was not the victim of harassment, intimidation, or bullying (HIB) within

the meaning of the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq.; and, that respondent violated the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq. by failing to adhere to the procedures mandated therein.

PROCEDURAL HISTORY

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on July 26, 2017, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

The hearing on the contested matter was held on January 8, 2018. The record remained open to permit the litigants to file post-hearing briefs. Petitioner filed a post-hearing brief on July 2, 2018. Respondent filed a post-hearing brief, dated June 29, 2018, on July 3, 2018. The record closed on July 3, 2018.

ISSUE

Did respondent err in determining that the minor child, G.D., was not the victim of HIB within the meaning of the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq.; and, did respondent violate the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq. by failing to adhere to the procedures mandated therein.

UNDISPUTED FACTS

The parties hereto have submitted the following undisputed facts:

1. Petitioners, W.D. and J.D., are parents of the minor student G.D.

2. Respondent is the Jefferson Township Board of Education (Board).

3. Dr. Patrick Tierney is employed by respondent as Superintendent of Schools.

4. Kevin Lipton is employed by respondent as Principal of Arthur Stanlick Elementary School (Stanlick).

5. Lyndsay LaConti is employed by respondent as Anti-Bullying Specialist.

6. Lisa Young is employed by respondent as a Teacher.

7. During the 2016-2017 school year, G.D. was a fifth-grade student at Stanlick.

8. On Friday, January 27, 2017, G.D. received a group text message, while off school grounds, from a fellow student, J.D.,[1] stating "Fuck ur dad you little niger [sic]." On Saturday, January 28, 2017, G.D.'s mother sent an email to Principal Lipton, Superintendent Patrick Tierney, and Lisa Young, G.D.'s teacher, informing the District about the text. Principal Lipton and petitioner exchanged subsequent related email correspondence. J-1.

9. On Monday, January 30, 2017, Principal Lipton notified the parents of G.D. of the commencement of a harassment, intimidation or bullying (HIB) investigation. J-2.

10. By letter dated February 1, 2017, Principal Lipton notified petitioners that the district did not find evidence that G.D. was the target of an act of harassment, intimidation or bullying. J-3. Petitioner appealed to the Board, which denied their request to overturn the determination that an HIB incident had not occurred. J-4.

[1] Petitioner and the student, J.D., have the same initials. Petitioner will be referred to as "Petitioner" and J.D. the student will be referred to as "J.D."

SUMMARY OF RELEVANT TESTIMONY

Petitioner's case:

J.D., petitioner, testified as follows:

She is the mother of G.D. She is a special education teacher in Prospect Park, New Jersey. G.D. no longer attends Stanlick. She is now in the Jefferson Township middle school.

In November 2016, she contacted Kevin Lipton by email, then principal at Stanlick, to advise that G.D. was called "nigger" while on the school bus by another student. She never heard back from Mr. Lipton about this incident. She again emailed Mr. Lipton on January 28, 2017, about an incident that occurred in a chat room wherein G.D. was referred to again as "nigger." This happened the day before, which was a Friday. Petitioner stated that G.D. did not want to go back to school and informed Mr. Lipton of this in the email. G.D. did attend school on Monday next at the request of Mr. Lipton. That Monday G.D. was taken to school by her grandmother. Petitioner stated that G.D. was sent to class and no one spoke with her or her grandmother.

Mr. Lipton called petitioner on Tuesday, January 31, 2017. She met with Mr. Lipton on Wednesday February 1, 2017, in his office. Mr. Lipton informed her that the incident was not an HIB violation, and that the students involved in the chat room used disgusting language. She replied it was racism and was different. Petitioner further stated that Mr. Lipton told her that G.D. should not speak of the incident, and that if she did she could be charged with a HIB violation. The letter she received from Mr. Lipton dated February 1, 2017, regarding the finding of no HIB violation did not contain any information why this decision was made.

Petitioner met with Dr. Tierney on March 1, 2017, and was told by him to appeal the HIB findings to the Board.

Petitioner stated that Mrs. Young told her that the incident affected G.D.'s grades, and that all the kids were distracted by it. Petitioner admitted to Mrs. Young in an email that she was more upset than G.D.

G.D. testified as follows:

She attends the Jefferson Township middle school. Last year while on a school bus another student, C.J., used the word "nigger." C.J. was mad, fighting, and using foul language. It was then he used the word "nigger." She at first stated the use was random and then stated it was directed toward her as C.J. was looking at her when he used it. She has heard this word before in songs. She was shocked by C.J.'s use of the word as she knew him to be a good person.

In January 2017, two classmates, J.D. and D.A., started a prank in a chat room. The prank was a pretend fight over homework. At one point J.D. used the word "nigger" directed at G.D. G.D. responded that this was racist. She thought J.D. was a good person. She informed her mother, who then notified Mr. Lipton. She did not want to go to school afterwards as she knew she would be pulled out of class, that seats would be changed. It would be "awkward." Seats were changed. She did not speak to J.D. after they returned to school. There was no contact. J.D. and G.D. are friends with the same people. G.D. is really good friends with P.R. At some point after they returned to school, J.D. pulled P.R. away from her. This made G.D. mad.

G.D. reviewed the statement she made during the HIB investigation and stated it was accurate.

G.D. had post-chat room contact with J.D. on a site called Road Blocks. This is a place where you can play games and chat. J.D. was on this site and G.D. unfriended her and blocked her. This occurred after the chat room incident. G.D. has had no other online contact with J.D.

G.D. stated that her mathematics grade went down as a result of the chat room incident. She also stated she could not hang out with her friends as J.D. was there.

Ms. LaConti asked her to write down what happened regarding the chat room incident. She was then sent back to class. Seats were reassigned at the lunch table.

Respondent's case:

Lyndsay LaConti, HIB specialist, testified as follows:

She works for the Jefferson Township Board of Education as a school counselor and HIB specialist. She has performed approximately sixty HIB investigations. She conducted the HIB investigation regarding the chat room incident. She met with G.D. and her grandmother when they arrived at school. She took the statement of G.D. first and then interviewed the other students involved in the chat room conversation.

Ms. LaConti discovered that the five girls involved in the chat room were friends. J.D. and B.A. engaged in a prank by pretending to be in an argument. They used vulgar language such as "cunt," "bitch," and "whore." After G.D. was told she was pranked she said "I love this." Then G.D. and P.R. engaged in a prank using the same vulgar words.

Ms. LaConti conducted the HIB investigation in the instant matter and concluded that there was no HIB. Rather, she determined that this was a conflict between friends. She spoke with Mrs. Young, the girls' teacher, who advised separating the girls. She is trained to be an HIB specialist. She is familiar with Board HIB policy.

On January 30, 2017, Mr. Lipton informed her of the HIB allegation and asked her to do an investigation. She was provided with the email from petitioner to Mr. Lipton. She knew the incident took place after school on Friday, January 27, 2017. She agreed that HIB can take place off school grounds.

Ms. LaConti interviewed the five girls involved and had them write statements. She completed the investigative report after interviewing the girls and submitted it to Mr. Lipton. The report was completed on February 1, 2017. She reviewed her report and confirmed she checked off the boxes setting forth certain findings. She does not impose any measures related to HIB, but may be involved in counselling. She did counsel J.D. regarding the matter.

Kevin Lipton, Principal, testified as follows:

Mr. Lipton was the principal at Stanlick during the 2016-2017 school year. He is now the principal at the middle school. He has been involved in approximately 150 HIB investigations. He received an email from petitioner and replied thereto, copying Superintendent Tierney and Mrs. Young. He may have also sent it to Ms. LaConti. He received Ms. LaConti's report on the incident and reviewed it. He approved the report and signed it. He agreed there was no HIB incident. He believed it was a conflict between two or more students who were mutually engaged in the behavior.

Mr. Lipton is aware of the school bus incident as he received an email from petitioner. He looked into it and determined it to be a conflict and not HIB. He took handwritten notes on his investigation into this matter. He did not refer it for an HIB investigation as it was clear to him this was a conflict and the students were engaged in mutually inappropriate behavior. He informed Petitioner in person of the finding of no HIB violation. He also hand delivered his letter to her with that determination. He explained to petitioner why this was not an HIB incident.

Mr. Lipton admitted stating that G.D. should not discuss the incident. He did so as to not interfere with the pending investigation. He denied stating that should G.D. speak of the incident she could be considered a bully. He also admitted that he advised petitioner that G.D. would have to get used to mean people. He did this in response to petitioner's request to remove J.D. from G.D.'s class. He issued a cease and desist order to the five girls involved. He told Mrs. Young to keep them separated.

Mr. Lipton spoke to petitioner about Road Blocks and that G.D. made comments to J.D. on this site. He is not sure if he contacted the parents of all the students involved. He did contact the parents of J.D. The mother of M.R. showed Mr. Lipton the entire thread of comments from the chat room incident. He was unable to print the thread. He did not take into consideration the incident on the school bus in making the decision to concur with Ms. LaConti in her report. He did encourage petitioner to have G.D. attend school after the chat room incident. Had G.D. stayed home it would have been considered in the HIB investigation. The effect on the behavior of G.D. in school would also be considered.

Mr. Lipton sent letters, dated February 1, 2017, to petitioner and the parents of J.D. advising them of the school's findings. The report itself was forwarded to the Superintendent on February 2, 2017. He usually gives the basis for the HIB determination verbally. He does not do so in letter form. The letter is to confirm the decision. The standard for an HIB determination is the same for in school conduct and off-school conduct. If the same exact incident like the chat room occurred in school it would not be HIB. If something interferes with a student's rights it could be HIB. Use of the word "nigger" does interfere with a student's rights, but the use of the word here is part of a much bigger picture. It could be considered counter HIB against G.D. Students cannot be mutually bullied. This becomes a conflict. He did not want G.D. to speak of the matter so as to not interfere with the investigation.

Lisa Young, Teacher, testified as follows:

Ms. Young is the fifth-grade teacher at Stanlick. She has been a teacher for thirty-three years. She was G.D.'s teacher during the 2016-2017 school year. She teaches all subjects. Last year she had twenty-three students. She was aware of the chat room incident from petitioner's email to Mr. Lipton. She responded to petitioner. She was also aware of the HIB investigation and spoke with Mrs. LaConti. She observed G.D. upon her return to school. She appeared fine. She told G.D. if there was a problem to let her know. That week was uneventful. G.D. had no academic problems. Her grades remained the same. G.D. always had a problem with math.

That week (the week of January 30, 2017) G.D. spoke poorly of J.D. twice. She spoke to G.D. about it. G.D. wrote something inappropriate about J.D. on Snapchat. G.D. also said something bad about J.D. Both times Mrs. Young spoke to G.D. and told her words can be hurtful. She did not tell petitioner that G.D.'s math grade suffered as a result of the chat room incident. She did speak with petitioner regarding the Snapchat matter. She never told petitioner that G.D. was upset by the incident. As a result of the chat room incident, she separated G.D. and J.D. pursuant to Mr. Lipton's instruction. The girls involved sided with G.D. The girls asked to work together. This occurred sometime in February. They were told they needed a letter from their parents. J.D.'s mother supplied a letter. The girls were permitted to work together and got along fine.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see Polk, 90 N.J. 550. Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973).

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 46 (1954).

Ms. LaConti, Mr. Lipton, and Mrs. Young were all straightforward and direct in their testimony. They demonstrated themselves to be conscientious and professional in the performance of the positions. They testified as such. I deem them all credible.

I found the testimony of petitioner somewhat different from what the evidence and testimony shows. While I do not believe that petitioner was untruthful in her testimony, I do believe her recollection is different from that which occurred. I note that petitioner was firm in her statement that G.D.'s grades suffered. This is simply not the case. While I am sure petitioner believes this to be true, it simply is not. The empirical evidence, as shown in G.D.'s report card, demonstrates that her grades did not suffer. Petitioner also was firm in her testimony about how the incident adversely affected G.D. She was again firm in her testimony that G.D. did not want to return to school, implying that it was due to G.D.'s adverse reaction to being subject to HIB. However, G.D. in her testimony stated she did not want to go back to school as she did not want to be called out of class or have her seat changed: what she characterized as awkward. Further, G.D. appeared completely nonplussed by the incident. I had the opportunity to observe her while she testified. I did not observe a young girl upset by the incident. She treated it matter of factly.

It was abundantly clear that petitioner was greatly upset by what occurred. This was evident in her emotional testimony. Again, I do not characterize her testimony as untruthful. However, I do believe, based upon the demeanor of Ms. LaConti, Mr. Lipton, and Mrs. Young, that their testimony rang true and was more in accordance with the actual facts of the matter. Their testimony was unaffected by emotion. They performed their jobs in a professional manner. Petitioner's testimony was shaded by her emotions, which I believe affected her recollection of the facts.

I afford the testimony of Ms. LaConti, Mr. Lipton, and Mrs. Young considerably more weight than the testimony of petitioner.

FINDINGS OF FACT

1. On January 27, 2017, a Friday, after school, five female fifth-grade classmates, all friends, engaged in an exchange of messages within a chat room. Those five students were G.D., J.D., B.A., P.R., and M.R.

2. During the course of the message exchange, J.D. and B.A. engaged in a prank wherein they pretended to engage in an argument over homework.

3. Thereafter, G.D. and P.R. also engaged in a prank.

4. During the course of these pranks, the girls engaged in the use of coarse and obscene language calling each other horrible names.

5. Ultimately, J.D. posted the following, addressed to G.D., "fuck ur dad you little niger [sic]." J-1.

6. G.D. is a student of color. J.D. is not.

7. Petitioner, on January 28, 2017, notified Principal Lipton via email of the incident. She stated in the email she wanted the offending student, J.D., removed from G.D.'s class and was further considering not sending G.D. to school. R-2.

8. Principal Lipton responded by email the next day. He requested petitioner to send G.D. to school the following Monday. R-11.

9. G.D. did attend school on Monday, January 30, 2017, without incident.

10. Ms. LaConti, the school HIB specialist, conducted an investigation and interviewed all five students involved. All five completed handwritten statements as to what transpired in the chat room. R-3.

11. Except for M.A., who stated that, while part of the group, she did not read all of the messages and did not know anything of what happened between G.D. and J.D., the other four students confirmed the messages exchanged.

12. Ms. LaConti concluded that there was no HIB incident. Rather, she concluded that the five students engaged in conflict behavior by mutual consent; and, that the incident did not substantially disrupt or interfere with the orderly operation of the school. This was not specifically stated in the report. R-1, R-3, R-6.

13. Mr. Lipton concurred with Ms. LaConti and signed the investigation report. R-6.

14. On February 1, 2017, Mr. Lipton met with petitioner and advised her orally of the HIB decision and the reasons for the same. He informed her that it was a conflict situation and not HIB. He also hand delivered his letter to her advising petitioner of the school's determination. R-7.

15. The report was forwarded to Superintendent Tierney on February 2, 2017.

LEGAL ANALYSIS AND CONCLUSION

The Anti-Bullying Bill of Rights Act (Act), N.J.S.A. 18A:37-13 et seq., is designed "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises." N.J.S.A. 18A:37-13.1(f). Under the Act, "harassment, intimidation or bullying" (HIB) is defined as:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression,

> or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c. 122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14.]

Each school district must adopt a policy that prohibits HIB and provides for a prompt response to any alleged HIB incident. N.J.S.A 18A:37-15. Once an alleged HIB incident is reported to the school principal, the principal must initiate an investigation within one school day of the report. N.J.S.A 18A:37-15(b)(6). The investigation shall be conducted by a school anti-bullying specialist, and shall take no longer than ten school days to be completed. The results of the investigation shall then be quickly reported to the superintendent of schools, who may take certain remedial action. The results shall also be reported to the board of education "no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent." Ibid.

Pursuant to the Act, the parents of the students involved in any alleged HIB incident are entitled to receive information about the nature of the investigation and the result of the investigation. The parents may request a hearing before the board, and the hearing must be held within ten days of the request. Any hearing shall be held in

executive session to protect the identity of any students involved. The board may hear from the anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents. The board must issue a decision at the first meeting after its receipt of the investigation report. The board may affirm, reject, or modify the superintendent's decision. The board's decision may be appealed to the Commissioner of Education.

An action by a board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). Thus, in order to prevail, those challenging an HIB decision made by a board of education "must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." G.H. and E.H. ex rel. K.H. v. Bd. of Educ. of the Bor. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24, 2014) (citation omitted), <http://njlaw.rutgers.edu/collections/oal/>, adopted, Comm'r (April 10, 2014). Also, a board's decision may be overturned if its determination violates the legislative policies expressed or implied in the governing act. J.A.H. ex rel. C.H. v. Twp. of Pittsgrove Bd. of Educ., EDU 10826-12, Initial Decision (March 11, 2013) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)), adopted, Comm'r (April 25, 2013), <http://njlaw.rutgers.edu/collections/oal/>.

There are reported cases in which HIB determinations by boards of education have been both affirmed and overturned. In R.G.B. v. Vill. of Ridgewood Bd. of Educ., EDU 14213-12, Initial Decision (May 15, 2013), <http://njlaw.rutgers.edu/collections/oal/>, adopted, Commissioner (June 24, 2013), the ALJ found that the Board did not act in an arbitrary, capricious, or unreasonable manner in determining that a student engaged in HIB when he repeatedly called a female student "fat," "fat ass," and "horse." According to the ALJ, such verbal statements satisfied all of the necessary elements under N.J.S.A. 18A:37-14. And, in G.H., the ALJ also upheld a Board's finding that a white student who repeatedly called a black student "Kool-Aid" engaged in HIB. The ALJ found that the "use of the word 'kool-aid' was directed at [the other student] because of his race; insulted and

demeaned [the other student]; and . . . interfered with [the other student's] education" because "[u]pset and embarrassed children are not fully available for learning." However, in J.A.H., the Board's finding that an incident in which one student stuffed a crumbled piece of paper down the shirt of another student constituted an act of bullying was overturned as arbitrary, capricious, and unreasonable because the incident was merely a prank that was part of an ongoing, mutual conflict between the two boys and did not "contain the more serious and aggravating elements either 'expressed or implied' under [N.J.S.A. 18A:37-14.]" The ALJ found that the incident was not improperly motivated by a distinguishing characteristic and that the facts "only support[ed] a finding of ordinary student conflicts rather than the more serious behavior of bullying."

In the instant matter, on first blush, it seems clear that an HIB incident did occur. The use of the word "nigger" is abhorrent and cannot be tolerated. However, the facts under which the word was used clearly show that the five students involved in the chat room were doing so voluntarily. All were engaged in the use of extraordinarily offensive language towards each other, using words such as "cunt," "bitch," and "whore." They further offended the sensibilities of anyone who may read their remarks by making sexual references towards each other. In short, all five girls were engaged in mutually egregious behavior aimed at the others. Their excuse for the use of such horrible language was that they were "pranking" each other. This is borne out by their own statements submitted during the HIB investigation and by G.D. in her testimony.

Further, G.D. appeared to suffer no detrimental effect. Notwithstanding petitioner's testimony (and G.D.'s testimony) that G.D.'s grades suffered, her report card belies that statement. Her grades were virtually unaffected. Further, G.D., in her testimony appeared entirely nonplussed by the incident. Clearly, petitioner was quite upset, but that is not where I must look in determining whether an HIB incident occurred. It is the effect upon G.D.

Ms. LaConti determined in her HIB investigation that the five students were engaged in a conflict among themselves and that there was no HIB violation. Mr.

Lipton agreed with Ms. LaConti's determination. The Board upheld the decision. I concur in that determination. It is supported by the evidence in this matter.

Given the totality of the facts in the instant matter I cannot conclude that the Board acted in an arbitrary, capricious, or unreasonable manner in determining that an HIB incident did not occur and that the students were only engaged in ordinary student conflict. See Thomas, 89 N.J. Super. at 332; R.G.B., EDU 14213-12 and, J.A.H. ex rel. C.H., EDU 10826-12.

Accordingly, I **CONCLUDE** that petitioner has failed to sustain the burden of establishing that the Board acted arbitrarily, capriciously, or unreasonably in finding that HIB did not occur.

Based upon the foregoing, I **CONCLUDE** that the Amended Petition must be dismissed.

ORDER

It is hereby **ORDERED** that petitioner's Amended Petition be **DISMISSED** with prejudice.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, 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 13, 2018
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: July 13, 2018

Date Mailed to Parties: July 13, 2018

db

APPENDIX

WITNESSES

For Petitioner:

J.D., Petitioner

G.D.

For Respondent:

Lyndsay LaConti, HIB Specialist

Kevin Lipton, Principal

Lisa Young, Teacher

EXHIBITS

Joint:

J-1 Email string

J-2 Letter from Mr. Lipton to Petitioner dated January 30, 2017

J-3 Letter from Mr. Lipton to Petitioner dated February 1, 2017

J-4 Letter from Patrick Tierney to Petitioner with Guidance for Parents on the Anti-Bullying Bill of Rights Act dated April 17, 2017

For Petitioner:

P-1 Email from Petitioner to Mr. Lipton dated November 4, 2016

P-2 Interview Information Statement Form of G.D. dated January 30, 2017

For Respondent:

R-1 HIB Incident Report Form dated January 30, 2017

R-2 Email from Petitioner dated January 28, 2017

R-3 Interview Information Statement Form dated January 30, 2017

R-4 Letter to Petitioner dated January 30, 2017

R-5 Letter to J.D.'s parents dated January 30, 2017

R-6 Investigation Report dated January 30, 2017

R-7 Letter to Petitioner dated February 1, 2017

R-8 Letter to J.D.'s parents dated February 1, 2017

R-9 Extract from BOE meeting of April 10, 2017

R-10 Petition dated June 17, 2017

R-11 Email from Petitioner dated January 29, 2017

R-12 Not in evidence

R-13 Report card of G.D. for 2016/2017 school year

R-14 Handwritten notes of Mr. Lipton

Pleadings

For Petitioner:

Petition

Amended Petition with Exhibits A-D

For Respondent:

Response to Petition

Response to Amended Petition

376-18

OAL DKT. NO. EDU 5658-18
(EDU 17578-17 ON REMAND)
AGENCY DKT. NO. 265-11/17

J.G., on behalf of minor children, C.G. and E.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,	:	ORDER
RESPONDENT.	:	

On June 7, 2018, a final agency decision was rendered in this matter, wherein the Commissioner found J.G. liable for tuition in the amount of Seventeen Thousand-Four Hundred and Eighty Dollars and Thirty-Two Cents ($17,480.32), representing tuition for a period of ineligible attendance by C.G. and E.G. in the Board's school district between January 7, 2017 and June 2017. The Board subsequently notified the Commissioner that J.G. had failed to comply with the decision and it requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Despite being given an opportunity to explain why the judgment against him should not be docketed, J.G. offered no explanation.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Joseph Ginsburg is now subject to entry of a judgment by the court in the amount of $17,480.32, which represents the payment ordered at the end of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/26/18
Date of Mailing: 11/26/18

OAL DKT. NO. EDU 12755-18
AGENCY DKT. NO. 204-8/18

C.R., ON BEHALF OF MINOR CHILD, C.R.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, 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 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.

In this emergent application, petitioner requested an out of district placement because of the Board's failure to address alleged incidents of bullying, as well as the school district's alleged lack of a gifted and talented program. The Commissioner agrees with the ALJ that petitioner has not demonstrated immediate irreparable injury nor any present threat with respect to the alleged bullying. The Commissioner notes that petitioner testified that her daughter has not been suffering any alleged bullying in the current school year. However, the recommended Order states that the ALJ did not consider petitioner's argument that the Board does not provide a satisfactory gifted and talented program, and instead limited the emergent relief application to the alleged bullying. The Commissioner notes that petitioner's allegations regarding the gifted and talented program were included in her petition and emergent motion, so it is within the purview of petitioner's emergent application. Nevertheless, the Commissioner finds that petitioner has failed to demonstrate that her daughter will suffer irreparable harm by the Board's refusal to place her in an out of district placement with a satisfactory gifted and talented

program. Petitioner testified in the emergent hearing that she could enroll her daughter in an out of district placement by paying the cost of tuition, but she has not done so due to the cost. It is well established that irreparable harm is the type of harm that "cannot be redressed adequately by monetary damages." *Crowe, supra*, 90 *N.J.* at 132-33. As petitioner cannot demonstrate irreparable harm, she does not meet the standards for emergent relief.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/26/18

Date of Mailing: 11/26/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
EMERGENT RELIEF
OAL DKT. NO. EDU 12755-18
AGENCY DKT. NO. 201-8/18

C.R. O/B/O MINOR CHILD, C.R.,
Petitioner,
v.
CITY OF EAST ORANGE
BOARD OF EDUCATION,
Respondent.

C.R., petitioner, pro se

Jennifer L. Personette, Esq., for respondent (DeCotiis, Fitzpatrick and Cole, attorneys)

Record Closed: October 10, 2018 Decided: October 29, 2018

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, C.R., on behalf of C.R. (child), seeks an order by way of emergent relief, alleging that since 2015, the child has been the victim of bulling under N.J.S.A. 18A:37-14 while a student at that the East Orange Board of Education, (District), and that the

District transfer the child from the District to the Nutley school district, to prevent the child from being a victim of bullying.

On August 20, 2018, Petitioner filed a petition of appeal with the Office of Special Education Policy and Procedure (OSEPP), seeking emergent relief pursuant to N.J.A.C. 6A-31.6. The matter was transferred to the Office of Administrative Law (OAL) and received at the OAL on August 31, 2018, as an emergent and contested matter. The parties agree that there are no other underlying issues that remain.

On September 4, 2018, the OAL Clerk's Office notified the parties that Petitioner's petition for emergent relief had been filed, and that oral argument was scheduled for September 7, 2018. At the oral argument, Petitioner, and representatives of the District appeared. Petitioner agreed to adjourn the emergent hearing to September 28, 2018, to allow her and the District to discuss a possible resolution of the within matter. On September 24, 2018, in lieu of filing an answer to the underlying petition for emergent relief, the District filed a motion to dismiss under N.J.A.C. 6A: 3-1.5(g).

On September 25, 2018, a telephonic case status conference was held, and Petitioner, and the District agreed to adjourn the emergent hearing to October 10, 2018, to allow for the exchange of discovery.

An emergent hearing was conducted on October 10, 2018, at which time the parties appeared.[1] Petitioner and C.R., petitioner's husband and father of the child (husband), testified and presented evidence regarding their claim for emergent relief. The District presented no witnesses, and instead, submitted a brief in support of the District's opposition to Petitioner's emergent relief, and in support of the District's motion to dismiss.

