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NEW JERSEY
SCHOOL LAW DECISIONS
Indexed

January 1, 1974, to December 31, 1974

vol. 1

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The 1974 edition of School Law Decisions is dedicated to Fred H. Combs, Jr., former Assistant Commissioner in charge of Controversies and Disputes who retired September 1, 1975.

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Reisha Epstein, individually and as parent and natural guardian of Judy Epstein, Robert Epstein, Michael Epstein; Jane Franck, individually and as parent and natural guardian of Stephen Franck, Matthew Franck, David Franck; Daniel Capone, individually and as parent and natural guardian of Jeffrey Capone, Karen Capone, Daniel Capone; Donald Johnson, individually and as parent and natural guardian of Melissa Johnson, D. Keith Johnson; Noel Sanchez, individually and as parent and natural guardian of Michael Sanchez, Dawn Sanchez, Jonathan Sanchez,

Petitioners,

v.

Board of Education of the City of Plainfield and Russell Carpenter, Superintendent of Schools, Union County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION ON MOTION TO DISMISS

For the Petitioners, Ruvoldt & Ruvoldt, (Harold J. Ruvoldt, Jr., Esq., of Counsel)

For the Respondents, King and King (Victor E. D. King, Esq., of Counsel)

Petitioners are five citizens who reside in the Plainfield School District and each is the parent and natural guardian of one or more school-age children. In the Petition of Appeal, they attack the procedures by which the Board of Education of the School District of the City of Plainfield, hereinafter "Board," adopted a plan, hereinafter "Plan 14," designated to correct racial imbalance in the several schools within the district, alleging that the Board's actions were arbitrary and unreasonable. Petitioners also attack the merits of Plan 14 as adopted by the Board, alleging that Plan 14 does not achieve the proposed purpose, and that it will cause harm to the educational opportunities of the children of petitioners.

The Board generally denies the specific allegations in their entirety. Also, the Board raises four separate defenses in addition to questioning the legal standing of petitioners to bring this action. Respondent Board now moves for dismissal of the Petition of Appeal.

On October 4, 1972, the return date of the Notice of Motion to Dismiss, oral argument was heard by a hearing examiner appointed by the Commissioner at the office of the Union County Superintendent of Schools, Westfield. Both parties filed Memorandums of Law and supporting affidavits. The report of the hearing examiner is as follows:

The Board contends that not one of the petitioners possesses standing to

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bring this Petition before the Commissioner. The Board relies upon affidavits No. 3 and No. 4 by the Superintendent of Schools, wherein it is stated that eight of the children of petitioners no longer attend the public schools within the district–one child attends Plainfield High School and three siblings entered the public schools during the first week of June 1972, and never attended long enough to be evaluated. Therefore, the Board argues that no injury or harm can befall the children of petitioners as the result of the operation of Plan 14, which was implemented for the 1972-73 school year. The Board also contends that the Petition fails to show that there is a controversy or dispute arising from a violation of the school laws. It is further asserted by the Board that petitioners have not set forth facts or specific violations of the school laws upon which relief can be granted by the Commissioner. In support of its argument that only walking to school or riding a bus can be claimed by petitioners as personal hardships caused to their children, the Board cites *Leona Rutherford et al. v. Board of Education of the Borough of Maywood,* 1963 *S.L.D.* 129, 130 and *Kenneth Alnor et al. v. Board of Education of the Township of Wayne,* 1965 *S.L.D.* 115.

The Board also asserts that petitioners are required to exhaust their administrative remedies by taking this matter to the Board and its administrators, and that they are precluded from bringing this suit until they do so. *Schults v. Board of Education of Teaneck et al.,* 86 *N.J. Super.* 29 *(App. Div.* 1964), 205 *A.2d* 762.

Finally, the Board states that the Petition should be dismissed on the grounds of mootness, since Plan 14 is presently in full force and effect.

In response, petitioners admit that some of their children are not now attending the district's public schools, but claim that they have been forced out of the public schools in order not to suffer a lesser or impaired quality of education resulting from the Board's Plan 14. Petitioners claim that those of their children now remaining in the public schools are being deprived of an education under truly integrated circumstances and also are receiving an educational program of diminished value. Petitioners aver that the parallelism and striking similarity of the instant matter with *Clyde E. Christner et al. v. Board of Education of the City of Trenton et al., Mercer County,* 1970 *S.L.D.* 354 confirms the presence of a legitimate cause of action.