FACTUAL SUMMARY

[1] Although Petitioner proceeded with her petition for emergent relief, she represented to the undersigned that the child had not been the victim of bulling during the current school year and that her initial emergent relief did not exist as a result of the same.

The essential facts in this matter are not in dispute. The child is a third-grade student in the District's Mildred Barry Garvin School ("Garvin School"). Petitioner contacted the Department of Education in July 2018 seeking assistance in connection with the District's alleged failure to provide the child with gifted and talented services. The Department of Education responded to Petitioner's concerns and advised her to seek the assistance of the administrators in her local school district. Sometime in July 2018, Petitioner contacted Dr. Kevin West ("Dr. West"), Superintendent of Schools, and requested a meeting to discuss her child's education – specifically, requesting to transfer the child within the District or to Radcliff School in Nutley, where one of Petitioner's children attends and receives special education services.[2] The request to transfer the child was due to alleged bullying and the District's failure to provide the child with gifted and talented services.

Dr. West did not meet with Petitioner and her husband, and instead suggested that Petitioner and her husband, meet with Garvin School representatives at the beginning of the school year in September when school personnel returned to the school Dr. West advised that it was best to have the meeting with Garvin School Principal Fidelia Sturdivant ("Sturdivant") and the child's teacher. Petitioner did not want to wait until September requested a meeting over the summer, however, Dr. West would not agree, and instead requested, Sturdivant to investigate and review Petitioner's claims of bullying. The results of the investigation are memorialized in a July 26, 2018 memo, attached as Exhibit A to the District's motion to dismiss, which investigation did not substantiate Petitioner's claim. C.R. then filed the within emergent appeal in August 20, 2018, requesting out of district placement at Radcliffe School, citing irreparable harm in the form of the District's failure to address 1) alleged bullying and 2) "no gifted and talented program" at Garvin School.

Petitioner argues that the child has been exposed to "staff bullying" in that the staff and teachers have comported themselves in a manner that Petitioner defines as unprofessional and a form of harassment as defined in N.J.S.A. 18A:37-17. Petitioner

[2] Petitioner has three minor children attending three separate schools; the child and her two brothers. The brothers have been designated eligible for special education services. One son attends the Radcliff school in Nutley, and the second son attends special education classes in another school in the District.

cites three instances that occurred since 2015 as examples of staff bullying (P-1 and P-2). In all of the cited instances, the alleged bullying conduct is not directed at the child exclusively but includes other students as well.

Petitioner contends that she notified the District concerning these three instances, and that the District ignored her requests, as they did not address her concerns. Petitioner testified that she requested that the District either discipline the teaches and administrative personal involved or that the child be removed from the classroom where the teacher's conduct occurred (P-2).

Petitioner cited two specific bullying instances in 2016 concerning the child, which the District did not address. The first concerned a student hitting the child with a pin, and causing her skin to break, and the second incident concerned a student pushing a desk into the child, causing an injury to her leg. In both instances, Petitioner testified, the Nurse called Petitioner into the school to inform her of what had occurred, as the child had been brought into the Nurse. Petitioner stated that she notified the District but that the District did nothing to address what had occurred in these two instances and she did not know if any disciplinary measure were taken against the children involved (P-3).

The District claims it was not aware of or had never heard any complaints of any bullying incidents against the child involving being struck with a pin or hit with a desk. The District has no record of these events. The District admitted that there was one incident in 2017, in which another student asked the child to call another student an inappropriate name, and the child complied. That District argues that this matter was immediately addressed by the teacher and Petitioner was notified of the same. Petitioner admitted that the same had occurred and was addressed by the school (P-4). Petitioner also admitted that there have been no other incidents of bullying since the beginning of the school year.

Petitioner's main grievance is that "no gifted and talented program" exists at Garvin School and that other children mistreat the child because she is seen as "better" than they are. Petitioner requests that the District place the child at the Radcliff School, where her son attends, because they provide for a gifted and talented program.

DISCUSSION

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
> 2. The legal right underlying petitioner's claim is settled;
> 3. The petitioner has the likelihood of prevailing on the merits of the underlying claim; and
> 4. When the equities and interests of the parties are balanced the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 6A:3-1.6(b).]

Petitioner has the burden of establishing each of the above requirements in order to warrant relief in his favor.

Turning to the first criteria, it is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, 90 N.J. at 132. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). See New Jersey Dep't of Environmental Protection v. Circle Carting, Inc., 2004 N.J. AGEN LEXIS 968 (April 2, 2004) (finding no irreparable harm in connection with the revocation of respondent's solid waste license in that financial loss is generally insufficient to demonstrate this requirement). The moving party bears the burden of proving

irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief is a "clear showing of immediate irreparable injury," or a "'presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.'" Ibid. (citation omitted.)

In the instant matter, there has not been a showing of "immediate irreparable injury" or a "presently existing actual threat". Petitioner's only allegation of bullying of the child concerns the two incidents where she was called in by the School Nurse, and no other proofs were submitted. The one incident involving any alleged bullying the child occurred when the child called another student a name because she was directed by a student to do the same. The District's records reflect that the District took action and Petitioner acknowledged the same and did not dispute that the Districts response was appropriate. In addition, Petitioner's argument that the child has suffered harm from her exposure to "staff bullying" is not substantiated from the proofs presented and therefore does not meet the requirement for emergent relief.

For the foregoing reasons, I **CONCLUDE** that Petitioner has not demonstrated that the child will suffer irreparable harm if the requested relief is not granted.

Petitioner's argument that the District does not provide a satisfactory "gifted and talented" program, is not within the purview of Petitioner's petition for emergent relief and will therefore not be addressed in this initial decision. In addition, as Petitioner has failed to establish that the child will suffer irreparable harm resulting from the alleged acts of bullying, **I CONDLUDE** that there is no need to address the remaining requirements of Crowe v. DeGioia, 90 N.J. 126, and N.J.A.C. 6A:3-1.6(b).

I CONCLUDE that since Petitioner has failed to establish that the child will suffer irreparable harm a discussion concerning the Districts alleged failure to comply with the HIB provisions is not an appropriate issue to be decided at this time.

CONCLUSION

I **CONCLUDE** that Petitioner is not entitled to emergent relief because the proofs submitted fail to establish all of the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b). Specifically, there has been no showing of irreparable harm by Petitioner. Therefore, I **CONCLUDE** that Petitioner has not met the burden of proof that she is entitled to such relief in this emergent application.

ORDER

It is hereby **ORDERED** that Petitioner's request for emergent relief to have the District address and prevent the alleged bullying of the child, and transfer the child to the Radcliff School because the District does not provide a gifted and talented program for the child are **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.

October 29, 2018
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency October 29, 2018

Date Mailed to Parties: October 29, 2018

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

October 29, 2018
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: October 29, 2018

Date Mailed to Parties: October 29, 2018

lr

APPENDIX

WITNESSES

For Petitioner:

C.R., petitioner

C.R., husband

For Respondent:

None

EXHIBITS

For Petitioner:

P-1 E-mails dated 8/28/14

P-2 E-mail dated 11/16/15

P-3 E-mail dated 7/30/18

P-4 E-mail dated 9/21/18

For Respondent:

None.

N.M., ON BEHALF OF MINOR CHILD, H.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CHATHAMS, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the determination of the respondent Board that H.M. was not the victim of harassment, intimidation or bullying (HIB) under the provisions of the New Jersey Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 *et seq.* (the Act), regarding four of five alleged incidents of bullying that occurred between January 2016 and April 2017. Petitioner alleged that the District failed to follow and discharge its obligations to conduct required investigations under the HIB laws and did not consider all relevant evidence in making its determinations. Further, petitioner contended that the District failed to restrain the alleged perpetrators, resulting in physical and emotional harm to H.M., and interfering with her right to a free and appropriate public education. Petitioner sought, *inter alia*, to vacate the District's determinations and to require appropriate disciplinary, behavioral, and/or personnel interventions to assure that H.M. is not subjected to additional acts of HIB. The Board asserted that it had fully complied with the requirements of the HIB law and acted properly in affirming the Superintendent's HIB determinations. 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 here, as the petitioner offered "only generalized subjective accusations rather than specific, objective facts to rebut the finding that there was no HIB," and the matter is ripe for summary decision; the District's anti-bullying specialist (ABS) thoroughly investigated each of the alleged incidents of HIB, conducted in-depth interviews with the alleged victim, perpetrators, and witnesses, and reached reasonable decisions on each incident in a timely manner; HIB was substantiated in the fifth alleged incident, but the ABS determined that HIB could not be proven in the other four alleged episodes of HIB. The ALJ concluded, *inter alia*, that: the District's findings of "No HIB" in regard to incidents one through four were all based on timely and thorough investigations; the District complied fully with the HIB laws, particularly *N.J.S.A.* 18A:37-15; and the resulting determinations were not arbitrary, capricious or unreasonable. Accordingly, the ALJ affirmed the Board's determinations with respect to H.M.'s HIB allegations and granted summary decision to the District.

Upon review, the Commissioner concurred with the ALJ that the Board's findings of no HIB in three of the incidents were not arbitrary, capricious or unreasonable. However, the Commissioner determined that an incident on March 7, 2016 – when a student made derogatory comments about H.M.'s deceased father during a video chat and told H.M. "You're fucking stupid" – does meet the definition of HIB. Given H.M.'s known status as a special education student, she has a distinguishing characteristic under *N.J.S.A.* 18A:37-14; the statement calling H.M. "stupid" was motivated by this characteristic. H.M. was the victim of HIB with respect to the March 7, 2016 incident, wherein she was insulted and demeaned, causing anxiety and depression that resulted in H.M. going on home instruction. The Initial Decision of the OAL was modified accordingly, and summary decision was granted to petitioner with respect to incident number two.

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

November 29, 2018

OAL DKT. NO. EDU 17732-17
AGENCY DKT. NO. 276-11/17

N.M., ON BEHALF OF MINOR CHILD, H.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CHATHAMS, MORRIS 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 by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto.

This case involves a challenge by petitioner to the Board's determination that her daughter was not the victim of acts of Harassment, Intimidation and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq*, with respect to four of her five allegations of HIB. According to the joint stipulation of facts, petitioner alleged that on January 27, 2016, a student told H.M. "cookies can make you fatter than you are" after she refused to give the student a piece of her cookie. (Joint Facts at ¶4). During the investigation, the Anti-Bullying Specialist (ABS) interviewed H.M., two witnesses, and the accused. *Id.* at ¶6-7. The ABS found that given the discrepancies in the witness descriptions of the event, the HIB claim could not be substantiated due to a lack of clear evidence. *Id.* at ¶8, Exhibit C.

Petitioner reported a second incident of alleged HIB on March 7, 2016, alleging that a student made derogatory comments about H.M.'s deceased father. *Id.* at ¶¶ 10-13. The investigation found that a student asked H.M. on a video chat website why she was upset about her dad, and in a subsequent text message told H.M, "You're fucking stupid." *Id.* at ¶14. The ABS found that the comment was out of frustration and a reaction to H.M.'s accusations during the video chat; the comment was not an

attack on H.M.'s intelligence. *Id.* at ¶16, Exhibit D. Further, the comment was not motivated by a distinguishing characteristic, as the accused had no knowledge that H.M. had a learning disability. *Ibid.*

The third alleged incident of HIB occurred on June 19, 2016, when petitioner alleged that while at the Colony Pool, a student yelled for people to "evacuate" because H.M. was there. *Id.* at ¶20. After interviewing H.M, the accused, and five witnesses, the ABS found that the incident did not amount to HIB because there was no distinguishing characteristic at issue, there was no disruption to the orderly operation of the school as H.M. was on home instruction, and there was no disruption to H.M.'s rights as she continued to use the pool. *Id.* at 22.

On April 28, 2017, in the fourth alleged incident of HIB, petitioner alleged that three students followed H.M. on Main Street in Chatham, and one of the students yelled, "What are you chicken, like your father?" *Id.* at ¶26. The statements could not be corroborated in the investigation, so the HIB claim could not be substantiated due to a lack of evidence. *Id.* at ¶29, Exhibit N. The three students were warned to limit any interactions with H.M. *Ibid.*

The fifth and final alleged incident of HIB also occurred on April 28, 2017. Petitioner alleges that a student sent H.M. an electronic message that said, "Your father never loved you." The ABS found that the incident constituted HIB because it was motivated by the fact that H.M. had lost her father and was devastated by his death.

The Administrative Law Judge (ALJ) found that the Board's determination that there had been no HIB in the first four alleged incidents was not arbitrary, capricious, or unreasonable. The ABS thoroughly investigated each allegation of HIB, conducted interviews, and reached each decision in a timely manner.

In her exceptions to the Initial Decision, petitioner argues that the ALJ failed to recognize H.M.'s status as a special education student as a distinguishing characteristic for the purpose of the HIB allegations. Petitioner points out that H.M.'s special needs have been long recognized in the District, as she has been a classified student for the past nine school years. Her certification establishes that H.M. has been pulled in and out of her classes for special education services and has a 1:1 aide with her in classes

and between classes, so H.M.'s special needs are obvious to the other students. Petitioner argues that the accused students frequently referenced H.M.'s dyslexia, commenting that she "can't even spell" and is "so dumb." (Petitioner's Exceptions at 5). Petitioner maintains that her daughter was harassed and bullied by a group of girls called the "Goon Squad" due to her status as a special education student.

Petitioner also contends that the ALJ erred in finding that petitioner's opposition papers "offered only generalized subjective accusations, rather than specific, objective facts to rebut the finding that there was no HIB; and therefore, I CONCLUDE that there are no unresolved issues of material fact that require submission to a fact-finder." (Initial Decision at 13). Petitioner and H.M. submitted sworn certifications which included specific accusations regarding the alleged HIB, including: comments students made about her learning disability; a student taunting H.M. by telling her that her father ran away; and students showing up at the yogurt shop where H.M. worked. As a result, petitioner indicated that H.M. became anxious and depressed, had to seek medical help, and went on home instruction. Petitioner maintains that the ALJ should have the benefit of testimony regarding the allegations.

In reply, the Board argues that the ALJ properly determined that the Board did not violate the procedural requirements of the HIB statute. The Board timely investigated all alleged incidents of HIB, including interviews of H.M, the accused, and any witnesses. The Board points out that petitioner does not contest the ALJ's finding that the alleged incidents were investigated in accordance with the law, and any effort by petitioner to bring up additional facts and allegations should not be considered as the scope of this matter is limited to the five HIB determinations. The Board clarifies that the ALJ did not find that H.M. lacked a distinguishing characteristic, but instead found that the Board was not arbitrary, capricious, or unreasonable in determining that the conduct was not motivated by that distinguishing characteristic.

Upon a comprehensive review of the record, the Commissioner is in accord with the ALJ that the Board's findings of no HIB in the first, third, and fourth incidents were not arbitrary, capricious or unreasonable. The Board conducted investigations in accordance with the Act. In incidents one and four, it was unclear from the investigation what the accused said to H.M., so the HIB allegation could not be

substantiated due to a lack of evidence. With respect to incident three, telling people to evacuate the pool when H.M. arrived is not motivated by a distinguishing characteristic.

However, with respect to the second alleged incident of HIB, the Commissioner finds that the alleged conduct – specifically the accused sending H.M a text message saying, "You're fucking stupid" – meets the definition of HIB. The Commissioner agrees with the petitioner that this comment was motivated by H.M's learning disability. The HIB report found that the accused did not have knowledge that H.M. has a learning disability. The Commissioner notes that knowledge of the distinguishing characteristic is not required, but rather *N.J.S.A.* 18A:37-14 indicates that conduct can constitute HIB if it is motivated by an "actual or perceived" characteristic. Given H.M.'s known status as a special education student, she has a distinguishing characteristic; further, the statement calling H.M. "stupid" was motivated by that characteristic. H.M. certified that she became anxious and depressed and was frightened to enter the school. As a result, she sought anti-depressant and anti-anxiety medications as well as mental health therapy. It is clear that H.M.'s rights were violated and that the actions insulted or demeaned her. As such, H.M. was the victim of HIB with respect to the second alleged incident.

Accordingly, the recommended decision of the ALJ is modified as stated above. The petition is hereby dismissed with respect to incidents one, three, and four. Summary decision is granted to petitioner with respect to incident two.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11/29/18

Date of Mailing: 11/29/18

* 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 17732-17
AGENCY REF. NO.276-11/17

N.M. ON BEHALF OF MINOR CHILD,
H.M.,
Petitioners,
v.
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CHATHAMS, MORRIS COUNTY,
Respondent.

Richard J. Kaplow, Esq., for Petitioners

Frances L. Febres, Esq., for Respondents

Record Closed: September 25, 2018 Decided: October 16, 2018

BEFORE **JOHN P. SCOLLO**, ALJ:

STATEMENT OF THE CASE

Petitioner is appealing the findings of the School's Anti-Bullying Specialists and Superintendent, as affirmed by the Board of Education, regarding four of five alleged

incidents. The first four alleged incidents resulted in findings of "no HIB"; the fifth incident resulted in a finding of HIB. The incidents are dated and designated as follows: 1/27/16 (the First Alleged Incident), 3/7/16 (the Second Alleged Incident), 6/19/16 (the Third Alleged Incident), 4/28/17 (the Fourth Alleged Incident), and another incident on 4/28/17 (the Fifth Incident).

PROCEDURAL HISTORY

N.M., on behalf of H.M., requested a hearing before the Chatham Board of Education on account of their dissatisfaction with the handling of the HIB investigations and the outcomes of the HIB determinations. At the petitioners' request, the Chatham Board of Education held a hearing on September 11, 2017, at which N.M., on behalf of H.M. appeared before the Board accompanied by their legal counsel, Attorney Kaplow. On September 15, 2017, the Board wrote to N.M. stating its affirmance of the District's determinations and advised her of her right to appeal to the Office of Administrative Law pursuant to N.J.S.A. 18A:37-15.

The Department of Education, Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law (OAL), where it was filed on December 1, 2017 as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The Tribunal issued a Pre-Hearing Order on February 14, 2018, to provide time for the parties to engage in discovery and for telephone conferences for the sake of case management, an agreement on stipulated facts, and the possibility of discussing settlement.

On August 16, 2018, the Tribunal received the Respondent's Motion for Summary Decision. After several conferences and a request for time, the Petitioners' Opposition papers were received on September 14, 2018. The Respondent's Reply was received on September 25, 2018, and the record closed.

STANDARD FOR SUMMARY DECISION

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995). In Brill, the Court looked at the precedents established in Matsushita Electrical Industrial Company v. Zenith Radio Corporation, 475 U.S. 574 (1986), Anderson v. Liberty Lobby, 477 U.S. 242 (1986), and Celotex Corporation v. Catrett, 477 U.S. 317 (1986), wherein the Supreme Court adopted a standard that "requires the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require a submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill, 142 N.J. at 533 (quoting Liberty Lobby, 477 U.S. at 251-52). The Court stated that under the new standard,

> A determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder 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."
>
> [Id. at 540 (quoting Liberty Lobby, 477 U.S. at 249).]

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to 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.'" Id. at 541.

In addressing whether the Brill standard has been met in this case, further guidance is found in R. 4:46-2(c):

> 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.

FACTS NOT IN DISPUTE

A document captioned "Parties' Joint Stipulated Facts" has been annexed to this decision as Exhibit "J-1." The Tribunal relies upon the stipulated statements of fact therein and the Parties' Joint Exhibits marked "A" through "U" therein.

APPLICABLE LAW

In 2002 the New Jersey Legislature enacted L. 2002, c. 83, this State's first harassment, intimidation and bullying (HIB) law. In 2007 the Legislature amended the law L. 2007, c. 129, to cover cyber-bullying. In 2010 the Legislature enacted the Anti-Bullying Bill of Rights Act, L. 2010, c. 122, which revised and supplemented the prior laws chiefly to cover incidents that occur off school grounds under special circumstances. The legislature also enacted L. 2012, c.1, which permits a school district to implement bullying prevention and training programs.

Definition of Harassment, Intimidation and Bullying (HIB)

The 2010 law refined the definition of HIB to include [bracketed numbers added]:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is **[1]** reasonably perceived as being motivated either by any actual or perceived characteristic such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by

> any other distinguishing characteristic, **[2]** that takes place on school property, at any school-sponsored function, on a school bus, or takes place off school grounds as provided for in N.J.S.A. 18A:37-15.3, **[3]** that substantially disrupts or interferes with the orderly operation of the school or the rights of other students **and that**:
>
> **a.** a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging a student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> **b.** has the effect of insulting or demeaning any student or group of students; **or**
>
> **c.** creates a hostile educational environment for the student by interfering with a student's education or be severely or pervasively causing physical or emotional harm to the student."
>
> [N.J.S.A. 18A:37-14 (emphasis added).]

Local Control of Policy and Required Contents of HIB Policy

The anti-bullying law provides that "[e]ach school district shall adopt a policy prohibiting harassment, intimidation and bullying on school property, at a school-sponsored function or on a school bus." N.J.S.A. 18A:37-15(a). Pursuant to N.J.S.A. 18A:37-15(b) each school district has "local control over the content of the policy" but the policy must include twelve enumerated components including a definition of harassment, intimidation, and bullying at least as inclusive as the one provided (see above) in N.J.S.A. 18A:37-14. The twelve required components of the policy are set forth in N.J.S.A. 18A:37-15 and are summarized below.

The twelve required components of a policy prohibiting HIB are:

(1) a statement prohibiting HIB of a student;
(2) a definition of HIB no less inclusive than that set forth in N.J.S.A. 18A:37-13;
(3) a description of the type of behavior expected from each student;

(4) consequences and appropriate remedial action for a person who commits an act of HIB;
(5) a procedure for reporting an act of HIB, including a provision that permits a person to report an act of HIB anonymously;
(6) a procedure for prompt investigation of violations and complaints, which procedure shall at a minimum provide that

[(a) the investigation be initiated within one school day of the report and be completed within ten days of receipt of the written report,
(b) the results of the investigation be reported to the superintendent within two days of completion,
(c) the investigation and reports be reported to the board of education no later than the date of the next board of education meeting,
(d) the parents or guardians of the students who are parties to the investigation be entitled to receive certain information and request a hearing within five days after the results of the investigation are reported to the board,
(e) the board must issue a written decision affirming, rejecting or modifying the superintendent's decision, which can be appealed to the Commissioner of Education, and
(f) a complaint can be filed with the Division on Civil Rights within 180 days of an incident of HIB based on membership in a protected group.][;]

(7) the range of ways in which a school will respond once an incident of HIB is identified, which shall be defined by the principal in conjunction with the school anti-bullying specialist but shall include an appropriate combination of services that are available within the district such as counselling, support services, intervention services and other programs, as defined by the commissioner. In the event that the necessary programs and services are not available within the district, the district may apply to the Department of Education for a grant from the "Bullying Prevention Fund" established pursuant to [N.J.S.A. 18A:37-28] to support the provision of out-of-district programs and services;
(8) a statement that prohibits reprisal or retaliation against any person who reports an act of HIB and the consequence and appropriate remedial action for a person who engages in reprisal or retaliation;

> (9) consequences and appropriate remedial action for a person found to have falsely accused another as a means of retaliation or as a means of HIB;
> (10) a statement of how the policy is to be publicized, including notice that the policy applies to participation in school-sponsored functions;
> (11) a requirement that a link to the policy be prominently posted on the home page of the school district's website and distributed annually to parents and guardians who have children enrolled in a school in the school district; and
> (12) a requirement that the name, school phone number, school address and school email address of the district anti-bullying coordinator be listed on the home page of the school district's website; and that on the home page of each school's website the name, school phone number, school address and school email address of the school anti-bullying specialist and the district anti-bullying coordinator be listed. The information concerning the district anti-bullying coordinator and the school anti-bullying specialists shall also be maintained on the department's website.
>
> [N.J.S.A. 18A:37-15(b).]

HIB on School Grounds versus off School Grounds

In regard to the location of acts of HIB (on school grounds versus off school grounds), the enactment of the Anti-Bullying Bill of Rights Act now requires that each school district's policy "include provisions for appropriate responses to harassment, intimidation or bullying . . . that occurs off school grounds, in cases where a school employee is made aware of such actions." N.J.S.A. 18A:37-15.3. A school district's responses to harassment, Intimidation or bullying occurring off school grounds must "be consistent with the board of education's code of student conduct or other provisions of the board's policy on harassment, intimidation, or bullying. N.J.S.A. 18A:37-15.3. Pursuant to the rules [N.J.A.C. 6A:16-7.5] governing a board of education's code of student conduct, N.J.A.C. 6A:16-7.5(a) states:

> School authorities have the right to impose a consequence on a student for conduct away from school grounds that is consistent with the district board of education's code of student conduct, pursuant to N.J.A.C. 6A:16-7.1.

> 1. This authority shall be exercised only when it is reasonably necessary for the student's physical or emotional safety, security and well-being or for reasons relating to the safety, security and well-being of other students, staff or school grounds, pursuant to N.J.S.A. 18A:25-2 and 18A:37-2.
>
> 2. This authority shall be exercised only when the conduct which is the subject of the proposed consequence materially and substantially interferes with the requirements of appropriate discipline in the operation of the school.
>
> 3. The consequence pursuant to (a) above shall be handled in accordance with the district board of education's approved code of student conduct, pursuant to N.J.A.C. 6A:16-7.1, and as appropriate, in accordance with N.J.A.C. 6A:16-7.2, 7.3, or 7.4.
>
> . . .
>
> (b) School authorities shall respond to harassment, intimidation, or bullying that occurs off school grounds, pursuant to N.J.S.A. 18A:37-14 and 15.3 and N.J.A.C. 6A:16-1.3, 7.1, and 7.7.

Reporting of HIB

In regard to the reporting of alleged HIB incidents and the investigation of same, N.J.S.A. 18A:37-16(a) forbids a member of a board of education, a school employee, a student or a volunteer from engaging in acts of reprisal, retaliation or false accusation against a victim of HIB or a witness who reports acts of HIB.

N.J.S.A. 18A:37-16(b) requires that acts of HIB must be reported and states:

> A member of a board of education, school employee, contracted service provider, student or volunteer who has witnessed, or has reliable information that a student has been subject to, harassment, intimidation, or bullying shall report the incident to the appropriate school official designated by the school district's policy, or to any school administrator or safe schools resource officer, who shall immediately initiate the school district's procedures concerning school bullying.

N.J.S.A. 18A:37-16(c) provides that any school official who promptly complies with the reporting requirement of the law is immune from a cause of action for damages arising from any failure to remedy the reported incident.