The factual circumstances as to whether the Board followed the procedures required by the policy and guidelines of the State Board of Education in the formulation and adoption of Plan 14 are in dispute, say petitioners.

Petitioners argue that their remedy for correction of the circumstances created by the Board's adoption of Plan 14 is to appeal to the Commissioner, particularly since the Board has already taken the formal action of adopting and implementing Plan 14 to change the racial balance of the public schools.

In conclusion, petitioners assert that the Petition does state facts regarding

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Plan 14 and its effects upon their children, and also states a cause of action. Therefore, petitioners aver that their appeal is entitled to be heard on its merits.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter.

It is clear that petitioners possess legal standing as real parties in interest in this case. They are resident citizens within the school district and parents of school-age children who are entitled to attend the public schools free of charge. In previous cases decided by the New Jersey Supreme Court, the petitioners-appellants have been either school-age children by their parents and guardians *ad litem,* or parents themselves who challenged the sufficiency of plans by local boards of education to correct racial imbalance in the public schools of this State. See *Morean et al. v. Board of Education of the Town of Montclair et al., Essex County,* 42 *N.J.* 237 (1964); *Booker et al. v. Board of Education of the City of Plainfield, Union County,* 45 *N.J.* 161 (1965); *Rice et al. v. Board of Education of the Town of Montclair,* 1967 *S.L.D.* 312; *Byers et al. v. Board of Education,* 1966 *S.L.D.* 15, aff'd. 1967 *S.L.D.* 341, *cert. den.* 51 *N.J.* 179.

Whether or not the Board followed the policy and guidelines set down by the State Board of Education in formulating and adopting Plan 14 raises questions of both fact and law. Another factual dispute in this case is whether the implementation of Plan 14 has caused a diminution of the quality of the educational program received by the affected children.

The implementation in the public schools of a plan to correct racial imbalance is a matter of public interest, and has been required by the public policy of this State for a period of years. *Morean et al. v. Board of Education of the Town of Montclair et al., supra; Booker et al. v. Board of Education of the City of Plainfield, supra*

Once a local board has taken formal action, after completing all of the necessary preliminary steps (which is not decided at this juncture in this matter), any attack upon a board's action on the grounds of arbitrariness or unreasonableness should be made, not to the board, which then becomes a party to the dispute, but to the Commissioner. See *Boney v. Board of Education of the City of Pleasantville et al.,* 1971 *S.L.D.* 579; *Singer v. Board of Education of the Borough of Collingswood et al., Camden County,* 1971 *S.L.D.* 594.

There is no question of mootness in the present posture of the instant matter. The Board's plan for correcting racial imbalance was implemented September 1972, and the questions of fact and law raised in the Petition of Appeal, *ante,* and crystalized in the pre-hearing conference of counsel are timely.

Accordingly, for the reasons stated the Motion to Dismiss is denied.

COMMISSIONER OF EDUCATION

January 2, 1973

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Reisha Epstein, individually and as parent and natural guardian of Judy Epstein, Robert Epstein, Michael Epstein; Jane Franck, individually and as parent and natural guardian of Stephen Franck, Matthew Franck, David Franck; Daniel Capone, individually and as parent and natural guardian of Jeffrey Capone, Karen Capone, Daniel Capone; Donald Johnson, individually and as parent and natural guardian of Melissa Johnson, D. Keith Johnson; Noel Sanchez, individually and as parent and natural guardian of Michael Sanchez, Dawn Sanchez, Jonathan Sanchez,

Petitioners,

v.

Board of Education of the City of Plainfield and Russell Carpenter, Superintendent of Schools, Union County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION ON MOTION TO INTERVENE

For the Petitioners, Ruvoldt & Ruvoldt (Harold J. Ruvoldt, Jr., Esq., of Counsel)

For the Respondents, King and King (Victor E. D. King, Esq., of Counsel)

The original petitioners in this case are five citizens who reside in the School District of the City of Plainfield, and each is the parent and natural guardian of one or more school-age children. In the Petition of Appeal, they attack the procedures by which the Board of Education of the School District of the City of Plainfield, hereinafter "Board," adopted a plan, hereinafter "Plan 14," designated to correct racial imbalance in the several schools within the district, alleging that the Board's actions were arbitrary and unreasonable. The merits of Plan 14 are also challenged by petitioners on the alleged grounds that Plan 14 does not achieve the intended purpose, and that it will cause harm to the educational opportunities of the children of petitioners.