N.J.S.A. 18A:37-16(d) provides that a school administrator who fails to investigate the allegation of HIB or fails to take sufficient action to minimize or eliminate the HIB may be subject to disciplinary action.

HIB Prevention

Pursuant to N.J.S.A. 18A:37-17(a) schools and school districts are required to annually assess their HIB prevention programs, or approaches and other initiatives so as to create school-wide conditions to prevent and address HIB. Grants are available from the Department of Education if needed.

N.J.S.A. 18A-37(b) obligates school, districts to provide training related to the district's HIB policies to its employees and volunteers emphasizing the importance of the definition of HIB and of the protected categories found in N.J.S.A. 18A:37-14.

N.J.S.A. 18A-37-17(c) obligates individual schools to include the school district's policies against HIB in its employee training, including full and part-time employees, volunteers and anyone who may have significant contact with students.

Comprehensive regulations promulgated by the Department of Education further assist districts in complying with these statutory requirements. N.J.A.C. 6A:16-7.7.

STATEMENT OF THE LEGAL ISSUES AND RELIEF SOUGHT

(1) The Petition alleges that the School District failed to follow and discharge its obligations to conduct the required investigations under the HIB laws and failed to consider all of the relevant evidence. Thus, the issue is whether the School District's investigations complied with or failed to comply with the requirements of the HIB laws.

(2) The Petition alleges that the School District failed to restrain the HIB perpetrators, that this failure to restrain the perpetrators resulted in physical and emotional harm to H.M., and that the School District's failure to restrain the HIB perpetrators interfered with H.M.'s right to a free and appropriate public education. Thus, the issue is whether the School District complied with or failed to comply with the HIB laws and, if indeed the school district has failed to comply with the HIB laws, whether the petitioner has demonstrated that the school district's failure to comply with the HIB laws has caused her to be denied a free and appropriate public education.

(3) Petitioner seeks the following:

(a) an Order vacating and setting aside the School District's determinations that HIB did not occur on 1/27/16; on 3/7/16; on 6/19/16; and on 4/28/17 (The First, Second, Third, and Fourth Alleged Incidents);

(b) an Order finding that acts of HIB occurred on 1/27/16; 3/7/16; 6/19/16; and 4/28/17 (The First, Second, Third, and Fourth Alleged Incidents)

(c) an Order directing the School District to propose necessary and appropriate disciplinary, behavioral and/or personnel interventions to assure that no acts of HIB take place against H.M.;

(d) an Order requiring the School District to provide H.M. with all necessary and appropriate related services necessary for her attendance at school;

(e) an Order finding the petitioners to be designated as the "prevailing parties" and as such entitled to reimbursement of all legally recoverable costs and fees associated with this action; and

(f) an Order for all such appropriate other and further relief.

(4) Respondent School District seeks the following:

(aa) an Order finding that the District complied with the applicable (HIB) law;

(bb) an Order finding that the BOE did not act arbitrarily, capriciously, or unreasonably in affirming the Superintendent's decisions pertaining to the allegations;

(cc) an Order affirming the BOE's 9/11/17 decision (set forth in its letter dated 9/15/17, Exhibit "U") to affirm the Superintendent's HIB determinations; and

(dd) an Order granting any other relief that is just and proper.

LEGAL ANALYSIS AND CONCLUSION

When any school personnel witnesses or receives reliable information about an incident of HIB, he/she will be obligated under N.J.S.A. 18A:37-16(b) to report it to the school district's designated official or school administrator (verbally within one day and in writing within two days pursuant to N.J.S.A. 18A:37-15(b)). Under N.J.S.A. 18A:37-16(d), the designated official or school administrator must immediately start an investigation and take action to minimize or eliminate the HIB. Failure to do so can result in disciplinary action.

N.J.S.A. 18A:37-15 sets forth twelve required policy components of a school districts HIB policy. Number 6 of the twelve policy components (subparts "a" through "f") require that the investigation of an alleged incident of HIB must:

> (a) be initiated by an ASB within one day of the report of the incident and must be completed within ten days of the written report of the incident;
>
> (b) be reported to the superintendent of schools within two days of the completion n of the investigation;

> (c) provide that the investigation and report must be forwarded to the Board of Education by the date of the BOE's next meeting;
>
> (d) provide that the parents or guardians of students who are parties to the investigation are entitled to receive information about the investigation and same must be provided within five days after the results of the investigation are reported to the BOE. The parents or guardians must be advised that they are entitled to a hearing before the BOE, which must be held within ten days of the request.
>
> (e) provide that the BOE must issue its written decision to affirm, reject or modify the superintendent's decision by the Board's next meeting, and must advise the parties that its decision can be appealed to the Commissioner of Education; and
>
> (f) advise the parents, guardians or student that they may, within 180 days of the date of the alleged HIB file a complaint with the Division on Civil Rights.

In regard to the alleged HIB incident dated 1/27/16 (the First Alleged Incident) Exhibits 'A' and 'B,' 'C,' and 'D' of J-1 demonstrate that the school received a verbal and written report of the alleged HIB incident from N.M. on 1/31/16; that the ABS's Assistant Principal, Timothy O'Halloran's investigation on 2/1/16 included interviews with the alleged target of HIB, the alleged perpetrator and two witnesses; that the ABS evaluated the evidence collected from the students he interviewed; that the ABS's report was completed on 2/1/16 and submitted to the school principal (Jill Gihorski) and reported the finding of "unsubstantiated" to N.M.

In regard to this alleged incident, the Petitioners' Opposition papers have offered only generalized subjective accusations rather than specific, objective facts to rebut the finding that there was no HIB; and, therefore I **CONCLUDE** that there are no unresolved issues of material fact that require submission to a fact-finder.

I **CONCLUDE** that the ABS interviewed all of the people with knowledge of the alleged HIB, asked probing and appropriate questions, and reached a considered decision based on the available evidence in a timely and thorough manner.

I **CONCLUDE** that the ABS informed N.M. of the finding in a timely manner and advised her of her right to request a hearing before the BOE.

In regard to the alleged HIB incident dated 3/7/16 (the Second Alleged Incident), Exhibits 'E', 'F,' and 'G' of J-1 demonstrate that an HIB incident was alleged to have occurred on 3/7/16. A verbal report of the alleged HIB incident was given on 3/7/16 and a written report was given on 3/8/16. The ABS (Marco A. Freyre, an Assistant Principal) investigated the alleged incident by speaking with and questioning the participants of an online Oovoo conversation: the alleged target (H.M.), the accused, and the two other participants (witnesses) as well as by reviewing the text of the conversation.

Mr. Freyre issued his investigation report to the school principal (Jill Gihorski) on 3/8/16 concluding that the accused's remark "Your f-ing stupid!" was made as a reaction to the actions and accusation made by the target and her friend; investigated and concluded that the accused had no knowledge of H.M.'s classification as a person with a learning disability; and concluded that the comment "Your f-ing stupid!" was not motivated by any distinguishing characteristic of the target. Thus, Freyre concluded that the accused did not commit an act of HIB.

On 3/11/16 Principal Gihorski and Assistant Principal Freyre interviewed the accused. They specifically inquired with the accused about her use of the statement "Your F-ing stupid!" This interview confirmed that the accused had no prior knowledge of H.M.'s learning difficulties and so they concluded that the statement was not made due to a specific characteristic.

Freyre promptly advised N.M. by letter that the school district did not find evidence that H.M. was the target of HIB.

In regard to this alleged incident, the Petitioners' Opposition papers have offered only generalized subjective accusations rather than specific, objective facts to rebut the finding that there was no HIB; and therefore, I **CONCLUDE** that there are no unresolved issues of material fact that require submission to a fact-finder.

I **CONCLUDE** that Freyre interviewed the students who were participants in the online conversation, asked probing and appropriate questions in order to fully understand the nature and context of the words spoken by the accused, which the target felt offended by. I **CONCLUDE** if the accused had no knowledge of the target's learning disability, then it follows that calling that person "stupid" could not be motivated by a desire to seize upon that particular characteristic. I **CONCLUDE** that Freyre's investigation was timely and thorough. I **CONCLUDE** that Freyre's finding that the accused did not commit an act of HIB was based upon the evidence and was proper. I **CONCLUDE** that the school informed N.M. of the finding in a timely manner and advised her of her right to request a hearing before the BOE.

In regard to the alleged HIB incident dated 6/19/16 (the Third Alleged Incident) Exhibits 'H,' 'I,' 'J,' and 'K' of J-1 demonstrate that the school district (specifically, Vincent D'Elia, Assistant Superintendent of School Support Services) received an e-mail on June 30, 2016, from N.M. regarding an allegation of HIB at the Colony Pool, which is a location that is not part of the subject school grounds. The HIB investigation began when the school district re-opened for business on July 5, 2016. Mr. Anthony Giaconia, the Chatham Middle School's Assistant Principal, was the ABS assigned to investigate the allegations. It was alleged that on June 19, 2016, one or more students announced an "evacuation" of the Colony Pool due to the presence of H.M. ABS Giaconia's investigation notes (Exhibit 'J') indicate that he engaged in a thorough fact-finding process designed to find out who said what at the Colony Pool; what the meaning of the "evacuation" was (and whether it was somehow related to anyone's distinguishing characteristics); and whether anything said or done was motivated by a desire to harm anyone by focusing on anyone's distinguishing characteristics. After interviewing H.M., several of her fellow Chatham Middle School classmates who were present at the Colony Pool on 6/1916, at least one parent, and a Colony Pool lifeguard, Giaconia concluded that there did not appear to be an HIB incident because the facts lacked evidence of a distinguishing characteristic; because there was no disruption to the orderly operation of the school; and because there was no disruption of a student's rights (i.e. H.M. continued to attend the Colony Pool).

On July 19, 2016, School principal sent a letter to H.M.'s mother, N.M. stating that the conclusion of the HIB investigation was that the reported incident at the Colony Pool dated 6/19/16 did not constitute HIB.

In regard to this alleged incident, the Petitioners' Opposition papers have offered only generalized subjective accusations rather than specific, objective facts to rebut the finding that there was no HIB; and therefore, I **CONCLUDE** that there are no unresolved issues of material fact that require submission to a fact-finder.

I **CONCLUDE** that ABS Giaconia interviewed all of the people with knowledge of the event of 6/19/16, asked probing and appropriate questions in order to ascertain what occurred and whether there was evidence of whether anyone desired to harm H.M. by focusing on any of her distinguishing characteristics. I **CONCLUDE** that ABS Giaconia reached a considered decision based on the evidence in a timely and thorough manner. I **CONCLUDE** that ABS/Assistant Principal Giaconia informed N.M. of the findings in a timely manner and advised her of her right to request a hearing before the BOE.

In regard to the alleged HIB incident dated 4/28/17 (the Fourth Alleged Incident), Exhibits 'L,' 'M,' 'N,' 'O,' and 'P' of J-1 demonstrate that the school received a verbal report of an alleged HIB incident on 5/1/17 (reported in writing on 5/12/17), from H.M.'s mother, N.M. The alleged acts of HIB arose out of an encounter in downtown Chatham between H.M. with three of her companions and a group of three other female Chatham Middle School (CMS) students, who allegedly made disparaging and otherwise insensitive remarks about H.M.'s deceased father. Assistant Principal Lori B. Gironda (Gironda) informed N.M. by letter dated 5/3/17 that an HIB investigation would be conducted. Gironda conducted interviews with H.M.'s three companions (the witnesses - W1, W2, and W3) and with the three accused CMS students. The ABS of the Calais School (where H.M. was in attendance) interviewed H.M. about the 4/28/17 encounter. Essentially, H.M.'s version of the events of 4/28/17 is set forth in a communication she sent to a friend in which she describes being followed by the three accused females

and being taunted by them about her deceased father. During their separate interviews, the information given by H.M.'s companions was that the three accused females were in the same area as H.M. and her companions (Main Street), but there was no clear indication that the accused females were following H.M. The interviews conducted by Gironda did not establish for certain whether H.M. and her companions had any verbal communications while on Main Street or in any stores on Main Street with the accused females.

In regard to this alleged incident, the Petitioners' Opposition papers have offered generalized subjective accusations rather than specific, objective facts to rebut the finding that there was no HIB; and therefore, I **CONCLUDE** that there are no unresolved issues of material fact that require submission to a fact-finder.

I **CONCLUDE** that Gironda relied upon the Calais School's ABS to obtain H.M.'s version of the facts related to the alleged incident of 4/28/17. I **CONCLUDE** that aside from H.M., Gironda interviewed all of the people with knowledge of the alleged 6/19/16 HIB incident. I **CONCLUDE** that Gironda conducted a timely and thorough investigation during which she asked probing and appropriate questions. I **CONCLUDE** that Gironda based her decision on the evidence and made a considered decision that the reported incident did not constitute HIB. I **CONCLUDE** that Gironda informed N.M. of the finding in a timely manner and advised her of her right to request a hearing before the BOE.

While it is not part of the matter before the OAL, it bears noting that the other incident (also dated 4/28/17) in which a male student used a school network to communicate the message "Your father never loved you" to H.M., was investigated and found to be an act of HIB. This incident was investigated by Gironda by means of probing and appropriate questions and by means of the gathering of the subject electronic communication made by the male student to H.M. This finding of HIB was timely communicated by Gironda to N.M.

I **CONCLUDE** that there was no evidence presented demonstrating that the School District conducted defective investigations or otherwise deviated from the

requirements of the HIB laws. I **CONCLUDE** that the parties' statement of Joint Stipulated Facts and Joint Exhibits was comprehensive in nature and covered all fact questions pertinent to the motion at hand.

I **CONCLUDE** that the Chatham School District findings of "No HIB" in regard to the First Alleged Incident dated 1/27/16, the Second Alleged Incident dated 3/7/16, the Third Alleged Incident dated 6/19/16, and the Fourth Alleged Incident dated 4/28/17, were each based upon timely and thorough investigations and I **CONCLUDE** that the School District complied with the HIB laws, particularly N.J.S.A. 18A:37-15. I **CONCLUDE** that since the School District complied with the HIB laws the issue of whether H.M. was denied a free and appropriate education does not arise.

The decision-making processes of the school's several ABS personnel, the district superintendent and the BOE were fully in compliance with the requirements of the HIB laws, particularly N.J.S.A. 18A:37-15 and therefore I **CONCLUDE** that their decisions were not arbitrary, capricious nor unreasonable.

In concluding that the School District conducted timely and thorough investigations of the HIB allegations brought to its attention, as well as the School District's actions in transferring H.M. to the Calais School, and there being no evidence to the effect that the School District has failed to adhere to the requirements of N.J.S.A. 18A:37-17 (establishing HIB training programs and approaches and HIB prevention programs and approaches), I further **CONCLUDE** that there is no basis for issuing an Order directing the School District to propose any further "necessary and appropriate disciplinary, behavioral and/or personnel interventions to assure that no acts of HIB take place against H.M.," and I further **CONCLUDE** that there is no basis for issuing an Order directing the School District to provide any further "necessary and appropriate related services for H.M.'s attendance at school."

I **CONCLUDE** that in HIB cases, the HIB statutes do not provide for the designation of "prevailing parties." I further **CONCLUDE** that the petitioners, under the

HIB statutes, are not entitled to seek or to receive reimbursement of any costs or fees incurred with or associated with this action.

ORDER

Based upon the foregoing, the 9/11/17 decision of the BOE (sent by letter dated 9/15/17 affirming the decisions of the Superintendent in each of the First, Second, Third, and Fourth Alleged Incidents) is hereby **AFFIRMED and SUMMARY DECISION is hereby GRANTED to the RESPONDENT**. Accordingly, the Petitioners' request for an Order to set aside the School District's findings and the BOE's affirmance of same must be **DENIED**. Likewise, the Petitioners' request for an Order for this Tribunal finding that acts of HIB occurred on 1/27/16 (the First Alleged Incident), on 3/7/16 (the Second Alleged Incident), on 6/19/17 the Third Alleged Incident), and on 4/28/17 (the Fourth Alleged Incident) must also be **DENIED**.

The Petitioners' request for entry of an Order directing the School District to propose "necessary and appropriate disciplinary, behavioral and/or personnel interventions to assure that no acts of HIB take place against H.M." is hereby **DENIED**.

The Petitioners' request for entry of an Order directing the School District to "provide H.M. with all necessary and appropriate related services necessary for her attendance at school" is hereby **DENIED**.

The Petitioners' request for entry of an Order finding the Petitioners to be designated as the "prevailing parties" and to be entitled to reimbursement of costs and fees 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.

October 16, 2018
DATE

John P. Scollo, ALJ
JOHN P. SCOLLO, ALJ

Date Received at Agency: October 16, 2018

Date Mailed to Parties: October 16, 2018

db

List of Exhibits

Joint:

J-1 The parties' statement of Joint Stipulated Facts and Joint Exhibits

For Petitioners:

P-1 Certification of N.M.

P-2 Certification of H.M.

For Respondent:

R-1 Certification of Anthony Giaconia

R-2 Certification of Marco Freyre

R-3 Certification of Lori Gironda

R-4 Certification of Vincent D'Elia

OAL DKT. NO. EDU 09950-17
AGENCY DKT. NO. 111-6/17

BRITT HUSS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NETCONG, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and 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: 11/30/18

Date of Mailing: 11/30/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 09950-17
AGENCY DKT. NO. 111-6/17

BRITT HUSS,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NETCONG, MORRIS COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld Cohen, P.C., attorneys)

Sandra N. Varano, Esq., for respondent (Nirenberg & Varano, LLP, attorneys)

Record Closed: October 3, 2018 Decided: October 10, 2018

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

This matter was transmitted to the Office of Administrative Law (OAL) on July 17, 2017, 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 was submitted on February 7, 2018, indicating the terms of agreement which are incorporated herein by reference.

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

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

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

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

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

October 10, 2018
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 10-12-2018

Date Mailed to Parties: 10-15-2018

dr

NIRENBERG & VARANO, LLP
32 Mercer Street
Hackensack, New Jersey 07601
(201) 996-1121
Attorneys for Respondent Board of
Education of Netcong

BRITT HUSS, Petitioner -vs.- BOARD OF EDUCATION OF NETCONG, MORRIS COUNTY, Respondent	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DOCKET NO.: EDU 09950-2017N AGENCY DKT NO.: 111-6/17 **SETTLEMENT AGREEMENT AND RELEASE**

This Agreement and General Release (the "Agreement") is by and between the Board of Education of Netcong (the "Board') and Britt Huss ("Huss") (collectively, the "Parties").

WHEREAS, Huss was employed by the Board as a non-tenured teaching staff member, teaching Art; and

WHEREAS, on or about April 25, 2017, the Board determined that it would not approve the renewal of Huss' contract of employment for the 2017-2018 school year; and

WHEREAS, Huss filed a Petition of Appeal on or about May 31, 2017, challenging the non-renewal of her contract of employment; and

WHEREAS, the Parties to this Agreement wish to resolve this matter amicably;

NOW THEREFORE, in consideration of the mutual covenants contained herein and for good and other valuable consideration, the sufficiency of which is hereby acknowledged and agreed to by all Parties hereto, Huss and the Board do agree as follows:

1. **Releasors and Releasees:** Huss as releasor hereby agrees to release the Releasees identified as the Board of Education of Netcong, its agents, servants and employees, Summit Risk Services and QBE Specialty Insurance Company.

2. **Release:** In exchange for the consideration set forth in Paragraphs 3 and 4 below, Huss agrees to release and give up any and all claims and rights which she may have against the Releasees. This Agreement releases all claims, demands, damages, causes of action, or suits which have been or could have been brought. This Agreement releases all claims, including those of which Huss is not aware and those not mentioned in this Release. This Agreement releases all claims resulting from anything which has happened up to now, including, but not limited to, all claims which were or could have been brought in the action entitled **Britt Huss v. Board of Education of Netcong, Morris County, OAL Docket No.: EDU 09950-2017N, Agency Docket No. 111/6/17.** This release includes, but is not limited to, all claims under N.J.S.A. 18A:27-4.1; the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.;* Section 1981 of the Civil Rights Act of 1866; the Conscientious Employee Protection Act, N.J.S.A. 34:11B-1 *et seq.;* the Federal Family and Medical Leave Act; the Employee Retirement Income Security Act of 1974; 42 USC 1983; N.J.S.A. 10:6-2; Negligence; the U.S. Constitution; the N.J. Constitution; tort law or contract law; any similar statute, regulation, rule or order; any provision of any other law, common or statutory, of the United States, New Jersey or any other state, county, city or locality; and/or any claims for costs, fees, or other expenses, including attorneys' fees. Notwithstanding this paragraph, it is understood and agreed that the Parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency, commission or person file a

charge, action, complaint or lawsuit against the Board based upon any of the above-released claims, Huss agrees not to seek or accept any resulting relief whatsoever.

3. **Terms:** Huss will be paid a total of **Seven Thousand Five Hundred Dollars ($7,500.00)** in full payment for making this Agreement and Release. Huss agrees that she will not seek anything further, including any other payment, from the Releasees. Huss shall be solely responsible for the payment of appropriate taxes, liens or encumbrances, including, but not limited to any child support judgments or obligations, on this settlement and shall indemnify and hold the Releasees harmless for same. This Agreement and Release, and the issuance thereof, is supported by, and is in consideration of, the mutual benefits to the Releasor and Releasees obtained from the resolution of these claims.

4. **Payment of Liens:** All claims and/or liens, past, current and/or future, arising out of this settlement or asserted against the proceeds of this settlement are to be satisfied by Releasor and/or her Attorneys, including but not limited to any Medicare or Medicaid claims and/or liens, Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician or attorney claims and/or liens, or any of the statutory, equitable, common law or judgment claims and/or liens, including but not limited to claim based on subrogation or any other legal or equitable theory. Huss therefore agrees, upon prompt presentation of any such claims and/or liens, to defend Releasees against any such claims and/or liens, and to indemnify and hold Releasees harmless against any judgment entered against the Releasees based on such claims and/or liens, including the payment of any fines, charges and attorney's fees incurred as a result of any such lien. Failure to satisfy any such lien shall be considered a breach of this Agreement and Releasor agrees to pay all costs, interest and attorney's fees relative to any such lien.

5. **Attorneys' Fees:** This Release includes all claims for attorneys' fees and costs. Huss agrees that any fees and costs incurred by any other attorney who may have rendered services to her related to this lawsuit shall be satisfied out of the payment set forth in Paragraph 3 and Huss agrees to indemnify, defend and hold Releasees harmless from any and all claims by any attorneys or their agents seeking payment of attorneys' fees and/or costs related to this lawsuit. Huss represents that she is satisfied with the legal services that Oxfeld Cohen, P.C. has rendered on her behalf. Any questions that she may have regarding this settlement have been answered to her satisfaction.

6. **Denial of Liability:** Releasees admit no liability and expressly deny the validity of the Releasor's disputed claims. Nothing contained herein may be used or viewed as an admission of liability or wrongdoing by any Party. Instead, this Agreement is reached to resolve the pending dispute.

7. **Confidentiality**: The settlement in this matter is subject to confidentiality to the extent permitted by law. In consideration of the payment made in this Release, Huss hereby agrees and promises that she will not make, publish, or cause to be made or published, any statements or comments, true, false or otherwise, whether they be oral or written, which in any way refer to this Agreement and Release and what is contained herein unless required by law.

8. **Non-Disparagement:** Neither Britt Huss nor the Netcong Board of Education and its Board Members will disparage one another. Nor shall these parties solicit or make any comments or statements or the like to others regarding one another that could adversely affect the reputation, image, goodwill, commercial or public interest of a party or which may be considered derogatory or disparaging.

9. **Waiver of Re-employment:** Huss hereby waives reinstatement to employment and agrees not to seek reemployment or apply for future employment with the Netcong Board of Education and agrees that this Agreement shall serve as a lawful and proper basis for denying or terminating any future employment with the Netcong Board of Education.

10. **Who is Bound:** The Parties are bound by this Release. Anyone who succeeds to the Parties' rights and responsibilities is also bound. This Agreement and Release is made for the Parties' benefit and all who succeed to their rights and responsibilities.

11. **Signatures:** The Parties understand and agree to the terms of this Agreement and Release. By signing this Agreement, the Parties acknowledge that they have carefully read it, understand it, and are aware that they may be giving up important rights. By signing this Release, the Parties acknowledge that they have been provided sufficient opportunity to consult with counsel of their own choosing regarding its terms and regarding the rights that they are relinquishing under it. The Parties sign this Agreement and Release freely, voluntarily, and with knowledge of its terms and the rights being relinquished.

12. **Entire Agreement**: This Agreement and Release constitutes the entire agreement between the parties and constitutes full and final settlement as identified herein. The terms of this Agreement shall be construed and enforced in accordance with New Jersey law.

13. **Approval**: This Agreement is subject to final approval by the Board and will only become effective upon the ratification and formal approval by the Board as well as the Office of Administrative Law and the New Jersey Commissioner of Education.

14. **Dismissal:** Upon the full execution of this Settlement Agreement and Release as well as approval of same by the Board, the Administrative Law Judge and the Commissioner

of Education and payment to Huss of the amount set forth in Paragraph 3, the above referenced Petition of Appeal will be dismissed with prejudice.

Britt Huss

DATED:

Subscribed and sworn to
before me on AUGUST 27TH, 2018.

Notary Public

My Commission Expires: 1/22/2023

DAVID DEMARCHI
Notary Public – State of New Jersey
My Commission Expires Jan 22, 2023

DATED:

Board President
Netcong Board of Education

Subscribed and sworn to
before me on 9/18, 2018.

Notary Public

My Commission Expires: 6/30/2020

KATHLEEN E. WALSH
My Commission Expires
June 30, 2020

EXTRACT FROM THE MINUTES
OF A MEETING OF THE BOARD OF EDUCATION OF THE BOROUGH OF NETCONG, MORRIS COUNTY NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK

Certified Minutes of the Work Session Meeting September 18, 2018.

The following members were present: Mrs. Dalesandro, Mr. Morton, Ms. Santalucia, Mrs. Santana, Mr. Quan

Not Present: None

Also Present: Mrs. Walsh, Principal/Interim Superintendent
James Olobardi, Interim Business Administrator/Board Secretary
Sandra Varano, NIRENBERG & VARANO, LLP

XII. INFORMATION/REPORTS/ACTIONS

A. FINANCE *(B. Dalesandro, Chair)*

Board Trustee Kerri Santalucia moved and Board Trustee Todd Morton seconded, that the Netcong Board of Education approve resolutions #3 as presented:

3. The Netcong Board of Education hereby approves the settlement of case no. EDU-09950-2017N pursuant to the terms of the settlement agreement on file. The Board further authorizes the Board Secretary and the Board Attorney to take whatever steps are necessary to effectuate the purposes of this resolution.

AYES: Mrs. Dalesandro, Mr. Morton, Ms. Santalucia, Mrs. Santana and Mr. Quan

NAYS: None

STATE OF NEW JERSEY)
)SS:
COUNTY OF MORRIS)

I, James Olobardi, Secretary of the Board of Education of the Borough of Netcong, 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 September 18, 2018 has been compared by me with the original minutes as officially recorded in my office in the minute book of said Netcong Board of Education and is a true, complete copy thereof and of the whole of said original minutes as 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 the Board of Education this 27th day of September, 2018.

James Olobardi
School Business Administrator/Board Secretary

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the matter of the tenure hearing:

Neptune Board of Education
Petitioner
and
Lawrence J. Wilson
Respondent

Arbitrator's
Opinion
and
Award

Agency Docket No. 113 - 5/18

Stephen J. Rosen, Arbitrator

APPEARANCES:

For the Petitioner:
Weiner Law Group, LLP
By: Patricia C. Melia, Esq.

For the Respondent:
Chamlin, Rosen, Uliano & Witherington
By: James J. Uliano, Esq.

This matter arises out of tenure charges filed with the Commissioner of Education by Neptune Board of Education against the Respondent Lawrence J. Wilson, dated April 11, 2018. After determination that the charges warranted further action, the Bureau of Controversies and Disputes forwarded the applicable documents to me on or about May 31, 2018.

The first hearing via conference call took place on June 8, 2018. The earliest dates agreed to by the parties were August 14th and 15th, 2018.

Initially, the Respondent's attorney did not include Mr. Wilson's name on the witness list. Shortly before the first hearing, Attorney Uliano notified Board Attorney Mark A. Tabakin that Mr. Wilson would testify. Board Attorney Tabakin cited N.J.S.A. 18A: 6-17.1 (b) (3) that specifies a witness list be provided ten (10) days prior to the hearing. Mr. Wilson's name did not appear on any list produced within ten days of the scheduled hearing.

I determined that Mr. Wilson would be permitted to testify at the hearing. The Respondent, I reasoned, was not an individual of "minor" importance. In addition, the Board had interacted with Mr. Wilson on numerous occasions and had evaluated him many times over the years. Given that the Respondent is the subject of the action taken by the District, I concluded the process would best be served if Mr. Wilson were permitted to testify.

One day prior to the August 14th hearing, I was informed by Attorney Uliano that the Respondent had been hospitalized. A conference call was held on August 14th at which time verification of Mr. Wilson's hospitalization was requested.

Hearings were scheduled and subsequently held on September 13 and 14, 2018, A transcript was prepared for both hearing dates. Both parties elected to submit post-hearing briefs after receipt of the transcripts.

BACKGROUND:

The Respondent had been employed as a Head Custodian by the Neptune Township Board of Education for eighteen (18) years at the time of his dismissal. He had been assigned to the Early Childhood Center, working from 6:30 a.m. to 3:00 p.m.

From December 22, 2017 through January 2, 2018, the district schools were closed for winter break. Except for the custodial staff, students and staff were not in attendance. Custodians worked their regular shifts performing regular duties and any additional tasks more easily completed during the winter break.

Mr. Wilson's duties and responsibilities as Early Childhood Center (ECC) Head Custodian included maintenance and security of the building and grounds, supervising other custodians assigned to ECC, assisting and support of the principal, staff and cafeteria personnel. The Head Custodian also serves as "role model" for other custodians assigned to the building. Donald

Frangipane, Facilities Engineer/Custodial Supervisor, was Mr. Wilson's immediate supervisor. The ECC was under the supervision of .Principal, Dr. Lori Burns.

One room in the Early Childhood Center is known as the Seahorse Café, It contains a refrigeration unit used to store food products and prepare food served to the students. The room also has a microwave that employees can use for coffee and other items.

On the day that school reopened after winter break, staff member Joseph Digeronimo discovered an empty bottle of vodka in the microwave. Mr. Digeronimo placed the empty bottle on the microwave. Principal Burns was informed about the empty bottle by lunch aide Ms. Terry Nickson. Principal Burns notified Facility Engineer Donald Frangipane and District Superintendent Tami Crader that an empty vodka bottle had been found in the Early Childhood Center.

After an investigation, the District determined that Mr. Wilson was guilty of "unbecoming conduct" and other policy violations that warranted removal from his tenured position as a school custodian. Among the allegations put forth by the Employer was the conclusion he engaged in highly suspicious activity during the December 2017 winter break. It was further alleged that in addition to the empty bottle of vodka Mr. Wilson failed to carry out the job duties he was required to perform from December 22, 2017 through December 29, 2017. It was alleged the Respondent did not work for one (1) hour and thirty-eight (38) minutes on December 22, 2017; did not work for five (5) hours and eleven (11) minutes on December 26; failed to perform any work duties for three (3) hours and fifteen (15) minutes on December 27, 2017; did not work for five (5) hours and nine (9) minutes while on duty on December 28, 2017 and did not engage in any work related activities for seven (7) hours and two (2) minutes on December 29, 2017.

While Mr. Wilson was remiss in performing his duties during this period, he requested and was granted 4.5 hours of overtime on December 29, 2017. Rather than use the overtime hours for work, he "lazed and loitered" with a fellow custodian from a nearby school, who did have a reason to be in the ECC, named Michael Miranda.

The District also questioned why the Respondent unplugged and moved a refrigeration unit located in the Café away from the wall and then failed to plug it back into the socket. Because the unit was unplugged for many hours, approximately $590 worth of food had to be thrown out. When questioned by Principal Burns, the Respondent was unable to provide a plausible explanation concerning the refrigeration unit.

In addition to the lack of work performed during the winter break, the District charged that Mr. Wilson violated policy when he smoked cigarettes on school grounds. The District also questioned the Respondent's other activities during the break. It was suggested that Mr. Wilson and Mr. Miranda were drinking alcohol and possibly ingesting illegal substances while on duty. The Employer characterized the Respondent's behavior and movements as "suspicious."

In addition to the lack of work performed during the winter break, the District charged Mr. Wilson had an extended pattern of "chronic and excessive absenteeism, tardiness, leaving work early, failing to comply with attendance reporting procedures, and failing to swipe in and out at building door readers." While Respondent received numerous warnings and counseling, he repeatedly disregarded the District's policies.

In response to the Board's action, Respondent's Attorney Uliano emphasized the District's burden in support of the charges. "The burden rests on the District by preponderance of the evidence" in the removal of a tenured employee. Loss of employment, Mr. Uliano noted, has consequences that include loss of employment and possible impact on pension benefits.

The charges brought forth by the District were described by Attorney Uliano as a "kitchen sink" of allegations designed to remove Mr. Wilson from his employment. What began as an empty vodka bottle, Mr. Uliano argued, inadvertently left in the microwave, escalated into a theft of time charge, insubordination, review of attendance records and violation of various District policies.

Mr. Wilson explained that the empty vodka bottle had been placed in his gym bag after visiting a relative during the holiday week. When he entered the building, he removed the empty bottle and placed it in his jacket.

There was no evidence, Mr. Uliano contended, that explicitly confirmed Mr. Wilson consumed alcohol. The District argued that bottles seen in the video footage closely resembled the vodka bottle.

In response to any inferences concerning the use of drugs, Mr. Uliano argued, no evidence was produced that showed the Respondent had used any illegal substance. The different innuendos cited by the District, Mr. Uliano contended, failed to support allegations of drug use. Attorney Uliano also noted that Mr. Wilson had passed the drug test required by the District.

Attorney Uliano argued that each suspicious movements identified by the District in support of its allegations were weak. Mr. Uliano suggested the District sought to strengthen a weak case by introducing unrelated and unproved issues.

POSITION OF THE PETITIONER

As previously contended, the Respondent had failed to carry out his responsibilities as a building custodian during the winter break. Evidence of his dereliction of duty was clearly shown in the security camera footage. The charges against Mr. Wilson included numerous

violations beyond his theft of time. In reaching its decision to terminate the Respondent, the District also cited a list of Policy violations that occurred during and before the December 2017 winter break.

The winter break provides an opportunity to perform duties that lend themselves to a period when students, staff and visitors are not in the building. There were numerous projects that can and should be performed during winter break such as sanitizing all surfaces, washing and waxing the floors, cleaning catch basins, changing light bulbs and surveying the building grounds.

On the same day the empty vodka bottle was found, a staff member also discovered that a refrigerator unit had been unplugged, resulting in the spoilage of $590 worth of food. Mr. Wilson acknowledged that he left the empty vodka bottle in the Café and admitted that he had erroneously failed to reconnect the refrigerator. He had also "voluntarily" apologized to Dr. Burns for his oversight.

Based upon the discovery of the empty vodka bottle and the unplugged refrigeration unit, Mr. Frangipane was instructed by the Administration to conduct an extensive review of security video footage. The ECC has thirty (30) interior and exterior surveillance cameras. Mr. Frangipane's examination of the videos covered the period from December 22, 2017 until the vodka bottle was discovered by staff. Each camera is motion activated. It took Mr. Frangipane approximately, with assistance of the District's video technicians, forty (40) hours within six (6) weeks to review and prepare his notes.

While reviewing video footage, Mr. Frangipane and other administrators discovered Respondent engaged in behaviors that could only be characterized as "odd" or "suspicious." It was curious that when entering the Café Respondent never turned on the lights, even when it was

dark outside. Respondent was also seen continually walking in and out of the Café and the custodial office without any legitimate work purpose.

The District identified several suspicious occurrences noted in review of the video footage. They were:

(a) Respondent and Miranda repeatedly stationing themselves in the corner of the Café where they knew that video cameras could not record their activities (Ex. B-7)

(b) Miranda reaching into his pocket, removing, and drinking from a bottle that appeared to be the vodka bottle found in the Café, then placing the bottle into a food insulation cart to conceal the bottle (Miranda had no valid reason for touching or opening the food insulation carts) (Ex. B-7).

(c) Respondent removing the bottle, which Miranda had concealed in the food insulation cart, and drinking from it (Ex. B-7). (Respondent would have no reason to touch the food insulation carts, unless he was moving them to clean/sweep, which he did not do).

(d) No one else carrying a bottle of any kind into the Café (Ex. B-7).

(e) Respondent was not seen with a gym bag despite claiming that he removed the bottle from his bag while cleaning it out (Ex. B-7).

(f) Respondent and Miranda on numerous occasions appearing to bend over the Café table as if they were "snorting" cocaine (Ex. B-7)

(g) Respondent and Miranda consistently and repeatedly touching and wiping their noses in a manner consistent with cocaine use (Ex. B-7).

(h) Respondent at the kitchen sink washing the lower portion of his face and nose (Ex. B-7).

(i) Respondent at the sink with two (2) cigarettes appearing to doctor/alter the cigarettes to presumably add an illegal substance (Ex. B-7).

(j) Respondent making suspicious, furtive movements, while looking over his shoulder (Ex. B-7).

(k) Respondent remaining in or near the Café after his shift ended and did not go home to his family despite it being the holiday season (Ex. B-7).

(l) Miranda spending significant periods of time at the ECC despite having no legitimate basis for being on the premises as he was assigned to work at Midtown, and Respondent knowingly permitting Miranda to enter and remain at the ECC for lengthy periods of time while Miranda should have been working at Midtown (Ex.B-7) and

(m) Respondent had no legitimate reason to spend so much time in the custodial office because there were no work orders to process on the computer.

Based upon the unimpeachable video evidence, the following facts are conclusively established:

1) In his review of the December 22, 2017 video footage, Mr. Frangipane did not see Respondent actually perform any work activities in the Café (Ex. B-7).

2) In his review of the December 26, 2017 video footage. Mr. Frangipane witnessed Miranda arriving at the ECC at approximately 11:17 a.m. despite Miranda being scheduled to begin his shift at Midtown at 11:00 a.m. (Ex. B-7). Miranda's behavior was highly suspicious because Miranda did not have any legitimate work reason for being at ECC during winter break.

3) Respondent not only granted Miranda entry into the ECC, but he knowingly permitted him to remain at the ECC and loiter for extended periods of time (they were "hanging out" together). While at the ECC, Miranda failed to perform his assigned duties at Midtown constituting a complete dereliction of his duties. Respondent, a Head Custodian, knew Miranda's complete abandonment of his job duties was wrong, yet still actively condoned and seemingly encouraged it (Ex. B-6).

4) On December 26, 2017:
   a. Respondent spent fifty-one (51) minutes smoking on the loading dock;
   b. Respondent spent seventy-one (71) minutes loitering in the Café;
   c. Respondent left the building for twenty-six (26) minutes without swiping out;
   d. Respondent spent two (2) hours and forty-three (43) minutes inside of the custodial office doing nothing and
   e. Respondent spent a total of five (5) hours and eighteen (18) minutes off task on December 26, 2017 (Ex. B-7).

5) On December 27, 2017:
   a. Respondent loitered for twenty-eight (28) minutes in the Café;
   b. Respondent spent thirty-five (35) minutes smoking on the loading dock;
   c. Respondent spent forty-nine (49) minutes in the custodial office doing nothing;
   d. Respondent left the building without swiping out for ten (10) minutes and
   e. Respondent spent a total of three (3) hours and fifteen (15) minutes off task.

6) On December 28, 2017:
   a. Respondent spent six (6) minutes smoking on the loading dock;
   b. Respondent left building for fifty-three (53) minutes without swiping out;
   c. Respondent spent four (4) hours and ten (10) minutes in the custodial office doing nothing;
   d. Respondent spent twenty-eight (28) minutes outside working on his personal car and
   e. Respondent spent a total of five (5) hours and nine (9) minutes off task (Ex. B-7).

7) On December 29, 2017:

a. Respondent spent three (3) hours and twenty-two (22) minutes in the Café;
b. Respondent spent forty-five (45) minutes smoking on the loading dock;
c. Respondent spent one (1) hour and forty-one (41) minutes in his custodial office doing nothing;
d. Respondent spent a total of seven (7) hours and two (2) minutes off task on December 29, 2017, yet he requested four and one-half (4½) hours of overtime;
e. During the time period he was supposed to be working "overtime" (3:00 p.m. to 7:20 p.m.), Respondent was either loitering in the corner of the Café or on the loading dock, but not performing any of his required job duties;
f. Respondent unplugged the refrigeration unit causing almost $590 worth of food to spoil. Respondent voluntarily told Dr. Burns that he moved the refrigerator to scrub the floor; however, the video shows that he did not clean anywhere near the unit;
g. At the same time and place that Respondent unplugged the refrigeration unit, Miranda was at the ECC (when he should have been working at Midtown) where he and Respondent suspiciously hung out in the corner of the Café in the dark. Careful review of the video footage shows Mr. Miranda bending down over the table, putting something to his nose and wiping his nose. Respondent is also seen wiping/touching his nose when he leaves the Café corner.

Mr. Frangipane testified that after the winter break he inspected the ECC and found that many "tick items" had not been completed.

On several occasions Respondent was informed that his behavior and disregard of policies was unacceptable. Mr. Wilson was given ample opportunity to correct his unacceptable conduct. Mr. Frangipane testified that prior to the appointment of the current Superintendent he had recommended the termination of Respondent. However, he was advised to give Mr. Wilson a warning. It was alleged that the failure to discharge Respondent reflected that his sister was a member of the Board, his mother was employed by the District, and his mother-in-law worked for the Assistant Superintendent.

Respondent had testified that problems at work were influenced by the murder of his son in November 2016. The Employer understood the impact this had on Mr. Wilson. However, the District did not deny Respondent any benefits or time off. Because of chronic and excessive absenteeism, Mr. Wilson had exhausted his sick and personal leave. Although Respondent had the option to ask for bereavement leave or a leave of absence, he did not submit such a request.

In response to the negative drug test, the District argued it was administered one month after winter break. Thus, the test results were inclusive. The delay in performing a drug test reflected the length of time it took Mr. Frangipane to complete his review of the "extensive video footage."

In spite of numerous warnings, Mr. Wilson ignored District policies and guidelines. The evidence clearly established that Respondent's conduct warranted removal from his position.

POSITION OF THE RESPONDENT

The Respondent argued that he was singled out and, without credible evidence, terminated unfairly by the District. No other employee during the holiday week was investigated. One might ask if video footage would reveal if any other employees had been "off task" between Christmas and New Year's Day.

The incident that triggered the investigation began after an empty bottle of vodka was found in the Café. There is no documentation that shows Mr. Wilson drinking alcohol while on duty. He explained the vodka had been consumed at a holiday party before he reported to work. The empty bottle had been placed in a gym bag and then transferred into his jacket pocket. The security video footage shows Mr. Wilson drinking from a bottle that contained only water.

Mr. Wilson testified that the bottle he placed in the food warmer contained frozen water he kept in his office and was placed in the warmer to defrost. The District suggested the bottle was the size of one containing vodka rather than water is without merit. Mr. Wilson was unable to explain how the empty bottle made its way into the microwave.

Attorney Uliano disputed the District's reason the refrigerator was unplugged and moved. The District contended Mr. Wilson and Mr. Miranda unplugged the noisy refrigerator because

they wanted to hear if anyone was coming into the building. Also, Mr. Frangipane erroneously contended the refrigerator was moved to block the view from the gym into the Café. However, the gym is equipped with a motor sensor light. Thus, the activated light would have alerted Mr. Wilson and Mr. Miranda if someone entered the building before they would be seen.

When asked about a "suspicious" vehicle arriving in the evening of December 29, 2017 at the ECC, Mr. Wilson explained that it was his daughter who asked to use his debit card. The appearance of the car was an additional accusation that falsely suggested suspicious activities.

Mr. Morris's testimony that he was asked to serve as a lookout cannot be accepted at face value. The allegation he was asked to serve as a "lookout" is unfounded. Mr. Morris stated that Mr. Wilson gave him a few "pointers" during the winter break and was limited to his position as head custodian. Furthermore, Respondent suggested his absence benefits Mr. Morris because it provides him with overtime. Mr. Wilson also had worked with Mr. Morris for a relatively short period (3 months) of time and had no more than a casual relationship with his fellow custodian.

An additional matter concerns the December 29, 2017 interaction Mr. Wilson had with Environmental Specialist, Supervisor Martin Cordero. Mr. Morris saw Mr. Cordero walking into the ECC building at 7:30 p.m. Mr. Morris observed Mr. Cordero and Mr. Wilson exchange New Year's wishes. Mr. Wilson was face-to-face with Supervisor Cordero. If Mr. Cordero had detected alcohol or drug use, he would surely have notified Mr. Frangipane. It is interesting to note that the District never bothered to speak to Mr. Cordero or call him as a witness. "The most logical theory regarding why Mr. Cordero never entered the district radar would be that Mr. Cordero viewed his interaction with Mr. Wilson that evening as ordinary."

In answer to Mr. Wilson's "unnecessary" request for winter break overtime, Respondent testified there was a miscommunication with Mr. Frangipane. The overtime request was needed

to clean the cubbies (after examination of building) and not the lobbies as assumed by Mr. Frangipane.

Mr. Wilson did not deny he smoked cigarettes outside the building during the winter break and would not have smoked on school grounds if children were present. Many of the cigarette butts found near the building were left by the outside contractors working during winter break. Mr. Uliano noted that Respondent had not been previously disciplined or warned for smoking on school grounds. Smoking did not warrant termination. At most, a minor suspension might be justified.

Unable to prove either drug use or alcohol consumption, the District sought to use attendance to justify the termination. Mr. Wilson explained that he had health and personal issues that resulted in his absenteeism. It was curious, Mr. Uliano stated, that the attendance issue did not become critical until 2018. Mr. Wilson testified that he came to school and opened the building even when sick and remained on duty until a fellow custodian reported in for the 11:00 a.m. shift. Prior to the termination, Mr. Wilson had never had his pay docked.

Mr. Wilson was described as a good employee assigned to a school of young children that contributed to a custodian's workload. Mr. Frangipane acknowledged that young children create more work for custodians. Mr. Wilson stated he often had to clean up vomit and feces but, readily carried out his responsibilities. Dr. Burns testified that Mr. Wilson always complied with her requests. Ms. Nickson testified that Mr. Wilson did a better job than other custodians.

Mr. Wilson explained that he walked in and out of the Café because he charged his cell phone in that room. Contrary to the District's accusation, he was not avoiding the security cameras.

The District failed to establish that they had met the burden of proof warranted for the termination. "It is conceded that nothing other than a small suspension would be appropriate discipline based on the evidence submitted in this matter."

DISCUSSION AND FINDINGS

The charges filed by the District fall into two categories. The first encompassed the Respondent's actions and behavior that occurred during the 2017-2018 winter break. The second category of charges entailed Respondent's employment record.

Respondent's legal council argued that Mr. Wilson's employment record had been considered only after the empty vodka bottle was discovered in the ECC building. Mr. Wilson's absenteeism, it was argued, was a secondary justification for the termination. Mr. Uliano contended absenteeism was designed to bolster an otherwise weak case.

An employee's past record is often introduced to support a party's position. A good record is considered a factor in the reduction in the level of discipline. A poor record is sometimes cited in support of an employer's decision to impose discipline.

A review of Respondent's early evaluations reveals a significant number of absences. In the March 2013 through February 2014 Evaluation, it was noted Mr. Wilson's tardiness and absenteeism continued to be excessive. Attendance and tardiness had also been included in the Evaluations completed for the ensuing two years. The Evaluation prepared in 2016 stated that excessive absenteeism is disruptive and could result in future disciplinary action. Mr. Wilson's unsatisfactory attendance record was also noted in the yearly Evaluation that was prepared in June 2017.

In a letter to Mr. Wilson dated December 6, 2017 (Ex. B-33), Mr. Frangipane emphasized

"unscheduled absences are not congruent with Board policy and have a deleterious impact on custodial operations at the Early Childhood Center." Mr. Frangipane stated that as of the date of his December 6th letter, Mr. Wilson had been absent a total of 21 days, excluding vacation days.

Facilities Engineer Frangipane alerted Respondent to the consequences of habitual absenteeism such as withholding salary increment and termination of employment. Mr. Wilson was informed that given the failure to negotiate improvements in his attendance "further disciplinary action (would) be taken. Discipline action to be taken includes but is not limited to: a negative report on your evaluation, withholding of a salary increment and termination of employment. None of this has made any difference, your neglect of district attendance policy continues with impunity."

Included in the yearly evaluations were references to a Failure to Swipe out when leaving the ECC. However, while citing shortcomings in certain custodial responsibilities, the District did not withhold an increment or not recommend continuation.

However, Respondent's absenteeism and tardiness had been noted in several yearly evaluations. With few exceptions, Mr. Wilson had exceeded the fifteen (15) sick days granted under the collective bargaining agreement. On a number of occasions, he failed to record (swipe) his movement in and out of the ECC. There were also instances in which Mr. Wilson did not report his absences on AESOP, a self-reporting online and telephonic reporting system.

In a letter dated, February 28, 2014, Mr. Frangipane advised Mr. Wilson that neglect of reporting procedures would result in disciplinary action. The record includes a number of letters from Mr. Frangipane to Mr. Wilson concerning tardiness, leaving early and failure to report absences. The letters were dated September 17, 2015, October 1, 2015 and August 4, 2016.

While the District had not taken disciplinary action immediately, Mr. Wilson had been warned that his attendance record was unacceptable.

In November 2016, Mr. Wilson did experience a personal tragedy with the death of his son. He testified that he had exhausted his sick leave and personal days. The District contended Mr. Wilson did have the option of requesting unpaid leave but did not file a request for additional time off.

Notwithstanding the above tragedy, Mr. Wilson did not respond to the warnings. In the letter dated October 2015, Mr. Frangipane notified Mr. Wilson about a meeting he failed to attend. The meeting was in regard to tardiness, leaving early, and failure to report absences.

The record does support the charges related to absenteeism, tardiness, leaving his assignment early and not observing District policy when leaving a building or reporting absences.

The second category of charges addressed Respondent's activities during winter break. A review of Mr. Wilson's movements confirms that he devoted less than the number of hours expected for custodial duties. Mr. Frangipane's review of security videotapes, initiated by the discovery of the empty vodka bottle, brought about the examination of Mr. Wilson's activities.

I believe Mr. Wilson's explanation for the empty vodka bottle was suspect. If an empty bottle were inadvertently brought into the Café, why was it left in the microwave? While there is no image on the tapes Mr. Wilson had consumed alcohol in the ECC building, the discovery of the empty bottle is suspicious. It is also unclear when Mr. Wilson alleged he found the empty bottle in his gym bag or why he did not then take the bottle out of the building. The District contended the duffle bag was not seen on the videotapes and theorized it was concealed in Mr. Wilson's coat.

The video footage revealed that both Respondent and a custodian assigned to a different building (Miranda) had drank from a bottle concealed in a food insulation cart. Mr. Wilson testified he had placed frozen water bottles in the cart to defrost them.

Mr. Frangipane testified that Mr. Miranda had no reason to be in the ECC building. Mr. Wilson had contended Mr. Miranda was upset over personal problems and wanted his counsel. The District asked why they found it necessary to meet during work hours.

The videotape had shown Mr. Wilson at the Café sink removing tobacco from a cigarette. Mr. Wilson testified he had inserted a menthol filter onto a Marlboro that he had been given by a contractor. Mr. Frangipane thought this suspicious and unacceptable in a food prep area. The District suggested it was unusual in conjunction with Mr. Wilson frequently leaving the building. In the use of the Café sink, the Petitioner questioned why Mr. Wilson did not use the sink adjacent to his office. Mr. Frangipane also noted Mr. Wilson did not turn on the lights in the Café. On numerous occasions both Mr. Wilson and Mr. Miranda were in areas not recorded by security cameras.

The answers concerning the unplugged refrigerator were not convincing. Mr. Wilson alleged the refrigerator had been moved so the floor could be cleaned. Video footage failed to show Mr. Wilson cleaning the area around the refrigerator. After Mr. Wilson pulled the refrigerator from the wall he unplugged it and then sat down in the dark.

Although there was disagreement concerning the reason he requested four and a half hours overtime on December 29, 2017, at the end of the day he sat the entire time in the darkened Café with Mr. Miranda. On the 29th, Mr. Wilson spent over three (3) hours in the Café, 45 minutes on the loading dock and over one hour in his office. While one might consider that the

29th was a more "relaxed" day because it was the last workday of the year, it has to be judged in conjunction with the entire week.