The Board generally denies the specific allegations in their entirety and sets forth four separate defenses in support of its action.

On January 2, 1973, the Commissioner rendered a decision which denied the Board's Motion to Dismiss, the Commissioner finding that petitioners possess legal standing and that the issues raised were timely.

Now a Notice of Motion to Intervene as respondents has been filed by ten citizens and taxpayers residing within the School District of Plainfield. Oral argument on the Motion to Intervene was heard on June 26, 1973 by a representative of the Commissioner at the State Department of Education, Trenton. The record in this matter, including the transcript of the oral argument, is before the Commissioner.

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Permission to intervene is requested on the grounds that a change in the present plan of pupil assignment, as sought by petitioners, would cause an educational, as well as financial, impact on both the children of the applicants and on the applicants themselves, thereby substantially affecting their interests. The ten applicants assert that their interests cannot be adequately represented by Respondent Board, and that they have defenses to the Petition of Appeal, including both questions of law and fact which are common to the main issues raised in the Petition, and which have not been adequately presented to the Commissioner.

The ten proposed intervenors have submitted affidavits which are essentially similar, in that each asserts that he will be substantially and specifically affected in an adverse manner by any relief which may be granted if petitioners prevail in this case. Particularly, several of the applicants aver in their affidavits that any disposition of this case in favor of petitioners would impair their ability to ensure that their children receive a quality education in a school arrangement free from the effects of racial isolation. The ten applicants have also filed a proposed Answer to the Petition of Appeal.

The Board states that it favors permission for the ten applicants to intervene as respondents in this case.

Petitioners oppose intervention on the grounds that (1) this would result in the re-litigation of issues already decided by the Commissioner, (2) the proposed Answer filed by the applicants attempts to raise issues beyond the three already agreed upon in a conference of counsel, and (3) if petitioners prevail in overturning Plan 14, the applicants would then have full opportunity to be heard by the Board prior to the Board's adopting any substitute plan.

The proposed intervenors argue that, if petitioners prevail, and the Board decides not to take an appeal of an adverse decision, the applicants would be precluded from contesting such a decision if not permitted to intervene at this time. Also, the applicants deny that their intervention, if permitted, would cause delay, because they do not propose to raise additional issues previously decided by the Commissioner.

The Commissioner has reviewed the pleadings in this matter and has considered the arguments, as stated above, regarding the question of intervention. It is clear that the Board of Education, as the representative of all citizens of the school district, must defend its action, including the procedures utilized, of adopting the school assignment Plan 14, against the attack raised by petitioners. It may be said without serious contradiction that, if petitioners prove their allegations and thereby secure a change in Plan 14, many school children and their parents will be affected to some degree, including the applicants. However, the Board is an agency of the State, duly created and empowered by action of the Legislature, and its action, which has the presumption of correctness, will not be overturned unless there is an affirmative showing that such action was taken improperly, or was arbitrary, capricious or unreasonable. *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327, 332 *(App. Div.* 1965) The burden of proof rests upon petitioners in this case, and the Commissioner can

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find no compelling reason to permit intervention of the applicants as respondents, since their individual interests are no greater than that of every other citizen of the Plainfield School District, all of whom are represented by the Board. The Board's decision is presumed correct until proven otherwise, and the applicants cannot at this juncture do more than assert their support for the wisdom of that decision. This is not an essential ground for intervention, in the judgment of the Commissioner.

Accordingly, for the reasons stated, the Motion for Intervention is hereby denied. This matter will be set down for the earliest possible plenary hearing.

COMMISSIONER OF EDUCATION

December 27, 1973

Reisha Epstein, individually and as parent and natural guardian of Judy Epstein, Robert Epstein, Michael Epstein; Jane Franck, individually and as parent and natural guardian of Stephen Franck, Matthew Franck, David Franck; Daniel Capone, individually and as parent and natural guardian of Jeffrey Capone, Karen Capone, Daniel Capone; Donald Johnson, individually and as parent and natural guardian of Melissa Johnson, D. Keith Johnson; Noel Sanchez, individually and as parent and natural guardian of Michael Sanchez, Dawn Sanchez, Jonathan Sanchez,

Petitioners,

v.