The District alluded to suspicions Mr. Wilson had used prohibited substances. Mr. Wilson submitted to a drug test toward the end of January 2018. The results of the test were negative. Petitioner speculated that the lapse of time in administering the test negated evidence of substance abuse. Although the District believed Mr. Wilson's actions were suspicious, the test result was negative.

Mr. Uliano suggested that Mr. Wilson had been investigated during winter break while other employees were not. However, interest in Mr. Wilson's workweek began only after the discovery of the empty vodka bottle. If not for the empty vodka bottle, the security videotapes would not have been reviewed. Mr. Frangipane testified that if not for the empty vodka bottle he would not have spent many hours within a busy schedule viewing the tapes. Mr. Frangipane also testified the decision to review the tapes was made in collaboration with other administrators.

While Mr. Wilson had been alerted to the District's policies, he failed to observe these rules and the advice of his superior. As a seventeen-year employee and head custodian, Mr. Wilson was familiar with these policies. Although the use of illegal drugs was not proven, the discovery of an empty vodka bottle placed in the microware lends credence to the District's allegation that alcohol was consumed in the building. Although the intensity of work might be less during the winter break, Mr. Wilson clearly neglected his duties.

In consideration of the above, I have concluded the preponderance of evidence supports the charges brought forth by the Neptune Township Public School District against Lawrence Joseph Wilson.

AWARD:

For the reasons described above, the tenure charges submitted by the Neptune Township Public School District against Lawrence Joseph Wilson are sustained.

11/16/18
Date

Stephen J. Rosen
Stephen J. Rosen

State of New Jersey}
County of Essex}

On this 16th day of November, 2018, before me personally came and appeared Stephen J. Rosen, to me known to be the individual described in the foregoing instrument, and he acknowledged to me he executed same.

Susan G. Rosen
SUSAN G. ROSEN
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 8/4/2019

OAL DKT. NO. EDU 18796-17
AGENCY DKT. NO. 264-11/17

N.G., on behalf of minor child, N.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge that this matter was properly transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, based on the petitioner's failure to appear at the hearing scheduled for October 30, 2018. Petitioner did not file an explanation for her failure to appear, notwithstanding the opportunity to do so.

Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/06/18
Date of Mailing: 12/06/18

* 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 03591-18
AGENCY DKT. NO. 46-2/18

A.G., ON BEHALF OF MINOR CHILD, M.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon 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: 12/06/18

Date of Mailing: 12/06/18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 03591-18
AGENCY DKT. NO. 46-2/18

A.G. ON BEHALF OF MINOR CHILD, M.A.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

A.G. o/b/o M.A. petitioner pro se

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

Record Closed: October 26, 2018 Decided: November 13, 2018

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

On March 9, 2018, 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.

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.

November 13, 2018

DATE

ERNEST M. BONGIOVANNI., ALJ

Date Received at Agency: 11-15-2018

Date Mailed to Parties: 11-14-2018

id

CLEARY | GIACOBBE | ALFIERI | JACOBS LLC

FRANCES L. FEBRES, Partner
ffebres@cgajlaw.com

Reply to: Oakland Office

October 26, 2018

VIA E-Mail (Ila.Dhabliwala@oal.nj.gov) and Regular Mail
Honorable Ernest Bongiovanni, A.L.J.
Office of Administrative Law
33 Washington Street,
Newark, NJ 07102

Re: Alia Graham o/b/o M.A. v. West Orange Board of Education
Agency Reference No: 46-2/2018
OAL DKT NO. EDU 03591-2018 N

Dear Judge Bongiovanni,

Please be reminded that this firm is Board Counsel to the West Orange Board of Education ("Board"). In that regard, enclosed please find a fully executed Stipulation of Settlement.

I thank Your Honor for your attention to this matter.

Respectfully submitted,

Frances L. Febres
Encl.

C: Eveny Pagan-DeMendez, Assistant Superintendent of Schools (by email)
John Calavano, School Business Administrator/Board Secretary (by email)
Alia Graham, Petitioner (by regular mail and email)

CLEARY GIACOBBE ALFIERI & JACOBS, LLC
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Attorneys for Respondent, West Orange Board of Education

Alia Graham o/b/o M.A., Petitioner, vs. West Orange Board of Education Respondent.	STATE OF NEW JERSE OFFICE OF ADMINISTRATIVE LAW OAL DOCKET EDU 03591-18 **STIPULATION OF SETTLEMENT**

The matter and things in controversy having been discussed by and between the parties, and a settlement having been agreed upon:

It is on this _____ day of _____, 2018, STIPULATED by and between the parties as follows:

1. Alia Graham o/b/o M.A., Petitioner in the above-captioned matter, personally guarantees and agrees to pay the Respondent, the West Orange Board of Education ("Board"), Eight Thousand, Six-Hundred, and Forty-Five Dollars and Fifty Cents ($8,645.50), which sum the Board agrees to accept as full settlement of the tuition assessed and owing for M.A.'s ineligible attendance during the 2017-2018 school year, inclusive of interest.
2. The sum aforesaid shall be paid by Alia Graham to the Board in the following manner:
   a. Alia Graham is to pay the Board a minimum amount of $144.09 by the 15th of the first month following execution of this Stipulation of Settlement ("Stipulation").
   b. By the 15th of each month thereafter, Alia Graham is to pay the Board a minimum amount of $144.09 until the full amount of $8,645.50 has been paid, except that:
      i. In the event Alia Graham has not paid the Board the entire $8,645.50 by October 15, 2023, then Alia Graham must pay the Board the existing balance by or before October 15, 2023.
   c. All payments shall be made to the Board by personal or certified check, payable to the West Orange Board of Education.

3. In the event Alia Graham fails to pay in accordance with the terms set forth in this Stipulation:

   a. Alia Graham shall be given ninety (90) days from Notice of Default to cure same;

   b. Thereafter, the Board may submit an ex parte certification to the Superior Court of New Jersey with notice to Alia Graham, setting forth her failure to pay in accordance with the terms set forth herein with a consent judgment in Plaintiff's favor, in the form annexed hereto, for entry by the court (the "Consent Judgment"). The Consent Judgment shall be for the agreed-upon tuition amount of $8,645.50, less any payments made by Alia Graham to the Board pursuant to paragraph 2 (above);

   c. Alia Graham waives all rights to contest entry of the Consent Judgment, an unexecuted copy of which is attached as Exhibit "A" to this Agreement. The Consent Judgment may be docketed with the Clerk of the Superior Court of New Jersey;

   d. Alia Graham shall pay all of the Board's reasonable attorney's fees and legal costs associated with enforcing the Board's rights under this Stipulation; and

   e. Any payments made above the minimum monthly payments shall be a credit towards the Board's future monthly payments.

4. No delay or omission on the part of the Board in exercising any right under this Stipulation will operate as a waiver of that right or of any other right under this Stipulation.

5. **Binding Effect.** All parties to this Stipulation, as well as their heirs, successors, and assigns, are bound by it. The other party and/or parties may rely upon his/her actual authority in connection with the signing of this Stipulation. Additionally, each party to this Stipulation is an intended beneficiary hereof.

6. **Integration Clause.** This Stipulation shall constitute the entire agreement among the parties and supersedes all prior or contemporaneous agreements, oral or written. This Stipulation cannot be altered, amended, modified, terminated, or discharged except in a writing signed by the party against whom enforcement of such alteration, amendment, modification, termination or discharge is sought.

7. **Governing Law.** This Stipulation shall be construed in accordance with the substantive

laws of the State of New Jersey, without regard to its conflicts of laws rules.

8. **Severability.** If all or any portion of any provision of this Stipulation shall be held to be invalid, illegal, or unenforceable in any respect, then such invalidity, illegality, or unenforceability shall not affect any other provision hereof, and such provision shall be limited and construed as if such invalid, illegal, or unenforceable provision, or portion thereof, were not contained herein.

9. **This Agreement is conditioned upon and subject to the review and approval of the West Orange Board of Education, at its September 24, 2018 meeting.**

We hereby consent to the form and entry of the within Stipulation.

ALIA GRAHAM (pro se)
Petitioner

Date: 9/6/2018

FRANCES L. FEBRES, ESQ.
Cleary Giacobbe Alfieri Jacobs, LLC
Attorney for the Respondent,
West Orange Board of Education

Date: 10/26/18

386-18L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

December 6, 2018

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Re: *P.C. and S.C., on behalf of minor child, A.C. v. Board of Education of the Bridgewater-Raritan Regional School District, Somerset County, OAL Dkt. No. EDU 1197-14, Agency Dkt. No. 13-1/14.*

Dear Counsel,

I have considered the papers filed in connection with the petitioners' request for interlocutory review of the November 21, 2018 Case Management Order of the Honorable Elia A. Pelios, ALJ, 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, the petitioners' request for interlocutory review is hereby denied.

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner

LOR/SLP/JKH

c: Honorable Elia A. Pelios, ALJ
County Superintendent
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In the Matter of the Tenure Hearing between

SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO,

Petitioner,

and

SARA A. ROBINSON,

Respondent.

Before the New Jersey Department of Education

Agency No. 222-8/18

OPINION AND ORDER

Before DANIEL F. BRENT, Impartial Arbitrator

OPINION AND ORDER

This matter was assigned to me as Arbitrator pursuant to P.L. 2012 Chapter 26 of Title 18A *N.J.S.A.* The matter involves tenure charges, dated July 9, 2018, that were certified by the Willingboro Township Board of Education on August 27, 2018. These charges seek to remove Respondent, Sara A. Robinson, from her position as a tenured Secretary. Respondent filed a motion to dismiss the tenure charges in lieu of an Answer pursuant to *N.J.A.C.* 6A:3-5.3(a)1, *N.J.A.C.* 6A:3-1.5(g), *N.J.A.C.* 6A:3-1.4 and *N.J.A.C.* 6A:3-1.10. Respondent asserted that the charges do not meet the filing and service time requirements or the specificity requirements of *N.J.S.A.* 18A:6-11 and *N.J.A.C.* 6A:3-5.1(b).

Having considered the moving papers, and the parties having been offered the opportunity to address the Motion, I find that the filing and service time lines as well as the specificity requirements required by the statute have not been satisfied. Therefore, I issue the following Order:

The tenure charges filed by the Willingboro Township Board of Education on August 27, 2018 against the Respondent, Sara A. Robinson, are hereby dismissed without prejudice and without costs or fees.

Dated: December 10, 2018

DANIEL F. BRENT
Impartial Arbitrator

ACKNOWLEDGMENT

State of New Jersey
County of Mercer

On this 10th day of December, 2018 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

Kathryn Gallagher

KATHRYN GALLAGHER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 2/18/2021

O.G., on behalf of minor children, A.G. and A.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her children, A.G. and A.G., seeking a determination that the children are entitled to a free public education in the Elizabeth schools. The respondent Board contended that a residency investigation revealed that that petitioner and her children are not domiciled in Elizabeth, but rather live in Carteret with O.G.'s boyfriend. The Board filed a counterclaim for tuition for the period of A.G. and A.G.'s ineligible attendance in Elizabeth schools.

The ALJ found, *inter* alia, that: pursuant to *N.J.S.A.* 18A:38-1(a), any persons between the ages of five and twenty years old are entitled to a free public education in the school district in which they are domiciled; under *N.J.S.A.* 18A:38-1(b)(2), parents may contest a local school board's residency decision, but have the burden of proof by a preponderance of the evidence to prove domicile within the school district; in this matter, a hearing was held on November 1, 2018, at which the Board presented credible testimony from the school district's residency investigator that indicated that petitioner does not reside in Elizabeth, but instead lives in Carteret; the petitioner's testimony and proofs of residency offered at hearing were not convincing. The ALJ concluded that the Board met its burden to show that A.G. and A.G. were not domiciled in Elizabeth during the period of the children's attendance in Elizabeth schools, and were therefore not entitled attend school there free of charge. Accordingly, the ALJ ordered the petitioner to reimburse the Board for tuition in the amount of $3,784.53 for the period of her children's ineligible attendance in Elizabeth schools.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision as the final decision in this matter with modification to the amount of tuition owed. The Commissioner found that the tuition amount stated in the Initial Decision was for one child rather than two. Therefore, petitioner was ordered to reimburse the Board in the total amount of $7,569.06, which represents the cost of tuition for both children during their period of ineligible attendance.

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

December 14, 2018

OAL DKT. NO. EDU 11833-18
AGENCY DKT. NO. 187-8/18

O.G., on behalf of minor children, A.G. and A.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons stated in the Initial Decision – that A.G. and A.G. are not domiciled in the district, and that the Board's decision denying A.G. and A.G. the ability to attend school in the district was not arbitrary, capricious or unreasonable. The Commissioner, however, is not in accord with the amount of the tuition that was assessed upon petitioner by the ALJ.

The Board is seeking tuition for A.G. and A.G.'s ineligible attendance in the district for 10 days during the 2017-2018 school year and 37 days during the 2018-2019 school year. The tuition rate for the 2017-2018 school year is $83.23 per day, and the tuition rate for the 2018-2019 school year is $79.79 per day. Therefore, the Board is seeking tuition for each of the students in the amount of $3,784.53, for a total of $7,569.06 to be reimbursed for the two students. In the

[1] The record did not include a transcript of the hearing held at the Office of Administrative Law on November 1, 2018.

Initial Decision, however, the ALJ awarded tuition in the amount of $3,784.53, which is the cost of tuition for only one of the students.

Accordingly, the Initial Decision is adopted as the final decision as modified above. The petitioner shall pay the Board $7,569.06 in tuition costs for A.G. and A.G.'s ineligible attendance in the District for 10 days during the 2017-2018 school year and for 37 days during the 2018-2019 school year.

IT IS SO ORDERED.[2]



COMMISSIONER OF EDUCATION

Date of Decision: 12/14/18

Date of Mailing: 12/14/18

[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 11833-18
AGENCY DKT. NO. 187-8/18

O.G. ON BEHALF OF MINOR CHILDREN
A.G. & A.G.,
Petitioner,
v.
CITY OF ELIZABETH BOARD OF
EDUCATION, UNION COUNTY,
Respondent.

O.G, petitioner, appearing pro se

Christina M. DiPalo, Esq. for respondent (LaCorte, Bundy, Varady & Kinsella, attorneys)

Record Closed: November 2, 2018 Decided: November 7, 2018

BEFORE: **JOANN LASALA CANDIDO**, ALAJ

STATEMENT OF THE CASE

Petitioner, O.G., challenges the residency determination made by the Elizabeth Board of Education ("Board") about her minor children A.G. (son). and A.G. (daughter). On August 9, 2018, respondent submitted an Answer, which was filed with the

Commissioner of Education on August 10, 2018. Respondent's demand included a request that the Commissioner dismiss the petition of appeal, that the children be removed from the district, and that the petitioner be assessed a tuition charge for each day of the two children's' ineligible attendance in the Board's schools for the last ten days of the 2017-2018 school year and thirty-seven days for the 2018-2019 school year.

The matter was transmitted to the Office of Administrative Law (OAL) on August 16, 2018, 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 November 1, 2018, and the record closed on November 2, 2018, upon receipt of tuition calculations.

The issues in this matter are whether A.G. (son) and A.G. (daughter) are 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 the children should be granted.

Based upon the papers submitted as of the hearing date and the supplemental submission by respondent as well as the testimony of O.G. and Elizabeth Board of Education Investigator Vito Tropeano, I **FIND** the following **FACTS**.

On or about November 20, 2017, Elizabeth Public School received an undeliverable letter sent to O.G. at the Summer Street, Elizabeth address provided by O.G. to the District as her residence. Residency Investigator Tropeano confirmed that the Summer Street address was vacant and under construction. Elizabeth Public Schools requested a residency investigation of petitioner and Investigator Tropeano was assigned the investigation on or about December 7, 2017.

An eligibility hearing was conducted on July 9, 2018. On July 10, 2018, the District sent a notice of final ineligibly to petitioner at a Carteret address. On July 18, 2018, Tropeano went to the Carteret address where petitioner's boyfriend resides and AG (daughter) answered the door and told the investigator that her mother was at work and her brother was at summer school. Tropeano returned to the Carteret address on September 25, 2018 and AG son answered the door and told him he stayed home from

school sick and his sister went to school and his mother went to work. Tropeano went to the Elizabeth address provided by petitioner on three occasions and observed names other than hers on the mailboxes at the two-family residence and did not observe petitioner at this address. He also contacted the Elizabeth Tax Assessor who confirmed a name other than petitioner owned the home in Elizabeth. Tropeano also inputted petitioner's name in a program Accurint that reveals her utility bills reflect the Carteret address.

Petitioner presented a shut off notice from Elizabeth Town Gas dated May 2, 2018, for a February 2018 unpaid bill. (P-1) The same for PSE&G. (P-2) Petitioner contends that she resides with her sister at the Elizabeth address but sometimes she and her children stay at her boyfriend's house in Carteret. Petitioner's driver's license is registered in New York. Petitioner provided to the District a letter from her sister claiming she lives with her at the Elizabeth address. Her sister did not testify at the hearing. She also stated that she has current utility statements but did not have them with her.

The respondent is seeking tuition for the two children for 2017-2018 school year at a daily rate of $83.23 for ten days for a total cost of $832.30; and tuition for the two children for the 2018-2019 school year at a daily rate of $79.79 for thirty-seven days for a total cost of $2,952.23.

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. 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 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. 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).

According to N.J.A.C. 6A:22-6.3(a), "[t]uition assessed pursuant to the provisions of this section shall be calculated on a per student basis for the period of a student's ineligible enrollment, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23-3.1. The individual student's record of daily attendance shall not impact on such calculation." However, "[n]othing in this chapter shall preclude an equitable determination, by the district board of education or the Commissioner, that, when the circumstances of a matter so warrant, tuition shall not be assessed for all or part of any period of a student's ineligible attendance in the school district." N.J.A.C.6A:22-6.3(b).

Based on the foregoing, I **CONCLUDE** that the respondent has met its burden under N.J.S.A. 18A:38 b (2) that A.G. and A.G. were not domiciled in Elizabeth for the dates reflected and therefore are not entitled to a free education in the Elizabeth school district.

I further **CONCLUDE** that A.G. and A.G. were educated in the District at a daily rate of $83.23 for ten days for a total cost of $832.30; and tuition for the two children for the 2018-2019 school year is at a daily rate of $79.79 for thirty-seven days for a total cost of $2952.23. The total cost for two children is $3,784.53 for which the district is entitled to reimbursement.

ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's determination that A.G. and A.G. are not residents and domiciliary in Elizabeth, New Jersey, and were not domiciled within its school district during the period being sought, 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 $3,784.53.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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, 2018

DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: November 7, 2018

Date Mailed to Parties:

EXHIBITS

For Petitioner

P-1 Shut-Off Notice for O.G. from Elizabethtown Gas Company

P-2 Shut-Off Notice for O.G. from PSE&G

For Respondent

R-1 Summary of File, postmaster returned mail, dated November 20 and December 7, 2017, stating building to be vacant, proof of delivery to Carteret address, UPS Tracking label to Carteret Address, picture of trailer in Carteret, picture of car, and picture of mailbox at Elizabeth address.

R-2 Notice of Final Ineligibility

R-3 2018-2019 Budget Worksheet

R-4 Letter from respondent's Counsel regarding tuition

391-18M

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

December 14, 2018

Sabino Valdes
P.O. Box 463
Paramus, New Jersey 07652

Board Secretary
Board of Education of the City of Union
3912 Bergen Turnpike
Union City, New Jersey 08087

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

Dear Parties:

I have reviewed all documents and correspondence filed in connection with Sabino Valdes' ninth motion to reopen this matter.[1]

Based upon my review of the present motion and the arguments set forth therein, Mr. Valdes' motion to reopen is denied as he has not demonstrated good cause to reopen this matter.

Accordingly, the ninth motion to reopen the above referenced matter is hereby DENIED.[2]

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner of Education

c: Susanne Lavelle, Esq.
County Superintendent
State Law Library

LOR/SLP/ATA

VIA REGULAR MAIL

[1] The procedural history of this matter has been fully set forth in decisions dated January 11, 2018 and March 30, 2018, as well as in subsequent decisions dated May 17, 2018, July 13, 2018, September 6, 2018, and November 8, 2018; this complete procedural history is incorporated herein by reference.

[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).

A.J., on behalf of minor child, D.J., and W.G., on behalf of minor child, J.M.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE PINELANDS REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Pro se petitioners challenged the determination of the respondent Board that their sons, D.J. and J.M., committed acts of harassment, intimidation or bullying (HIB) against a middle school classmate, L.M., pursuant to the New Jersey Anti-Bullying Bill of Rights Act (the Act), *N.J.S.A.* 18A:37-13 *et seq.* Petitioners sought to have the HIB findings against their children removed. The Board contended that its actions were not arbitrary, capricious or unreasonable, and that the HIB investigation was conducted properly. The petition was filed in April 2015 and the Board subsequently filed a motion for summary decision, which was not answered by the petitioners. The OAL adjourned the hearing dates in May 2017 and the case was reassigned in September 2018 to ALJ Masin, who determined that no opposition was ever filed to the Board's motion for summary decision.

The ALJ found, *inter alia*, that: the evidence in support of the Board's motion for summary decision stands unopposed by any evidence whatsoever, as petitioners never responded to the motion; the New Jersey Legislature adopted the Act to strengthen the standards and procedures for preventing, reporting, investigating and responding to incidents of harassment, intimidation and bullying that occurs within the school environment; the Act applies to any gesture, or any written, verbal or physical act, or any electronic communication that is reasonably perceived as being motivated either by an actual or perceived characteristic, such as, *inter alia*: race, color, religion, national origin, gender, sexual orientation, or a mental, physical or sensory disability, or any other distinguishing characteristic; the District's HIB policy mirrors the New Jersey law, and sets forth the process by which complaints are investigated to determine whether an action meets the definition of HIB; in the instant case, an HIB investigation ensued after a complaint from student witnesses that D.J. and J.M. had engaged in conduct towards L.M. that constituted bullying and harassment; petitioners targeted L.M. with derogatory comments and language, including terms such as "dick-sucker, pussy, bitch, asshole, queer, gay, tattletale"; the effects of the alleged bullying included changes in L.M.'s demeanor, lowering of his grades, social isolation, increased absenteeism, and withdrawal from the gifted class that L.M. attended with petitioners. The ALJ concluded that the Board acted within its scope of authority and reached a rational, evidence-based determination of HIB conduct. Accordingly, the Board's motion for summary decision was granted and the petition was dismissed.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision as the final decision in this matter, for the reasons well expressed therein. The petition was dismissed.

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

December 17, 2018

. 392-18

OAL DKT. NO. EDU 07634-15
AGENCY DKT. NO. 90-4/15

A.J., on behalf of minor child, D.J., and W.G., on behalf of minor child, J.M.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE PINELANDS REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	
RESPONDENT.	:	

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

Upon review, the Commissioner agrees with the Administrative Law Judge (ALJ) – for the reasons thoroughly expressed in the Initial Decision – that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its Harassment, Intimidation and Bullying determination in this case. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 12/17/18

Date of Mailing: 12/17/18

[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 7634-15
AGENCY DKT. NO. 90-415

A.J. on behalf of minor child, D.J., and W.G., on behalf of minor child, J.M.,

Petitioners,

v.

BOARD OF EDUCATION OF THE PINELANDS REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,

Respondent.

A.J. on behalf of D.J., petitioner, pro se

W.G., on behalf of J.M., petitioner, pro se

Casey P. Acker, Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Cooley, Lang & Casey, attorneys)

Record Closed: September 6, 2018 Decided: November 16, 2018

BEFORE **JEFF S. MASIN**, ALJ (Ret., on recall):

On April 22, 2015, A.J. and W.G., parents of two minor children who at that time attended school in the Pinelands Regional School District, filed a joint petition with the Commissioner of Education, seeking to have HIB (Harassment, Intimidation and Bullying) findings made by the Board against their minor children removed. The Board filed an amended answer on May 22, 2015. On May 27, 2015, the Commissioner transferred the dispute as a contested case to the Office of Administrative Law. On August 13, 2015, the Board moved for summary decision, as permitted by N.J.A.C. 1:1-12.5. On October 18, 2015, during a teleconference, the then assigned administrative law judge instructed the petitioners that if they opposed the Board's motion, they were to file their opposition by January 9, 2016, with the Board to file any reply by February 9, 2016. On March 30, 2017, Board counsel wrote to the judge, noting that no such opposition had ever been filed by the petitioners and seeking to have the judge grant the unopposed motion. Again, on April 20, 2017, Board counsel wrote, explaining that he had been instructed that April 17, 2017 was "the final deadline for petitioners to oppose Pinelands' motion for summary decision." No such opposition was filed and counsel requested that the pending hearing dates be adjourned and the motion be adjudicated. On May 1, 2017, after the OAL had notified Board counsel that the hearing dates were adjourned, counsel wrote to the petitioners of the adjournment pending resolution of the motion for summary decision.

On September 6, 2018, the case was reassigned to this judge, retired on recall. Examination of the file indicates that no opposition was ever filed to the Board's motion for summary decision.

According to the Board's motion, the HIB investigation that led to the action from which these parents appealed on behalf of their minor children, ensued after a complaint by student witnesses that the two minors were engaged in conduct towards a victim, L.M., and that the complaining witnesses had attempted to intervene and had then been subjected to harassment by the offending minors. An HIB investigation was conducted and the District found evidence of conduct that violated the prohibitions against HIB. The petitioners requested a hearing before the Board of Education, which

was held on March 2, 2015. Suspensions for the alleged offenders were held in abeyance pending the hearing. Relevant materials were provided to the petitioners prior to the hearing. The hearing was held and after the presentation of a PowerPoint setting forth information detailing the timeline of events, administrative actions, the detailed HIB actions of the petitioners' children, and confirmation of those actions, and with no denial of the conduct by the minor children, the Board found the minor children to have engaged in HIB conduct towards the victim. As part of the presentation to the Board, the history of involvement of the alleged HIB perpetrators and the alleged victim was explained, along with information regarding the manner in which the conduct between them was initially addressed and interventions taken. This interaction and response had preceded the institution of the complaint alleging HIB conduct and the subsequent initiation of the HIB investigation.

In moving for summary decision, the Board notes that long-established case law provides that when the Commissioner reviews disciplinary action taken by a local board of education, the Commissioner will not substitute his/her judgment for that of the Board, unless the record demonstrates that the action of the Board was arbitrary, capricious or unreasonable.

> Local boards of education have been expressly charged with protecting the health, safety and welfare of its students, and ensuring the orderly conduct of the academic process. When a local board has acted within its authority, its actions carry a presumption of validity and will not generally be disturbed, absent an affirmative showing that its judgment was arbitrary, capricious or unreasonable. Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd., 46 N.J. 581 (1966); Quinlan v. North Bergen Bd. of Educ., 73 N.J. Super. 40, 46-7 (App. Div. 1962). The imposition of discipline on students is considered within the discretionary powers of the school board, and the decision of a local board as to the appropriate penalty to be imposed upon a student for a disciplinary infraction should not be disturbed, absent evidence that the board's action was arbitrary, capricious, or unreasonable. J.D. and E.D. o/b/o B.D. v. Bd. of Ed. of Toms River Reg. Sch. Dist., EDU 6009-97 Initial Decision (December 29,1997 adopted, Comm'r (July 8, 1998)), http://njlaw.rutgers.edu/collections/oal/search.html.

> In matters involving the exercise of a local board of education's discretion, the 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." Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 296 (App. Div. 1960). "Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dept. of Envt'l. Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd. 131 N.J. Super. 37 (App. Div. 1974). Therefore, petitioner must demonstrate much more than simply a difference of opinion over the action taken by respondent. In order to satisfy the arbitrary and capricious standard, petitioner must prove that respondent acted in either bad faith or in disregard to the circumstances.

Thus, the burden placed upon petitioners appealing from such board action is quite substantial.

N.J.A.C. 1:1-12.5 provides that a party may file a motion for summary decision. This motion, the administrative law equivalent of the judicial motion for summary judgment, provides a means to resolve a case in which the facts material to the legal decision are not in genuine dispute and the law, when applied to these undisputed material facts, supports a judgment for the moving party. The New Jersey Supreme Court defined the standard for determining motions for summary decision in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). In this case, the Court elaborated upon the standards first established in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954). Under the Brill standard, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." The determination as to whether disputes of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact. The substantive law governing a dispute determines which facts are material. Only disputes regarding "those facts that might affect the outcome

of the suit under the governing law will properly preclude the entry of summary judgment." Dungee v. Northeast Foods, Inc., 940 F. Supp 682, 685 (D.N.J. 1996), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248(1986) (Anderson).

In Judson, at 75, the Supreme Court stated that the material facts allegedly in dispute upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, . . . ," (citations omitted). Brill focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." Brill, at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. "The essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.'" Id. at 536, quoting Anderson, 477 U.S. at 251–52. In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" which would apply at trial on the merits, whether that is the preponderance of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed material facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied, and a full evidentiary hearing held.

The New Jersey Legislature adopted legislation intended to address the significant problem of harassment, intimidation and bullying that occurs within the school environment. In N.J.S.A. 18A:37-13,

> The Legislature finds and declares 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; and since students learn by example, school administrators, faculty, staff, and volunteers should be commended for demonstrating appropriate behavior, treating others with civility and respect, and refusing to tolerate harassment, intimidation or bullying.

N.J.S.A. 18A:37-13.4 defines "Harassment, intimidation or bullying" as

> any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> **a.** a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> **b.** has the effect of insulting or demeaning any student or group of students; or
>
> **c.** creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

Each local school district is responsible for the adoption of a policy "prohibiting harassment, intimidation or bullying on school property, at a school-sponsored function or on a school bus." The statute also provides for a procedure that must be followed in conducting any investigation of alleged harassment, intimidation or bullying. N.J.S.A. 18:37-15. The nature of this investigation policy is set forth in detail in the provision.

In its motion, Board counsel describes that the alleged perpetrators of what was eventually determined to be conduct that violated the Board's HIB policy had some history of negative interaction with L.M., the student who was determined to have been the victim of that HIB conduct. Originally, the interaction was managed through intervention and subsequent discipline that involved detentions for D.J. and J.M. According to Exhibit A, a notice sent to Ms. G., on October 16, 2014, J.M. received an in-school suspension for two days due to "Dangerous Behavior." Ms. J. received a notice dated January 16, 2015, that after-school detention was ordered for D.J. due to "inappropriate language." Then, following complaints received from student witnesses, an HIB investigation was initiated, which involved the taking of numerous statements from students and teachers. The complaints alleged that J.M. and D.J. were each engaging in HIB conduct toward L.M., and that when students sought to intervene as peers they were also subjected to harassment by the two. While in their petition the two parents contend that the two female students who complained were motivated by the two alleged perpetrators having reported the girls as having cheated on a science test, the Board contends that the HIB investigation had nothing to do with any such alleged "cheating matter." At the conclusion of the HIB investigation, the parents were each notified by the superintendent that the investigation by the school's Anti-Bullying Specialist and the principal had determined that "evidence" indicated that the two had "committed the act of harassment, intimidation or bullying." The findings were to be reported to the Board on February 11, 2015. Each student was to have the following interventions, counseling and/or disciplinary consequences imposed: "Administrative Meeting; ABS Counseling Sessions: Follow up with ABS/or other counseling staff." Each parent requested a hearing before the Board and was notified by letter dated February 20, 2015, that the hearing would take place during an executive session of the Board on March 2, 2015. On February 24, 2015, each parent was sent a letter with copies of documents related to the investigation. At the Board meeting on March 2, a PowerPoint presentation was made to the Board, which documented a history between the three boys and the ultimate intervention of school personnel up to January 15, 2015. Then, on January 16, L.M. met with Mr. Pschorr, asking to be removed from the Talented and Gifted (GATE) class due to the conduct of the two perpetrators. On January 21, two other students, apparently the girls, reported that L.M. was receiving continuing bullying. This initiated the HIB investigation by Ms. Thompson, the school's

Anti-Bullying Specialist. On February 3, based on the data collected, the HIB conduct was confirmed by Thompson. On February 3, based on the victim's continued request, he was removed from GATE. The PowerPoint detailed the language found to have been used by the perpetrators towards or concerning L.M., including "dick-sucker, pussy, bitch, asshole, queer, gay, 'get big', tattletale" and a reference to "Busty Deb," noted as the "target's mother." Additional episodes of "making fun", including reference to a "relationship with student-teacher (gay)" and "dating his cousin (Poca-hot-ness") and head-butting, and threatening and insulting text messages were noted as well. Effects of the bullying were detailed, including changes in demeanor as reported by staff and students, lower grades, isolation and increased absenteeism, verbalized to staff and students as a decreased desire to attend school and the requested removal from L.M.'s placement in GATE. The presentation to the Board included reference to the requirements for confirmation of HIB, including "substantial disruption or interference with the orderly operation of the school or a student's rights; an actual or perceived distinguishing characteristics as a motivating factor" and "one of the following: physical or emotional harm to a student . . . or fear of harm to student; effect of insult of demeaning a student or group of students; creation of a 'hostile' educational environment interfering with student's education." The demonstration then discussed the nature of the findings as to how each of the requirements had been met for confirmation of HIB conduct. The Board confirmed the finding of HIB conduct against each student.

In their petition, the petitioning parents describe a series of alleged factors that they contend require that the HIB findings concerning their children be removed. However, allegations made in a petition are not evidence. Here, the Board moves for summary decision, presenting a series of exhibits that demonstrate that an HIB complaint was received, investigated in the normal course, findings were made, a hearing held before the Board at the parents' request where the details of the allegations, investigative findings and rationale for the findings were all presented, and findings confirmed. Despite being given a very long time in which to respond to the motion, and reminded of their opportunity to do so, neither of the petitioning parents ever filed a response. As such, I **FIND** that the evidence in support of the Board's motion stands unopposed by any evidence offered by the parents at all, much less any

that suggests that genuine issues of material fact are in dispute. Again, the statement in a petition concerning alleged misconduct, improper investigation and the like is not evidence. The record demonstrates that the school authorities properly conducted an HIB investigation and that the Board had ample reason to confirm the finding of HIB conduct on the part of both D.J. and D.M. Further, as discussed earlier, the test is not whether this judge or the Commissioner would differ with the Board's findings, but whether the action of the Board was arbitrary, capricious or unreasonable. Based upon the undisputed evidence, I **CONCLUDE** that the Board clearly acted within its scope of authority and reached a rational, evidence-based determination of HIB conduct. For that reason, **IT IS HEREBY ORDERED** that the motion for summary decision is **GRANTED** and the joint 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.

November 16, 2018
DATE

JEFF S. MASIN, ALJ (Ret., on recall)

Date Received at Agency: 11-16-18

Date Mailed to Parties: 11.16.18

mph

LIST OF EXHIBITS:

For petitioners:

None

For respondent:

Exhibit A	Letter dated October 16, 2014 to Ms. W.G. from Thomas P. Denning, Assistant Principal; Discipline Disposition Summary Report for M.J.; Student Incident Report Form, dated January 26, 2015; Letter dated January 16, 2015 to Ms. A.J. from Dr. Kimberly Cark, Assistant Principal; Discipline Disposition Summary Report for J.D.; Student Incident Report Form, dated January 23, 2015
Exhibit B	Numerous investigative materials relating to investigation Report by Anti-Bullying Specialist Melissa S. Thompson
Exhibit C	Letters dated February 2, 2015 to Mrs. A.J. and Mrs. W.G. from Robert L. Blake, Ed.D., Superintendent
Exhibit D	Letters dated February 20, 2015 to Mrs. A.J. and Mrs. W.G. from Robert L. Blake, Ed.D., Superintendent
Exhibit E	Letter dated February 24, 2015 to Mrs. A.J. and Mrs. W.G. from Robert L. Blake, Ed.D., Superintendent, forwarding documentation prior to Board hearing
Exhibit F	PowerPoint presentation
Exhibit G	Joint Petition to Commissioner of Education from A.J. and W.G.

393-18

AGENCY DKT. NO. 157-7/17

K.A., ON BEHALF OF MINOR CHILDREN, D.B., D.A., AND K.A.,	:	
PETITIONER,	:	
	:	COMMISSIONER OF EDUCATION
V.	:	ORDER
BOARD OF EDUCATION OF THE BOROUGH OF LODI, BERGEN COUNTY,	:	
RESPONDENT.	:	

On June 7, 2018, a final agency decision was rendered in this matter, wherein the Commissioner found K.A. liable for tuition in the amount of Fifty Five Thousand Thirty Two Dollars and Forty Four Cents ($55,032.44) – representing tuition for a period of ineligible attendance by her children in the Board's school district during the 2016-17 and 2017-18 school years, through February 9, 2018 – plus $69.74 each for D.B. and D.A., and $65.28 for K.A., for each day that the minor children remained enrolled in the District's schools beyond February 9, 2018. The Board asserts that there were 82 school days from February 9, 2018 through the end of the 2017-18 school year, so the total amount owed to the Board is $71,822.76. The Board subsequently notified the Commissioner that K.A. had failed to comply with the decision, and requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. K.A. 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,.Karen Alberto is now subject to entry of a judgment by the court in the amount of $71,822.76, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/17/18
Date of Mailing: 12/17/18

OAL DKT. NO. EDU 11695-15
AGENCY DKT. NO. 158-7/15

D.M., on behalf of minor child, M.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY AND VICTOR HAYEK, SUPERINTENDENT,	:	DECISION
RESPONDENT.	:	

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

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: 12/17/18

Date of Mailing: 12/17/18



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11695-15

AGENCY DKT. NO. 158-7/15

D.M. O/B/O MINOR CHILD M.M.,

Petitioner,

v.

BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION, SOMERSET COUNTY AND VICTOR HAYEK, SUPERINTENDENT,

Respondents.

D.M., petitioner, pro se

Elizabeth F. Murphy, Esq., for respondents (Busch Law Group, LLC, attorneys)

Record Closed: November 14, 2018 Decided: November 15, 2018

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on August 4, 2015, 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 settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/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.

Nov 15 2018

DATE

CARL V. BUCK III, ALJ

Date Received at Agency: 11-16-18

Date Mailed to Parties: 11-16-18

/lam

EXHIBITS

J-1 Settlement Agreement

J-2 Board Resolution

BUSCH
LAW GROUP LLC

ELIZABETH FARLEY MURPHY
PARTNER
EMURPHY@BUSCHLAWGROUP.COM

November 14, 2018

2018 NOV 14 P 1:27

VIA FAX TO: (609) 689-4100
VIA EMAIL TO: Lysa.Martino@oal.nj.gov

Honorable Carl Buck III, A.L.J.
State of New Jersey
Office of Administrative Law
P.O. Box 049
Trenton, NJ 08625-0049

RE: D.M. o/b/o minor child M.M. v.
Bridgewater-Raritan Reg. Sch. Dist. Bd. of Educ., et al.
OAL Docket No.: EDU-11695-2015

Dear Judge Buck:

This office represents the Respondents, Bridgewater-Raritan Regional School District Board of Education and Victor Hayek, in the matter referenced above. Enclosed please find a copy of the fully-executed Settlement Agreement and certified resolution approving same.

Your Honor's courtesies are appreciated.

Respectfully,

THE BUSCH LAW GROUP LLC

Elizabeth F. Murphy

Elizabeth Farley Murphy, Esq.

EFM:bms
Enc.

cc: Petitioner D.M. (w/enc.) (via email only to Marzulli_Debra@Allergan.com)

J-1

Elizabeth Farley Murphy - ID #021991993
THE BUSCH LAW GROUP, LLC
450 Main Street
Metuchen, NJ 08840
(732) 243-9588 Office
(732) 243-9590 Fax
Attorneys for Respondents Bridgewater-Raritan
Regional School District Board of Education
and Victor Hayek, Superintendent

2018 NOV 14 P 1:27

D.M. o/b/o MINOR CHILD M.M. Petitioners, V. BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION AND VICTOR HAYEK, SUPERINTENDENT Respondents.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU 11695-2015S AGENCY REF NO.: 158-7/15 SETTLEMENT AGREEMENT

WHEREAS, Respondents, Bridgewater-Raritan Regional School District Board of Education ("Board"), is a local educational authority with the responsibility of complying with its obligations under the New Jersey Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13 et seq.; and

WHEREAS, Respondent Victor Hayek is the former Superintendent of Schools; and

WHEREAS, Petitioner D.M. is the parent of M.M., a minor student residing within and attending school in the Bridgewater-Raritan Regional School District ("District"); and

WHEREAS, the District's anti-bullying staff members conducted a harassment, intimidation, and bullying ("HIB") investigation relating to events involving M.M. which occurred in March 2015 when M.M. was seven years old, following which M.M. was determined to have engaged in an act of HIB against another student; and

WHEREAS, Petitioner disagrees with the HIB decision and filed a petition of appeal with the Commissioner of Education ("Commissioner"), which was assigned Agency Reference Number 158-7/15 and OAL Docket Number EDU 11695-15S; 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 Petitioner's statement, attached hereto as Exhibit "A," will be maintained as part of M.M.'s student records for so long as the HIB report is maintained.

2. Petitioner, on her own behalf and on behalf of M.M., 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, arising out of events that have occurred prior to the date on which this Agreement is signed, including but not limited to the HIB matter relating to M.M.

3. The parties agree to refrain from filing any proceeding, action or complaint regarding any claims by or rights of Petitioner or M.M. from the beginning of time through the date of this Agreement. It is expressly understood and agreed, however, that the parties reserve the right to bring a claim before any tribunal of competent jurisdiction to enforce their rights under this Agreement.

4. 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 of liability, responsibility, or wrongdoing, that its HIB decision was incorrect, inappropriate, or unlawful, that any rights of Petitioner or M.M. were violated at any time, or that either party has failed to act in accordance with any laws, statutes, regulations and/or codes.

5. 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. The parties acknowledge that they enter into this Agreement voluntarily and free of coercion.

6. The parties further agree that this Agreement may not be altered, amended, modified, superseded, canceled or terminated except by an express written agreement duly executed by all of the parties which makes specific reference to this Agreement.

7. 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 Petitioner against the Board regarding M.M. from the beginning of time until execution and/or entry hereof.

8. This Agreement shall be subject to ratification by the Board and is without prejudice to either party if the terms are not ratified. Petitioner is 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 Petitioner.

9. 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.

WITNESS:

DATED: 11/8/18

WITNESS:

DATED: 11/13/18

D.M. o/b/o M.M.

DATED: 11/08/2018

Respondent Bridgewater-Raritan
Regional School District Board of Education

By: Jill Gladstone

DATED: 11/13/18

Exhibit A

October 15, 2018

Re: OAL Docket. No.: EDU 11695-2015 S
Harassment, Intimidation and Bullying Course of Events (on Behalf of Madison Marzulli)

To whom it may concern,

The intent of this letter is to provide background concerning an alleged HIB incident that took place in March 2015, involving Madison Marzulli.

Madison was 7-years-old at the time of the incident and was a 2nd grade student at Crim Primary in the Bridgewater Raritan Regional School District (BRRSD). At the time of the incident, Madison was a classified student and had an IEP in place for "Communication Impaired".

The parents of Madison Marzulli disagree with the BRRSD decision to consider this as HIB incident, due to the age of the children and feel that Madison's documented communication impairment was not considered during the school's investigation, although we understand that the BRRSD insists that it was and that the HIB statute and regulations were compiled with fully.

It should be noted that as of this time, Madison does not have a disciplinary record.

Debra Marzulli

DATED: 11/08/2018

Brian Marzulli

DATED: 08-NOV-18

J-1

BOARD OF EDUCATION
OF THE TOWNSHIP OF BRIDGEWATER
AND BOROUGH OF RARITAN
SOMERSET COUNTY, NEW JERSEY
As recorded in the official minute book

The Board of Education of the Township of Bridgewater and Borough of Raritan in the County of Somerset, New Jersey, convened in public session on **Tuesday, November 13, 2018** at the Wade Administration Building, Bridgewater, New Jersey

Jill Gladstone – President
Melanie Thiesse – Vice President

The following members of the Board of Education were present: Mrs. Mead, Mr. Walker, Mr. Malek, Mr. Brookner, Mrs. Hurley, Mrs. Gladstone

The following resolution was offered by Mr. Brookner, seconded by Mrs. Hurley and adopted by roll call vote:

APPROVAL OF SETTLEMENT AGREEMENT
(RESOLUTION NO. OTH-19-17)

ROLL CALL: **AYES: 6**
NOES: 0

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STATE OF NEW JERSEY)
COUNTY OF SOMERSET) ss

I, **Peter Starrs**, Secretary of the Board of Education, of the Township of Bridgewater, in the County of Somerset, hereby certify that the foregoing extract from the minutes of **November 13, 2018** has been compared by me with the original minutes as officially recorded in my office in the minute book of said Bridgewater-Raritan 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 in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this **14th day of November, 2018.**

SEAL

BOARD SECRETARY

CHRISTOPHER CONCATO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RIVER DELL REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In October 2016, the petitioner – a tenured industrial arts teacher employed in the respondent Board's school district prior to a Reduction in Force (RIF) in May 2016 – filed an appeal contending that the Board violated his tenure and seniority rights when he was dismissed during the RIF, while three positions for which he is qualified were then filled by teachers with less seniority. The Board filed a motion to dismiss, contending that the petitioner's appeal was untimely filed under *N.J.A.C.* 6A:3-1.3(i). Petitioner opposed the motion, arguing that the ninety-day limitation period for the filing of an appeal should toll from September 2016, when he first became aware of the newly created positions which had been filled with less senior employees.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; the issue for determination here is what constitutes a "final order, ruling or other action" under the ninety-day rule; in this case, the Board asserted that the date petitioner was terminated by the RIF, on May 11, 2016, represents the final action from which the ninety-days must toll; this argument, however, is inconsistent with case law such as *Kaprow v. Board of Education of Berkeley Tp.*, 131 *N.J.* 572 (1993), which found that the tolling date was not the date of the RIF, but the later date upon which an individual was appointed to the position to which Kaprow claimed entitlement; here, the final action that serves as the basis for petitioner's appeal is the assignment to three teachers to the disputed teaching positions, which occurred on June 7, 2016; the petition in this matter was not filed until October 12, 2016. The ALJ determined that the petition was filed outside of the limitations of the "90-day" rule. Accordingly, the Board's motion to dismiss was granted.

Upon comprehensive review, the Commissioner found that: the ALJ erroneously dismissed the petition as time barred under *N.J.A.C.* 6A:3-1.3(i); summary decision is not appropriate at this stage of the case because there are material facts in dispute as to when petitioner had adequate notice that teaching staff members with less seniority were assigned to positions that petitioner sought in the wake of the RIF. Accordingly, the matter was remanded to the OAL for further proceedings to allow a determination as to when the petitioner had the adequate notice contemplated by *Kaprow, supra.*

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

December 18, 2018

395-18

OAL DKT. NO. EDU 16480-16
AGENCY DKT. NO. 276-10/16

CHRISTOPHER CONCATO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RIVER DELL REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Christopher Concato, and the River Dell Board of Education's (Board) reply thereto.[1] In this matter, the petitioner alleges that his tenure and seniority rights were violated when he was dismissed due to a reduction in force while three teaching positions were filled by individuals with less seniority. The Administrative Law Judge (ALJ) found that the petition of appeal was untimely filed under *N.J.A.C.* 6A:3-1.3(i), and as a result, the ALJ granted the Board's motion to dismiss.

In his exceptions, the petitioner maintains that the ALJ erroneously granted the Board's motion to dismiss. The petitioner contends that the ALJ rightfully concluded that "in determining when the ninety-day rule begins to accrue, it is necessary to consider when the final action of the respondent occurred and when the petitioner received adequate notice of that action." However, the ALJ's determination of the trigger date in this instance is flawed, unreasonable and unsupported by the evidence in the record. The ALJ found that an email that was sent to the "HS Teaching Staff @ River Dell High School" on June 6, 2016, stating that the teaching schedule for

[1] The petitioner filed a reply to the Board's reply exceptions. *N.J.A.C.* 1:1-18.4 does not allow for a reply to reply exceptions, therefore, the petitioner's submission was not considered.

the 2016-2017 school year would be available on June 7, 2016, provided notice to the petitioner that the Board had assigned three teachers to positions that were contested by the petitioner. The petitioner emphasizes that at the time the June 6, 2016 email was sent to the River Dell High School staff and faculty, the petitioner was a teacher at the middle school and there is no evidence that this information was sent to the middle school teachers. Petitioner has stated in his certification that he did not receive any communication from the Board regarding the assignments and it was not until the beginning of the school year in September 2016 that he learned that there were less senior, tenured staff assigned to teach new classes that he was entitled to teach. Thereafter, the petitioner timely filed the petition of appeal on October 12, 2016, well within the ninety-day time requirement.

Petitioner stresses that *N.J.A.C.* 1:1-12.5(b) states that summary disposition is only appropriate when there is no issue of material fact challenged and the moving party should prevail as a matter of law. Further, the ALJ is required to view the competent evidence in the light most favorable to the non-moving party. *Brill v. Guardian Life Insurance Co.*, 142 *N.J.* 520, 539-40 (1995). Here, the petitioner's certification reveals that he had no knowledge of the June 6, 2016 email and related assignments: he had no way of knowing which staff accepted positions, or whether the other staff had less seniority than he did, until his own investigation in September 2016. As such, the ALJ erred when he accepted the facts outlined in the Board's motion to dismiss without any further hearing. The petitioner also contends that where there is a reduction of force (RIF) and the potential entitlement to future positions, the trigger date for purposes of the 90-day rule does not commence on the date of the RIF, but instead, when the petitioner becomes aware of the newly created positions and the appointment of someone else to those positions. Therefore, the Initial Decision should be rejected and the material facts that remain unresolved

regarding what notice the petitioner received – and the sufficiency of the notice – should be resolved at a hearing so that all the issues in this case can be fairly adjudicated.

In reply, the Board argues that the material facts indisputably demonstrate that the petitioner's claim was filed outside the ninety-day limitation period, and therefore the ALJ properly concluded that the Board's motion to dismiss should be granted. In his exceptions the petitioner contends that his certification states that "he did not receive any communication from the Board regarding these assignments;" however, that is not accurate. Instead, the petitioner's certification simply avers that in mid-September he learned for the first time that non-tenured and less senior tenured staff were assigned to the new classes. The facts clearly establish that the assistant principal of the River Dell Regional High School notified the teaching staff on June 6, ,2016 that the schedules for the 2016-2017 school year would be available the next day. Even though the petitioner was a teacher in the middle school, the master teaching schedule for all teachers in the District was available on June 7, 2016 for any teacher to review at any time in the main office. The petitioner should have known at that point which teachers were assigned to teach courses which he claimed an entitlement to teach.

Furthermore, the petitioner's union representative who was investigating facts relative to the petitioner's tenure and seniority claims engaged in communications with the District's Superintendent. Specifically, on July 6, 2016, the Superintendent provided petitioner's union representative with the Board resolution approving the courses in dispute and the teachers assigned to teach those courses during the 2016-2017 school year. Thus, the petitioner had notice and knowledge of the information provided to his union representative, and he should have at least filed his petition within ninety days after receipt of the requisite notice on July 6, 2016, but he failed to do so. The petitioner's claim that he did not possess the necessary information upon which to base a claim until September 2016 is also inconsistent with his action the prior school

year, when he filed a petition challenging the Board's decision to reduce him from a full-time teaching position to a part-time teaching position. Within 10 days after petitioner received notice of the 2015 RIF, he filed a petition of appeal challenging the Board's action and asserted his entitlement to teach 22 courses.[2] Finally, the Board maintains that the cases cited by the petitioner in his exceptions do not stand for the premise for which they are asserted. Therefore, the Board argues that the Initial Decision should be adopted as the final decision in this matter.

Upon a comprehensive review of the record, the Commissioner finds that the ALJ erroneously dismissed the petition of appeal as time barred under *N.J.A.C.* 6A:3-1.3(i). Pursuant to *N.J.A.C.* 1:1-12.5(b), a motion for summary decision[3] may be granted if the papers and discovery, together with any supporting affidavits, show there is no genuine issue of material fact and that the moving party is entitled to prevail as a matter of law. A determination regarding 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 disputed issue in favor of the non-moving party. *Brill*, *supra*, 142 *N.J.* at 529. The Commissioner finds summary decision is not appropriate at this stage of the case because there are material facts in dispute as to when the petitioner had adequate notice that the newly created classes were assigned to teaching staff members with less seniority.

Under *N.J.A.C.* 6A:3-1.3(i), a petition must be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party or agency, which is the subject of the requested contested case

[2] The other matter referenced in the Board's exceptions is *Christopher Concato v. Board of Educ. of the River Dell Regional School District, Bergen County*, Commissioner Decision No. 54-17 (decided February 13, 2017), *aff'd.* Appellate Division (August 14, 2018).

[3] The same standard is applied in administrative proceedings for a motion to dismiss and a motion for summary decision. Both motions seek to resolve a case without a plenary hearing.

hearing." Guidance as to what constitutes notice sufficient to trigger the running of this regulatory provision was provided by the Supreme Court in *Kaprow v. Board of Education of Berkeley Tp.*, 131 *N.J.* 572 (1993). 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* at 587.

In this case, the ALJ determined that the petitioner had adequate notice of the Board's final action on June 7, 2016, and therefore the October 12, 2016 petition of appeal was filed outside the 90-day limitations period. The ALJ found – based upon an email sent from the assistant principal of the River Dell High School to high school staff on June 6, 2016 – that the petitioner had notice on June 7, 2016 of the assignment of teaching staff to the newly created positions. The June 6, 2016 email provided notification that the teaching schedule for the 2016-2017 school year would be available on June 7, 2016. Importantly, at the time of the email, the petitioner was not a teaching staff member at the high school; rather, petitioner was a middle school teacher. Moreover, the Board presented no evidence to indicate: that middle school teachers also received the email; that the petitioner ever received the email; or that the petitioner was aware that the master teaching schedule was available on June 7, 2016.

The Board also maintains that the petitioner's union representative and the Superintendent exchanged emails in June and early July of 2016 regarding the newly created positions, and that this exchange provided the petitioner with sufficient notice to trigger the limitations period. Again, based upon the evidence submitted by the Board with the motion to dismiss, there is no definitive indication as to whether the union representative was acquiring information on the petitioner's behalf or whether the union representative provided the petitioner with any notice of the exchange. On the other hand, in response to the Board's motion to dismiss,

the petitioner submitted a certification stating that in mid-September 2016, he learned for the first time that less senior tenured staff were assigned to newly created classes that the petitioner claims he is eligible to teach. When viewing the competent evidentiary material in the light most favorable to the petitioner, the non-moving party, it cannot be found that the petitioner had the requisite notice of the Board's action in June 2016. Based on the limited information presented in connection with the motion to dismiss, petitioner's certification was uncontroverted. Therefore, before this matter can be dismissed on procedural grounds, the record needs to be further developed to determine when the petitioner had the adequate notice contemplated by *Kaprow*, *supra*, that the newly created classes were assigned to less senior teaching staff members.[4]

Accordingly, the Commissioner hereby remands this matter to the OAL for further proceedings consistent with the concerns set forth above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/18/18
Date of Mailing: 12/18/18

[4] The Commissioner is in accord with the ALJ's conclusion that the tolling date in this matter is not the date of the RIF as the Board's action that is being challenged is the violation of the petitioner's tenure and seniority rights through the appointment of less tenured staff members to positions that the petitioner alleges he is entitled to.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 16480-16
AGENCY DKT. NO. 276-10/16

CHRISTOPHER CONCATO,

Petitioner,

v.

RIVER DELL REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION BERGEN COUNTY,

Respondent.

Alfred F. Maurice, Esq., for Petitioner (Springstead & Maurice, attorneys)

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

Record Closed: August 20, 2018 Decided: September 21, 2018

Before: **LELAND S. MCGEE,** ALJ (Ret., on recall):

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Christopher Concato (Petitioner or Concato) was a teacher employed by the River Dell Regional Board of Education (Respondent or the Board). Answering Certification of Christopher Concato (Pet'r Cert.) ¶ 2. Concato holds several teaching certifications, including the relevant certification for teacher of industrial arts. Id. at ¶ 6. He has worked

He has worked for the River Dell Board since February 25, 2002, as an industrial arts teacher and he eventually received tenure and began accruing seniority. Id. at ¶¶ 5, 8.

On October 12, 2016, he filed an appeal to the Commissioner, arguing that his tenure and seniority rights were violated when he was dismissed due to a reduction in force (RIF) while three teaching positions were filled by individuals with less seniority. Id. at ¶ 5. On May 10, 2016, the Board passed a Resolution abolishing twenty percent of the industrial arts teachers at River Dell Middle School effective July 1, 2016. Certification of Patrick J. Fletcher in Support of Respondent's Motion to Dismiss Petition of Appeal (Fletcher Cert.) ¶ 16.

Patrick J. Fletcher (Fletcher), the Superintendent of Schools for the River Dell Regional School District, stated that the classes in controversy are cyber-education classes named Computer Systems and Networking and SUPA Cyber Security, and they were created at a board meeting on November 16, 2015. Supplemental Certification of Patrick J. Fletcher in Support of Respondent's Motion to Dismiss Petition of Appeal (Supplemental Fletcher Certification) ¶¶ 6, 7. Those classes required assigned teachers to have a certification in science and mathematics respectively. Id. at ¶ 9. The creation of those classes was published during the public River Dell Board meeting on November 16, 2015, and the positions were posted on the publicly accessible River Dell District website on February 9, 2016. Id. at ¶¶ 8, 10. Later, on June 7, 2016, three tenured teachers holding the required certifications were assigned to those positions, and those assignments were disseminated via email to all faculty. Id. at 7:21. Fletcher also provided documentation of these classes and the teachers who filled them to Raymond E. Skorka (Skorka) who is Concato's field representative for the New Jersey Education Association. Ibid.

Concato states that he first discovered that the positions had been created in the summer of 2016. Concato Certification ¶ 4. He discovered which teachers had been assigned to those classes in September 2016. Id. at ¶ 5. Thereafter, on October 12, 2016, that discovery, Concato filed his appeal. On October 26, 2016, the matter was transmitted to the Office of Administrative Law (OAL) pursuant to pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, where it was filed on October 28, 2016.

On April 12, 2017, Respondent filed this Motion to Dismiss and on April 27, 2017, Petitioner filed an Answer to the Motion. On May 11, 2017, Respondent filed a Reply to the Answer and on August 14, 2018, submitted supplemental information in support of his position.

ARGUMENTS

The Board seeks dismissal of Petitioner's appeal pursuant to N.J.A.C. 6A:3-1.3(i), which states that any appeals must be filed within ninety days of the final order, ruling or action that gives rise to the petition. In determining when the ninety-day rule begins tolling, the River Dell Board argues that "it begins to run when a petitioner learns of facts that would enable him or her to file a timely claim." Br. in Supp. of Resp't Mot. to Dismiss Pet. of Appeal (Resp't Br.) at 11 (citing Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 588-89 (1993) (motion to dismiss granted because petitioner filed appeal five months after receiving notice)). Respondent also argues that "informal awareness of adverse action" is sufficient to fulfill the ninety-day rule's notice requirement. Mazzeo v. Bd. of Educ. of Twp. of Barnegat, EDU 4561-05, Initial Decision (August 18, 2005), modified, Comm'r (September 29, 2005), http://njlaw.rutgers.edu/collections/oal/.

The Board goes further, arguing that the 90-day rule has been adhered to strictly and that exceptions occur only when the petitioner can "identify any substantial constitutional issue or fundamental public interest beyond that of concern to petitioners themselves." E.G.M. ex rel. J.M. v. Bd. of Educ. of Mahwah, EDU 02119-13 (April 9, 2013), adopted, (Comm. Ed. May 21, 2013), http://njlaw.rutgers.edu/collections/oal/.

Finally, Respondent argues that the ninety-day rule begins to accrue at the time of the "initial action" suggesting that the date of the initial action is the date that Concato was notified of the RIF. Id. at 22 (citing Meyer v. Wayne Twp. Db. of Educ., 1984 S.L.D. 1849, rev'd, 1986 S.L.D. 3094, 3099 (St. Bd. March 5. 1986), aff'd, (App. Div. September 24, 1987)).

In his Answer, Concato argues that the ninety days should begin tolling when "he first became aware of the newly created position and the appointment of someone else to it." Br. in Supp. of Pet'r Answer to Resp't Mot. to Dismiss (Pet'r Br.) 4 (citing Gordon v Bd. of Educ. of the Twp. of Passaic, 1985 S.L.D. 1929, St. Bd. (March 6, 1985)). More specifically, he suggests that the final action taken by the River Dell Board was the appointment of individuals who are less entitled to the position. Id. at 5 (citing Beshaw v. Bd. of Educ. of Borough of Oakland, A-3958-97T5, slip op. at 4 (App. Div. Mar. 23, 1999). Because he had no actual knowledge of the appointments until September 2016, Concato argues that petition he filed on October 12, 2016, is well within the 90-day limit. Id. at *9.

Furthermore, Concato argues that the Board should have provided him with notification that the positions were available pursuant to N.J.S.A. 18A:28-12., which he asserts should have been sent to him.

In response, the Board argues that by any calculation of the tolling date established by the facts, Concato's petition falls outside of the ninety-day rule, and they provide evidence demonstrating that the classes had been created on November 16, 2015; and were published on the school website on February 9, 2016. Resp't Reply Br. to Pet'r Answer to Resp't Mot. to Dismiss (Resp't Reply Br.) 13-14; Supplemental Fletcher Certification ¶ 13. Respondent argues that because these dates happened prior to Concato's RIF, the tolling date should be May 11, 2016. Resp't Reply Br. 15-16. Furthermore, Respondent provided documents regarding the classes and the teachers who filled them to Skorka on June 6, 2016, is additional notice that places Concato's application beyond the limit. Id. at 17.

DISCUSSION

Defining "final order, ruling or other action"

The ninety-day rule reads that:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. 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.
>
> [N.J.A.C. 6A:3-1.3(i).]

In calculating the limitations period under the ninety-day rule, the focus is on "the date of the employer's wrongful act as the accrual date for a cause of action," not "the date on which the consequences of the act [are] directly felt by the employee." Nissman v. Bd. of Educ. of Long Beach Island, 272 N.J. Super. 373, 381 (App. Div. 1994). In Nissman, on April 23, 1990, the Board of Education of the Township of Long Beach Island decided that Nissman's contract would end on August 31, 1990. Id. at 375. The Appellate Division affirmed the State Board of Education's holding that the ninety-day period began to run on the date of the decision not on the date the contract ultimately expired. Id. at 382.

Kaprow provides another example of a final action that is analogous to the instant case. Kaprow was the only tenured assistant superintendent in the school district when he was affected by a RIF on June 31, 1981. Kaprow, 131 N.J. at 576. On February 23, 1988, Kaprow became aware that, in violation of his tenure rights, two assistant superintendent positions had been filled by other individuals on September 9, 1986, and July 1, 1987. Id. at 577. Kaprow filed a petition on August 1, 1988, to assert those rights after failing to reach a settlement during negotiations with the district. Id. at 578. The Supreme Court of New Jersey found that the final action of the State Board was the appointment of nontenured individuals to the positions the petitioner was claiming. Id. at 588.

Furthermore, both actions and omissions by the Board may begin the tolling of the of the 90 days. Mazzeo, EDU 4561-05. In Mazzeo, the petitioner filed to enforce a prior ruling reinstating her to principal that was issued on December 23, 2004. Ibid. The Commissioner of Education determined that the respondent likely received the

order on January 3, 2005, and their subsequent failure to reinstate the petitioner "on or about that date" was the final action that triggered the ninety-day rule. Ibid.

Applying these standards in the instant case, it is possible to determine which actions by the River Dell Board should be considered the final action for the purpose of Concato's petition. The River Dell Board asserted that the date Concato was terminated by the RIF on May 11, 2016, was the focus of the controversy. Resp't Br. 22. However, this is inconsistent with case law, such as Kaprow, which determined that the tolling dates were later alleged violations of tenure and seniority rather than the date of the RIF. Specifically, Kaprow cited the appointment of the individual to the position, not the creation and subsequent failure to appoint the petitioner to those positions as the action that violated Kaprow's tenure. Kaprow, 131 N.J. at 588. Rather, the final action that serves as the basis for Concato's petition is the assignment of the three teachers to the disputed teaching positions, which occurred on June 7, 2016. Supplemental Fletcher Certification 7:21.

Defining Notice

To satisfy the statute, the notice required by the regulation:

> must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. See Burns v. West Am. Corp., 137 N.J. Super. 442, 446 (Dist. Ct. 1975). Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. See Apex Roofing Supply Co. v. Howell, 59 N.J. Super. 462, 467 (App. Div. 1960). A limitations period has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. Ochs v. Fed. Ins. Co., 90 N.J. 108, 112 (1982). The second purpose is "'to penalize dilatoriness and serve as a measure of repose'" by giving security and stability to human affairs. Ibid. (quoting Farrell v. Votator Div., 62 N.J. 111, 115 (1973)).
>
> [Kaprow, 131 N.J. at 587.]

In Kaprow, the Court found that the ninety-day rule did not begin tolling until the petitioner received informal information regarding those positions and their appointees, and the Court refused to establish a higher notice standard. Id. at 588-89. Kaprow's claim was found to be outside the ninety-day limit. Id. at 589.

Providing a more concrete example, the Appellate Division, affirming decisions by the OAL and the State Board, found that an announcement made during a faculty meeting regarding the appointments to contested positions was considered adequate notice to begin the ninety-day rule. Beshaw, A-3958-97T5, slip op. at 4. Beshaw, after she had been affected by a RIF, filed a petition on January 19, 1996, claiming that the Oakland Board of Education violated her tenure rights by assigning non-tenured teachers to two classes. Id. at 1-2. The OAL dismissed her claim, finding that the meeting, which took place on September 5, 1995, provided adequate notice, and the Appellate Division agreed, finding that Beshaw was "provided sufficient information to alert [her] as to her qualifications to teach the courses." Id. at 5. Furthermore, the Appellate Division found that using the faculty meeting as the tolling date provided for "the necessity for repose in administering school affairs" as required in the wake of Kaprow. Id. at 4.

In the case at bar, on June 7, 2016, the assignment of the three teachers to the contested classes were announced to all teachers via an email that included the full teaching schedule for the 2016-2017 academic year. Supplemental Fletcher Certification ¶21. That email acts as an analogue to the faculty announcement in Beshaw and should be considered sufficient notice for beginning the ninety-day limit.

Concato asserts that actual knowledge is required for the ninety-day limit to begin tolling. Pet'r Br. 9. However, there is little support for this assertion in law. The regulation simply requires "notice," and per Kaprow, that notice need not be formal. Kaprow, 131 N.J. at 588.

Relaxing the 90-day rule

There are times where the ninety-day rule may be relaxed. In particular, the limit may be extended in "cases involving (1) important and novel constitutional questions; (2) informal or ex parte determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification." Brunetti v. Borough of New Milford, 68 N.J. 576, 586 (1975). Concato does not attempt to argue that his case requires an extension under any of these grounds, and as such, there is no reason to consider relaxing the ninety-day rule in this case.

Summary Decision

Under the New Jersey Uniform Administrative Procedure Rules, a party may move for summary decision regarding all or any substantive issues in a case. N.J.A.C. 1:1-12.5(a). Motions for summary decision may be granted if the papers and discovery, together with any supporting affidavits, show there is no genuine issue of material fact and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). A motion for summary decision is almost identical to the standard used for summary judgment under the New Jersey Rules of Court, which provides that summary judgment should be granted if:

> the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences there from favoring the non-moving party, would require submission of the issue to the trier of fact.
>
> [R. 4:46-2(c).]

In Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 536 (1995), the New Jersey Supreme Court further refined the standard for summary

decision with this analysis: "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." Thus, a court should deny a motion for summary judgment only where the party opposing the motion has come forward with evidence that creates a genuine issue of material fact. Id. at 529. The Brill Court stated:

> A determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. 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, 477 U.S. 242, 251-52 (1986)).]

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to 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, 142 N.J. at 541.

For a party opposing summary decision to prevail, that party must file a responding affidavit setting forth specific facts demonstrating the existence of a genuine issue that can only be determined by an evidentiary proceeding. Ibid. The opposing party must demonstrate, moreover, that the disputed issue of fact is material to the adjudication. See Frank v. Ivy Club, 120 N.J. 73, 98 (1990). The genuinely disputed material fact must be essential to the decision in the case. Ibid. In addition, the opposing party must establish the issue with competent evidential materials. Robbins v. Jersey City, 23 N.J. 229, 240-41 (1957). "Bald allegations or naked conclusions" are insufficient to warrant an evidentiary hearing. J.D. ex rel. D.D.H. v. N.J. Div. of Developmental Disabilities, 329 N.J. Super. 516, 525 (App. Div. 2000). If the opposing

party fails to raise a material factual issue with competent proofs, then the issue should be resolved on summary decision. Frank, 120 N.J. at 98-99.

A contested case can be summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed material facts indicate that a particular disposition is required as a matter of law. In re Robros Recycling Corp., 226 N.J. Super. 343, 350 (App. Div.), certif. denied, 113 N.J. 638 (1988). A summary decision must be based on an examination of the totality of circumstances, mitigating and aggravating factors, adequate factual findings and conclusions of law. Ibid.

CONCLUSION

In determining when the ninety-day rule begins to accrue, it is necessary to consider when the final action of the respondent occurred and when the petitioner received adequate notice of that action. In the instant case, the date for both the action and notice is the same. On June 7, 2016, the River Dell Board assigned three teachers to the positions that are contested by Concato. Supplemental Fletcher Certification ¶ 21. However, Concato did not file his petition until October 12, 2016. Concato Certification ¶ 5. That filing occurred 127 days after the date of action and notice, placing Concato's petition outside of the ninety-day time limit by 37 days and therefore barring Concato from pursuing relief in this action.

For the foregoing reasons I **CONCLUDE** that Respondent's Motion to Dismiss should be granted because Petitioner's claim was filed outside of the limitations of the "90-day" rule.

ORDER

For the foregoing reasons it is hereby **ORDERED** that Respondent's Motion to Dismiss is hereby **GRANTED**.

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

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

September 21, 2018
DATE

LELAND S. McGEE, ALJ

Date Received at Agency: September 21, 2018

Date Mailed to Parties:
LSM/lr

396-18R

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.	:	

SYNOPSIS

This matter comes before the Commissioner on remand from the Appellate Division. Petitioner – formerly employed as a teacher in Lawrence Township schools – was disqualified from employment in any New Jersey school or educational facility under the supervision of the Department following his criminal conviction in 2012 in the Bucks County, Pennsylvania, Court of Common Pleas. Petitioner's conviction stemmed from a criminal complaint that petitioner had fired a rifle toward two teenagers on his property; petitioner contended that the teens were trespassing. The Criminal History Review Unit (CHRU) – in determining that petitioner's crimes were disqualifying under *N.J.S.A.* 18A:6-7.1 – relied upon two of petitioner's convictions under Pennsylvania law, one for possession of instruments of a crime and one for recklessly endangering another person. By decision dated August 21, 2014, the Commissioner determined that one of petitioner's convictions in Pennsylvania was for a crime involving the use or threat of force upon another person, and – since that conviction was for an offense enumerated in *N.J.S.A.* 18A:6-7.1 – petitioner was properly disqualified from teaching. On appeal, the Appellate Division disagreed with the Commissioner's decision, and remanded the matter for further proceedings. The Commissioner, determining that additional fact-finding was required, transferred the case back to the Office of Administrative Law (OAL).

On remand, 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 was convicted in Pennsylvania of possessing instruments of a crime, in violation of 18 Pa.C.S.A. §907(a), which is a crime "substantially equivalent" to *N.J.S.A.* 2C:39-4(a); further, petitioner is also disqualified by *N.J.S.A.* 18A:6-7(1) due to his conviction for recklessly endangering another person. Accordingly, the ALJ granted summary decision to the respondents, and dismissed the petition.

Upon comprehensive review of the record, the Commissioner concurred with the ALJ – for the reasons set forth in the Initial Decision – that the petitioner's conviction for possessing instruments of crime, in violation of 18 Pa.C.S.A. §907, is an offense substantially equivalent to *N.J.S.A.* 2C:39-4(a); further, the Commissioner also concurred with the ALJ that the petitioner is also disqualified from employment under *N.J.S.A.* 18A:6-7.1 as the result of his conviction for recklessly endangering another person. Accordingly, the Initial Decision of the ALJ 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.

December 18, 2018

OAL DKT. NO. EDU 12761-16
(ON REMAND 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.[1] Petitioner herein is challenging the determination of the New Jersey State Department of Education, Criminal History Review Unit (CHRU), that he is statutorily disqualified from school employment based upon convictions for certain crimes in the state of Pennsylvania. Petitioner contends that the criminal convictions on which CHRU based its determination – namely, recklessly endangering another person in violation of 18 *Pa.C.S.A.* § 2705 and possessing instruments of crime in violation of 18 *Pa.C.S.A.* § 907 – do not constitute disqualifying convictions under *N.J.S.A.* 18A:6-7.1.

Upon a comprehensive review of the record, the Commissioner concurs with the Administrative Law Judge – for the reasons stated in the Initial Decision – that the petitioner's conviction for possessing instruments of crime, in violation of *Pa.C.S.A.* § 907, is an offense substantially equivalent to *N.J.S.A.* 2C:39-4(a). As a result, the petitioner is disqualified from

[1] The parties did not file exceptions to the Initial Decision.

employment or service as a teacher in New Jersey. The Commissioner is likewise in accord with the ALJ's determination that the petitioner is also disqualified for employment under *N.J.S.A.* 18A:6-7.1 due to his conviction for recklessly endangering another person. Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter.

IT IS SO ORDERED.[2]



COMMISSIONER OF EDUCATION

Date of Decision: 12/18/18

Date of Mailing: 12/18/18

[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
OAL DKT. NO. EDU 12761-16
AGENCY DKT. NO. 51-3/12
(ON REMAND OAL DKT. NO. EDU 5753-12)

DAVID KELLY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT, AND BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCE, MERCER COUNTY,

Respondents.

Edward Cridge, Esq., for petitioner (Mellk O'Neill, attorneys)

Joan Scatton, Deputy Attorney General, for respondent New Jersey Department of Education (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Casey P. Acker, Esq., for respondent Board of Education of the Township of Lawrence (Lenox, Socey, Formidoni, Giordano, Cooley, Lang & Casey, attorneys)

Record Closed: October 26, 2018 Decided: November 16, 2018

BEFORE **JEFF S. MASIN**, ALJ (Ret., on recall):

David Kelly was employed by the Lawrence Township School District as a tenured music teacher. On February 3, 2012, the Criminal History Review Unit (CHRU) of the New Jersey Department of Education notified the superintendent of the Lawrence Township Board of Education that Mr. Kelly had been convicted of a "disqualifying crime or offense" for which he had been arrested on August 22, 2011, and convicted on January 24, 2012, in Bucks County [Pennsylvania] Court of Common Pleas after a trial by jury. As such, Kelly was "permanently disqualified or ineligible for employment . . . with any school or educational facility under the supervision of the Department of Education." The letter did not identify the statutory basis for the disqualification arising from this conviction: that provision is N.J.S.A. 18A:6-7.1. The letter does not specify the statutory violations of Pennsylvania law of which Mr. Kelly was convicted. Following its receipt of the letter, the Board's director of personnel notified Kelly by letter dated February 9, 2012, that he was to be terminated as of February 3, 2012. Kelly ultimately filed an appeal of his disqualification with the Department of Education, Bureau of Controversies and Disputes. Following the CHRU's filing of an answer, the contested case was transferred to the Office of Administrative Law.

While Mr. Kelly was also convicted of other offenses, the CHRU identified the convictions which it relied upon for the decision that Mr. Kelly was disqualified from employment as his convictions for possession of instruments of crime, in violation of 18 Pa. Con. Stat. §907(a) and for recklessly endangering another person, in violation of 18 Pa. Con. Stat. §2705.

After a motion for summary decision was filed, Administrative Law Judge Pat Kerins issued a decision, Kelly v. New Jersey State Department of Education, Criminal History Review Unit and Board of Education of Lawrence, EDU 5753-12, Initial Decision (May 23, 2014), http://njlaw.rutgers.edu/collections/oal/, determining that the statutory disqualification did not apply, finding that the convictions of Pennsylvania law were not for offenses "substantially similar" to offenses identified as disqualifying under N.J.S.A. 18A:6-7.1. The Commissioner of Education reviewed the judge's decision and disagreed, determining that Mr. Kelly's conviction in violation of 18 Pa. Con. Stat. §2705

was for a crime involving the use or threat of force upon another person, and since that conviction was for an offense enumerated in N.J.S.A. 18A:6-7.1, Kelly was properly disqualified from teaching. The Commissioner declined to determine if Kelly was also disqualified from teaching as a result of his conviction for possessing an instrument of crime. Kelly's appeal was dismissed. Kelly, EDU 5753-12, Comm'r (August 21, 2014), http://njlaw.rutgers.edu/collections/oal/.

Both the judge and commissioner's decisions were based upon information gathered from the Affidavit of Probable Cause that was filed in connection with the Pennsylvania investigation. On appeal, the Appellate Division did not agree with the Commissioner's decision, instead remanding the case to the Commissioner for further proceedings. Kelly v. N.J. Dep't of Educ., Criminal History Review Unit and Bd of Educ. of Lawrence, No. A-0679-14T4 (June 29, 2016), https://njlaw.rutgers.edu/collections/courts/. As will be discussed, Mr. Kelly contends that the remand was limited to one issue, while the respondents disagree with that assessment. Thus, it is necessary to examine the court's decision.

Based upon the Appellate Division's discussion, the Affidavit of Probable Cause described an incident in which it had been reported that one of two teenaged victims alleged shots had been fired at them as they walked through property later determined to be that of Mr. Kelly. The victims claimed that a white male who appeared to be intoxicated screamed at them, told them that he had guns, and told them where they were allowed to walk. While exiting the property, they heard gunshots and noticed that the man had a rifle. According to the officer reporting to the affiant, the victims later identified Kelly as the person who had "shot at them." The Appellate Division, for reasons to be discussed further below, determined that the Affidavit did not provide the basis for concluding that Kelly had used or threatened to use force when he committed the crime of recklessly endangering another person. The court found the record before the Commissioner could not justify disqualification from teaching under the New Jersey prohibition for this conviction. Additionally, the court noted that the Commissioner had not considered the judge's decision that Kelly's conviction for possessing instruments of crime was not substantially equivalent to one of the enumerated offenses in N.J.S.A. 18A:6-7.1.

The Commissioner, determining that additional fact-finding was required, transferred the case back to the Office of Administrative Law. Following that transfer, in early September 2018, both the CHRU and the Lawrence Board of Education moved for summary decision, as permitted by N.J.A.C. 1:1-12.5. On September 21, 2018, due to Judge Kerins' voluminous calendar, the case was transferred to this administrative law judge, retired on recall. Mr. Kelly responded to the motions on October 10, 2018. Replies were then submitted by the Board and the CHRU and the motion record closed on October 26, 2018.

The Scope of the Remand

In its decision, the Appellate Division, citing N.J.A.C. 1:1-15.5(b), determined that while hearsay evidence is generally admissible in administrative proceedings, nevertheless, "'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.' The court found that the contents of the affidavit were not supported by legally competent evidence in the proceeding before the ALJ." Kelly, No. A-0679-14T4, https://njlaw.rutgers.edu/collections/courts/ (citations omitted). More importantly in the court's view, neither the ALJ nor the Commissioner considered the evidence that was actually presented to the jury in the four-day trial that Mr. Kelly underwent in Pennsylvania in January 2012. That evidence, which may or may not have included the "alleged facts in the affidavit", was not part of the record.

> Consequently, based on this record, Kelly cannot be disqualified from teaching under N.J.S.A. 18A:6-7.1(c)(1) because of this particular conviction.
>
> As the commissioner did not consider the ALJ's decision that Kelly's conviction for possessing instruments of crime was not substantially equivalent to one of the enumerated offenses in N.J.S.A. 18A:6.7.1, we remand this matter to the commissioner for consideration of this remaining issue.

Mr. Kelly understands the Appellate Division to have only remanded to the Commissioner the issue of his possible disqualification based upon the conviction for possessing instruments of crime, described in the court's opinion as the "remaining issue." However, while surely it was the manifest intention of the court that the remand address that issue, it is also quite reasonable to understand the decision as not precluding the Commissioner's consideration of a more complete record regarding the issue of possible disqualification due to the conviction for recklessly endangering another. The court identified the flaw in the Commissioner's analysis as regards that question to have been that the Commissioner did not "ascertain if the jury had found Kelly used or threatened to use force", a question for which the court said the Affidavit, with its double hearsay and factual inconsistencies, did not "provide a basis to conclude" whether "Kelly used or threatened to use . . . when he committed the crime of recklessly endangering another." However, the present record on remand, upon which these motions are to be decided, includes the transcript of the Pennsylvania proceedings, including the charge to the jury by Honorable Diane E. Gibbons, Judge of the Court of Common Pleas, Seventh Judicial District, Bucks County, who presided at the trial and sentenced Kelly after the jury returned its verdict on January 27, 2012, as well as the Bucks County Criminal Court Sheets and Bill of Information, part of the Bucks County Criminal Case File for Commonwealth of Pennsylvania v. David Kelly, Case No.: CP-09CR-0006418-2011. Thus, the information that the court determined to be missing from the record when the ALJ and Commissioner first considered the case is now before me. As for the reference to the "remaining issue," that may be understood to address the fact that while the ALJ had ruled on the disqualification for the conviction of possessing instruments of crime, the Commissioner had not, and thus, the question of a disqualification on that ground still awaited a final decision by the Commissioner, one that, once issued, if unfavorable to Kelly, might then be the subject of a further appeal from that final agency action. Considering that the court's criticism on the first issue, the only one the Commissioner ruled on, was aimed at the lack of a sufficient record to properly decide the question, and given the important public interest involved in regard to the authorization of the certificated individual to teach in the public schools, I **CONCLUDE** that the Appellate decision did not intend to foreclose consideration of a more complete record as to both potential grounds for disqualification.

Summary Decision

Summary decision motions are permitted by N.J.A.C. 1:1-12.5. The standard for determining such motions was established by the New Jersey Supreme Court, first in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J 67, 74-75 (1954), and later refined in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). Under the Brill standard, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." Here, the record of the criminal trial in Pennsylvania, including the testimony, jury charge and verdict, establish the factual grounds for the contention that, as a result of the convictions, Mr. Kelly is statutorily disqualified. The jury's verdict in a trial held before a competent court of a sister state must of course be accepted. I **CONCLUDE** that determination of the legal arguments surrounding the issue of substantial equivalency between New Jersey and Pennsylvania criminal statutes does not require any additional fact finding, except as to the determinations which the jury reached and the directions that were provided to them as the law that they had to apply in determining the issues before them. These facts are spelled out in the trial record and are not in dispute, except as to their legal consequences. Summary decision is the appropriate means for resolving this case

Are the Convictions for Crimes "substantially equivalent" to New Jersey Crimes?

N.J.S.A. 18A:6-7.1 provides

> An individual, except as provided in subsection g. of this section, shall be permanently disqualified from employment or service under this act if the individual's criminal history record check reveals a record of conviction for any crime of the first or second degree; 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
>
> d. For the purposes of this section, a conviction exists if the individual has at any time 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.

As the convictions at issue here occurred in Pennsylvania, any disqualification that Mr. Kelly may suffer must result from a determination that one or both of the crimes of which he was convicted of is "substantially equivalent" to those referred to in N.J.S.A. 18A:6-7.1. Mr. Kelly was convicted on two counts of simple assault, 18 Pa. Con. Stat. §2701(a)(3); one count of possessing an instrument of crime, 18 Pa. Con. Stat. §907(a); two counts of recklessly endangering another person, 18 Pa. Con. Stat. §2705; and one count of disorderly conduct, 18 Pa. Con. Stat. §5503(a)(4). As has been noted, the convictions upon which the CHRU determined Mr. Kelly's disqualification were for reckless endangering another person and possessing an instrument of crime. The convictions for simple assault and disorderly conduct were not deemed disqualifying.

18 Pa. Con Stat. §907(a) provides, "A person commits a misdemeanor of the first degree if he possesses any instrument of crime with intent to employ it criminally." And 18 Pa. Con. Stat. §2705, reads, "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."

During his trial in Pennsylvania, Mr. Kelly was confronted with evidence from the two teenagers that he had yelled and cursed at them for being on his property and screamed that he had "guns." Shortly after this, one of the boys saw him with a gun and a shot was fired. Kelly later admitted to a police officer that he did possess a .22 rifle

and that he had fired it after being advised that two individuals, referred by Kelly as teenagers, were on his property. Kelly told the officer that the teenagers said that they were going to fish (they testified that they had fishing poles with them) and he had directed them to a path that was apparently not on his property. However, they crossed back on to his property and, at that time, he fired the rifle, hitting a saw horse that was about fifteen to twenty feet from the house.[1]

Judge Gibbons instructed the jury on the elements of simple assault under Pennsylvania law. While the CHRU did not identify conviction for assault as grounds for disqualification, nevertheless, as will be seen, the jury's verdict on this charge provides some context for understanding the import of other charges of which Kelly was convicted. Judge Gibbons stated,

> Simple assault. It's actually called simple assault by physical menace. A defendant is guilty of simple assault by physical menace when he attempts, tries, to put another in fear of imminent serious bodily injury by engaging in conduct that is physically menacing or frightening . . . The defendant attempts, meaning he has the specific intent, and takes a substantial step towards putting another person in fear of imminent serious bodily injury . . . The defendant is guilty of simple assault would have to attempt, which means he has a specific intent to put another person in fear, takes a substantial step towards causing that or trying to cause that fear, and the fear he is attempting to cause Is put them in fear of imminent serious bodily injury. Serious bodily injury is defined as an injury which would create a substantial risk of death or an injury which could cause serious permanent disfigurement, or an injury which would cause a protracted loss of a bodily member or organ. And the Commonwealth's evidence—what the Commonwealth argued to you was that the defendant created a risk—wanted to put them in fear of serious bodily injury, meaning that they would be shot. That's what their argument was. . . . You could find that the defendant attempted to put another person in fear of imminent serious bodily injury by engaging in conduct, specifically he shot—he intentionally shot the weapon in the direction of the two teenagers. If you find that the defendant did not engage in that conduct, there could be a second

[1] According to the police witness, he first denied having fired the rifle, but then admitted to having done so after the officer explained to him that Kelly's wife had said that she heard the weapon fired. According to the witness, she heard a loud bang.

> mechanism or means by which you could find him guilty of simple assault; And that would be that he handled the weapon, displayed the weapons, brandished the weapon in such a fashion, specifically showing teenagers the weapon in such a manner that was the physically-menacing behavior that he utilized in order to frighten the teenagers. So it could be either one or both. You may find that he did both, or you may find that he did neither.
>
> [Tr., January 27, 2012, at 575:5 to 577:15.]

On the charge of simple assault, the jury found the defendant guilty. However, the jury did not "find that the defendant intentionally discharged his rifle in the direction of the victims." Id. at 586:3-9. Judge Gibbons had specifically tailored the jury sheet to obtain the jury's position on this issue, as she felt that if there was conviction for any of the charges, the answer would be a factor in determining the sentence.

Possessing Instruments of Crime

The CHRU argues that Mr. Kelly's conviction for possessing instruments of crime, 18 Pa. Con. Stat. §907(a) is similar to N.J.S.A. 2C:39-4, which reads

> 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.

In State v. Banko, 182 N.J. 44, 56–57 (2004), Justice LaVecchia speaking for the Court, defined the "four elements to this 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.

In State v. Williams, 168 N.J. 323 (2001), the Court explained that the fourth element "is pivotal." It requires a finding that a defendant armed himself "with the actual

purpose of using the weapon in a criminal manner . . . The focus is on the subjective attitude of the accused. The State must prove that the accused intended to use the weapon unlawfully."

Judge Gibbons charged the Pennsylvania jury regarding the elements of the crime of possessing an instrument of crime, 18 Pa. Con Stat. §907(a).

> In order to find the defendant guilty of that crime, you must find that the defendant possessed an instrument of crime with the intent, purpose, to employ it criminally. And in this case to employ it criminally means to commit the crimes of simple assault, terroristic threats, disorderly conduct. So in order to find the defendant guilty of possessing an instrument of crime, you must find they possessed the weapon with the intent to employ it criminally, meaning he intended to commit one of the crimes that commonwealth has argued: Terroristic threats, and simple assault, or disorderly conduct. In this case the possession—The Commonwealth has argued that he was actually in physical possession of the weapon. An instrument of crime is anything made—specifically made for criminal use or any ordinary item that is used for criminal purposes that—so it's being used for a crime, and it's not being used for something that would normally, manifestly be appropriate in terms of its lawful uses. In this particular case the Commonwealth has argued that the criminal instrument was a gun.
>
> [Emphasis added.]

Noting that the defendant had claimed justification, the judge advised the jury that

> If you find the defendant shot at the two victims, intentionally discharging his rifle in the direction of the victims there can be no defensive justification. The law does not allow the use of deadly force to prevent an individual from a mere trespass or—onto land. So if you find that the defendant intentionally discharged his rifle in the direction of the victims, that is the use of deadly force; and there—and deadly force cannot be used in order to prevent or terminate a mere trespass onto land.
>
> [Id. at 547:3-548:20.]

As noted, the jury did not find that Kelly had intentionally discharged the weapon in the direction of the victims. That said, the jury found that Kelly was guilty of "possessing instruments of crime." Id. at 586:17-19. They thus found that he did possess a gun, in this case a .22 rifle, that is, an instrument of crime, that is, at minimum an "ordinary item that is used for criminal purposes." However, as the Pennsylvania Supreme Court explained, in Commonwealth v. Hardick, 380 A.2d 1235 (1977), a case in which Hardick was found in a commercial district at night, in possession in his automobile of a suction device, known as a tin-plate, known especially as a tool used for safe cracking, as well as other items useful for such purpose, mere possession of such instruments is not enough to sustain a conviction.

> Section 907 of the Crimes Code provides in relevant part:
>
> (a) Criminal instruments generally. -- A person commits a misdemeanor of the first degree if he possesses any instrument of crime with intent to employ it criminally.
>
> (c) Definitions. -- As used in this section the following words and phrases shall have the meanings given to them in this subsection:
>
> "Instrument of crime."
>
> (1) Anything specially made or specially adapted for criminal use; or
>
> (2) anything commonly used for criminal purposes and possessed by the actor under circumstances not manifestly appropriate for lawful uses it may have.
>
> It is clear from this statutory language that two requirements must be met before one can be convicted under this section: (1) possession of criminal instruments by the defendant; and (2) an intent to use the tools for some criminal purpose. The Crimes Code provision is simply a recodification in general terms of the former crime of possessing burglary tools, defined in some detail by the Penal Code of 1939 Thus as appellant correctly asserts, intent to use the instruments in a criminal manner is an independent element of the offense which the Commonwealth must prove. As in any criminal offense, however, intent need not be directly proved, but may be inferred from the circumstances surrounding the

> incident out of which the charges arise. See e.g., . . . Commonwealth v. Dionisio, 178 Pa.Super. 330, 116 A.2d 109 (1955). In Commonwealth v. Dionisio, supra, the Superior Court stated:
>
> The third element, possession with the intent to use the tools for any of the felonious purposes set forth in the act, cannot be inferred from the mere possession of the tools. The Legislature, in enacting section 904 of the Act of June 24, 1939, P.L. 872, 18 P.S. § 4904, omitted that part of the Act of March 14, 1905, P.L. 38, § 1, which provided that the jury could infer such intent from the mere possession of the tools. Such omission by the Legislature is significant and must be construed to indicate that proof of intent requires more than possession. Statutory Construction Act of May 28, 1937, P.L. 1019, Art. IV, § 51, 46 P.S. § 551. However, proof of a general intent is sufficient. It is not necessary to allege or prove an intent to use the tools in a particular place, for a special purpose or in any particular manner. Such general intent need not be proved by direct evidence, but may be indicated by the circumstances surrounding the possession.
>
> [Commonwealth v. Hardick, 380 A.2d at (citations omitted)].[2]

In Kelly's case, in determining to convict Kelly on this charge, the jury not only determined that he possessed the instrument of crime, but also that he did so with the "intent, purpose, to employ it criminally." According to the instructions provided by the Judge, using the weapon criminally meant "to commit one of the crimes that the Commonwealth has argued: 'terroristic threats, and simple assault, or disorderly conduct.'" And the jury did convict Kelly of simple assault and of disorderly conduct. Thus, as the jury necessarily found, Mr. Kelly possessed a firearm and intended, purposely, to employ it in a manner that involved the commission of a crime under Pennsylvania law. And, while the conviction for simple assault is not itself disqualifying, it can hardly be argued that a simple assault is an action that is not directed "against the person." Thus, while, as Kelly emphasizes in his arguments, conviction under the New Jersey offense requires, as Williams explained, not only possession but that the possession be for an unlawful purpose, the act of which Kelly was convicted under

[2] Hardick was convicted based upon the totality of circumstances surrounding the possession, for as the Court observed, the tools were all of the type used for breaking safes, they were in a car rather than a home or a shop, the area was commercial, the time of evening was when the businesses were for the most part closed, and the particular nature of one of the tools, that the specialized nature of the tin-plate that was well-known as an uniquely designed tool for such illegal activity.

Pennsylvania law was, in the language of the New Jersey statute, possession "of any firearm with a purpose to use it unlawfully against the person . . . of another." Although the jury found that Kelly had not discharged the weapon "in the direction" of the victims, this finding does not lessen the fact that the weapon was possessed and that it was possessed for an "unlawful purpose" or, as the Pennsylvania statute terms it, "unlawfully," that is, to commit crimes, and that it was, as an essential element of the Pennsylvania as well as the New Jersey offense, used with intent and purpose and that it was so used, "against the person of another," for as Judge Gibbons explained to the jury, even if they found that he did not discharge it in the direction of the teenagers,

> there could be a second mechanism or means by which you could find him guilty of simple assault; and that would be that he handled the weapon, displayed the weapons, brandished the weapon in such a fashion, specifically showing teenagers the weapon in such a manner that was the physically-menacing behavior that he utilized in order to frighten the teenagers.

Counsel for Mr. Kelly argues that Hardick requires only a "general intent" for conviction of §907. In contrast, he claims that the New Jersey statute requires "purpose." This alleged distinction does not shelter Mr. Kelly. In Hardick, the Pennsylvania Supreme Court explained that if the defendant was alleged to have possessed the tools "with the intent to use the tools for any of the felonious purposes set forth in the act," that intent could not be inferred merely by possession alone. Hardick, at 475 Pa. 479. The proof of such intent did not have to be specific as to the place, time, exact purpose or manner of that intended use. But the "circumstances surrounding the possession" could themselves provide the evidence that the possession was accompanied by the intent for felonious use. In Kelly's case, the verbal statements made by Kelly, the presence of the boys on his property without permission, his order for them to get off of the property and his eventual firing of the weapon, albeit not directly at the teenagers, demonstrated the felonious use for which the jury found Kelly possessed the gun. There can be no valid claim that the jury verdict did not determine that Kelly's possession was, in the words of the New Jersey statute, "with a purpose to use it unlawfully."

I **CONCLUDE** that Mr. Kelly was convicted of a crime in Pennsylvani possessing instruments of crime, in violation of 18 Pa. Con Stat. §907(a), which is a crime "substantially equivalent" to N.J.S.A. 2C:39-4(a)(a). As a result, by the terms of N.J.S.A. 18A:6-7.1(d), he is disqualified from employment or service as a teacher in New Jersey.

Recklessly Endangering Another Person

Mr. Kelly's disqualification from employment is established by his conviction for possessing an instrument of crime. Thus, this decision could end at this point. However, N.J.S.A. 18A:6-7.1(c)2 also specifically requires disqualification if one has been convicted of a violation of N.J.S.A. 2C:12-2. The original decisions by Judge Kerins and the Commissioner addressed this possible basis for disqualification as well. As the Appellate decision noted that that decision was made without the benefit of the trial record, examination of that record, now available, allows a determination as to whether the conduct for which Kelly was convicted of "recklessly endangering another person" matches "substantially" with the conduct addressed in N.J.S.A. 2C:12-2. While that statutory provision was repealed effective January 1, 2016, L.2015, c. 186, it was effective at the time of Mr. Kelly's conviction and thus if he was convicted in 2012 of a Pennsylvania crime "substantially equivalent" to the then existing New Jersey offense disqualification would be required. At the time, N.J.S.A. 2C:12-2 addressed acts performed "knowingly or purposely" that resulted in loss or destruction of a vessel; or the manufacture of golf balls containing acid or a corrosive fluid substance, or other actions that, I **FIND**, are positively not of the sort that the evidence demonstrated to the jury Mr. Kelly performed. I **CONCLUDE** that the Pennsylvania crime of "recklessly endangering another person" is not "substantially equivalent" to the then effective N.J.S.A. 2C:12-2. However, there is another portion of N.J.S.A. 18A:6-7.1 that the conduct of which Kelly was convicted of "recklessly endangering another person" might match.

Judge Gibbons charged the jury on the elements of "recklessly endangering another person."

> Recklessly endangering another person is committed when you recklessly engage in conduct that places or may place another person in danger of death or serious bodily injury. Again, recklessly endangering another person is you engage in—you recklessly engage in conduct that places—actually places somebody in danger of death or serious bodily injury, or that may place somebody in danger of death or serious bodily injury . . . Reckless conduct, what it means to act recklessly is that you consciously disregard a substantial and unjustifiable risk that you could cause that injury. Doesn't have to be caused; but there's a risk that somebody could be seriously injured as a result of your conduct; and you consciously disregard that risk, and you engage in that conduct anyway. That's what recklessness means. And the recklessness can't be merely negligence. It's got to be something that shows you that the person that—It was a gross deviation from the conduct a reasonable person would engaging under the circumstances.
>
> [Id. at 577:16 to 578:15.]

The jury found that Kelly had recklessly endangered another person. Id. at 586:10–13. Thus, the jury necessarily found that Mr. Kelly's conduct, involving, as the evidence offered at trial demonstrated, the discharge of his weapon out towards the portion of his property away from his house and at least generally towards where the teenagers were or had been, as opposed to firing more directly in the actual direction of the teenagers at the moment he shot, did "consciously disregard a substantial and unjustifiable risk that [he] could cause," "death or serious bodily injury." While such conduct clearly does not match up with the language of N.J.S.A. 2C:12-2, nevertheless, the conduct does fit within the description of conduct in N.J.S.A. 18A:6-7.1 "(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." The conduct, as established by testimony at the trial, involved the threat of force towards the teenagers, a threat that, in a context involving the teenagers apparently encroaching upon Mr. Kelly's property, was first at least implied by the shouted reference to having guns, but more directly in regard to this provision, was then backed up by the discharge of a rifle, a discharge that was not merely up into the air or into the ground, but directed out away from the house and which sent a .22 bullet at least 15–20 feet away from the spot where Kelly stood. At

that point the implied threat, not in and of itself a crime, turned into one. While the conduct did not involve such dire matters as robbery or an assault of such severity as to rise to the level of aggravated assault, nevertheless, the discharge of the weapon after the threat was voiced so vigorously, a discharge involving an action that involved "a gross deviation from the conduct a reasonable person would engage under the circumstances," does bring his conduct within the scope of this provision. As for the fact that the jury acquitted Kelly of Terroristic Threats with Intent to Terrorize Another, 18 Pa. Con. St. §2706, which Kelly notes in quoting Judge Gibbons' comments about continuing bail after the verdict, clearly the judge did not think immediate incarceration was necessary given that Kelly had not shot "at the two children." She certainly felt that had the jury found that he had shot directly at them, that bail would not have been appropriate following conviction. However, that she did not deem it necessary to place him in jail immediately does not detract from the fact that he was convicted of crimes that were, as analyzed above "substantially similar" to New Jersey crimes.

I **CONCLUDE** that Mr. Kelly is also disqualified by N.J.S.A. 18A:6-7(1) due to his conviction for recklessly endangering another person.[3]

ORDER

Based upon the above analysis, summary decision is **GRANTED** to the moving parties. As Mr. Kelly is disqualified, it is hereby **ORDERED** that his appeal from disqualification is **DISMISSED**.

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

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[3] Counsel for Kelly contends that "a show of force is not concomitant with a threat of force," and refers to naval exercises in the South China Sea that do not "mean that the Navy is actually threatening to attack China." Without attempting to analyze either the military or diplomatic aspects of such exercises, suffice it to say that such an attempted analogy with the circumstances herein, involving the presence of the teenagers on or just off of Kelly's property, his shouting and announcement that he had "guns", his orders and commands and his eventual discharge of the .22 is completely unpersuasive. The fact that the weapon was not fired directly at the teenagers did not negate his guilt of the Pennsylvania crime and it does not demonstrate any grounds for determining that the Pennsylvania statute under which he was convicted and the New Jersey statute are not "substantially equivalent."

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 16, 2018
DATE

JEFF S. MASIN, ALJ (Ret., on recall)

Date Received at Agency: 11-16-18

Date Mailed to Parties: 11-16-18

mph

EXHIBITS:

For petitioner David Kelly:

None

For respondent N.J. Department of Education, CHRU:

CHRU-1	Certification of Joan M. Scatton, Deputy Attorney General, dated September 7, 2018 with attachments as follows:
Exhibit A	Letter dated July 13, 2016, from Jennifer Kilough Herrera, Acting Director, Bureau of Controversies and Disputes
Exhibit B	Letter dated August 19, 2016, from Jennifer Kilough Herrera
Exhibit C	Letter dated November 15, 2016, from Kelly Pierce, Deputy Clerk of Courts-Criminal, Court of Common Pleas of Bucks County, with attached Bucks County Criminal Court Sheet (4 pages); Information Commonwealth of Pennsylvania v. David M. Kelly, Docket No: CP-09-CR-0006418-2011.
Exhibit D	Transcripts of proceedings in the case of Commonwealth v. David Kelly, January 24, 25, 26 and 27, 2012, Court of Common Pleas of the Seventh Judicial District, Bucks County, Pennsylvania.

For respondent Board of Education of Lawrence Township:

BOE-1	Certification of Casey P. Acker, Esq., dated September 10, 2018, with attachments as follows:
Exhibit A	Letter from Jennifer Kilough Herrera, dated August 19, 2016
Exhibit B	Appellate decision in David v. Kelly v. New Jersey Department of Education, Criminal History Review Unit and Board of Education of the Township of Lawrence, Mercer County, June 29, 2016

Exhibit C	Transcript of trial proceedings in Commonwealth v. David Kelly, January 27, 2012, pages 514, 547, 586, 593
Exhibit D	Letter from Rebecca Gold, Director of Personnel, to David Kelly, dated February 9, 2012 and Letter from Carl H. Carabelli, Manager,CHRU to Dr. Crystal Lovell, Lawrence Township Board of Education

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges

SCHOOL DISTRICT OF THE TOWN OF SECAUCUS, HUDSON COUNTY,

Petitioner,

-and-

ROBERT BERCKES,

Respondent.

AGENCY DOCKET NO.: 191-8/18

ORDER APPROVING SETTLEMENT

BEFORE: RUTH MOSCOVITCH, Arbitrator

Appearances:

For the Petitioner:

Stephen R. Fogarty
Fogarty & Hara, Esq.
21-00 Route 208 South
Fair Lawn, NJ 07410

For the Respondent:

Kevin Walsh
Mary Frances Palisano
Gibbons P.C.
One Gateway Center
Newark, New Jersey 07102-5310

This matter comes before me on tenure charges filed with the Bureau of Controversies and Disputes on August 8, 2018. I was appointed the arbitrator to adjudicate this matter on August 24, 2018. Subsequently, the parties advised me that they had reached a settlement of this matter, whereby the Respondent agreed to resign from his position on a set date contingent upon the approval of the Settlement Agreement (Agreement) by the Petitioner School District (District), which has now occurred.

On December 11, 2018, I conducted a hearing, via conference call, in which the Respondent, his attorney, and the Superintendent and Secretary of the District and its attorney all participated. A stenographic record of the conference was made at the request of the District.

In preparation for that conference, I reviewed the tenure charges filed against the Respondent and the draft Agreement proffered by the parties, including all exhibits. I questioned the Respondent and his attorney as well as the representatives of the District. As a result of that hearing, I conclude:

1. Both the charged and charging parties consent to the settlement and disposition of this matter.
2. The charged party has entered into the Agreement with a full understanding of his rights;
3. Approval of this Agreement is in the public interest, because it results in the resolution by settlement of pending litigation and does not conflict with the public good;
4. The charged party has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificates he holds.
5. On November 30, 3018, the charged party signed the Agreement, as well as a Release and a letter of resignation from his position, effective June 30, 2019. The Board of Education of the District voted to approve the Agreement on December 6, 2018; the President and Secretary of the Board of Education executed a copy of the Agreement on that date.

6. The resignation of Robert Berckes has rendered the pending proceedings moot.

For all of the foregoing reasons, I hereby approve the Settlement Agreement between the parties and order this case dismissed.

Ruth Moscovitch, Arbitrator

Dated: December 13, 2018

ACKNOWLEDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On December 13, 2018, RUTH MOSCOVITCH, whom I know, came before me and acknowledged that she executed the foregoing as and for her Order in the above-captioned matter.

Notary Public
My Commission expires

KIMBERLY A. ROBINSON
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01RO6364386
Qualified in Queens County
Commission Expires September 11, 2021