Board of Education of the City of Plainfield and Russell Carpenter, Superintendent of Schools, Union County,

Respondents.

STATE BOARD OF EDUCATION

DECISION

For the Petitioners, Ruvoldt & Ruvoldt (Harold J. Ruvoldt, Jr., Esq., of Counsel)

For the Respondents, King & King (Victor E. D. King, Esq., of Counsel)

For the Applicants for Intervention, McCarter & English (John J. McGoldrick, Esq., of Counsel) and Norman J. Chachkin, Esq.

Decision on Motion to Intervene by the Commissioner of Education, December 27, 1973

This matter involves a controversy pending before the Commissioner of

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Education in which Petitioner Reisha Epstein, a parent who claims to have a child or children in the public schools of Plainfield, contends that a plan (commonly known and referred to as "Plan 14") advanced by Respondent Board in an effort to eliminate racial imbalance in the district's schools deprives her and her children of their United States and New Jersey constitutional rights for various reasons.

During the pendency of the proceedings before the Commissioner, application was made by Floyd H. Brown and other persons claiming to be residents of Plainfield, and having children in its public schools, seeking to intervene in the action and alleging opposition to the contentions of petitioners. They claim to have an interest in the controversy that cannot be adequately and fully represented by respondent. The application was denied by the Commissioner on December 27, 1973. Applicants have appealed that determination and in addition move before us for a Stay of proceedings before the Commissioner.

The affidavits supporting intervention are similar and allege in conclusory fashion and without specific factual data that the affiants have an interest in the controversy and may be affected by the outcome. There is no showing that their interests cannot be adequately and fully represented by the respondents, nor that they have a special interest otherwise justifying the grant of leave to intervene. Should it develop in subsequent stages of this proceeding that the factual picture might justify an application to intervene, such an application can then be made.

The decision of the Commissioner of Education dated December 27, 1973, denying leave to intervene is affirmed for the reasons expressed in his decision and those expressed herein.

The Motion for Stay of proceedings before the Commissioner pending this appeal is denied.

May 1, 1974

Case withdrawn July 11, 1974, following Stipulation of Dismissal.

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Board of Education of the City of Plainfield,

Petitioner,

v.

Boards of Education of the Borough of Dunellen, Township of Edison, Township of Piscataway, Borough of South Plainfield, Middlesex County; Boards of Education of the Borough of North Plainfield, Borough of Watchung, Township of Greenbrook, Somerset County; Board of Education of Scotch Plains-Fanwood, Union County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION ON MOTION TO DISMISS

For the Petitioner, King & King (Victor E. D. King, Esq., of Counsel)

For the Borough of Dunellen, Johnson & Johnson (Edward J. Johnson, Jr., Esq., of Counsel)

For the Township of Edison, R. Joseph Ferenczi, Esq.

For the Borough of South Plainfield, LeRoy P. Lusardi, Esq.

For the Township of Piscataway, Frank J. Rubin, Esq.

For the Borough of North Plainfield, Charles A. Reid, Jr., Esq.

For Scotch Plains-Fanwood, Johnstone & O'Dwyer (Jeremiah D. O'Dwyer, Esq., of Counsel)

For the Borough of Watchung, Robert J. Mooney, Esq.

For the Township of Green Brook, Harmon R. Clark, Jr., Esq.

This matter comes before the Commissioner of Education as a result of Motions by the eight respondent Boards of Education, hereinafter "respondents," requesting that a Petition of Appeal filed by the Plainfield Board of Education, hereinafter "petitioner," on December 9, 1971, be dismissed. That Petition asserts:

"COUNT ONE

"1. The Board of Education of the City of Plainfield, in the County of Union [hereinafter referred to as Petitioner] is the duly constituted authority in charge of administering public instruction in the School District of the City of Plainfield pursuant to a constitutional mandate to 'provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of the children in the

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State between the ages of 5 and 18 years' as prescribed in the 1947 Constitution of the State of New Jersey, Art. 8, Sec. IV, paragraph 1 and *N.J.S.A.* 18A:1-1 *et seq.;* as such the Petitioner has the responsibility of taking whatever reasonable and practical means exist to eliminate racial imbalance in its schools.

"2. Petitioner is currently under direction by the Supreme Court of the State of New Jersey to maintain pupil distribution plans within its district that achieve the greatest dispersal of non-white students consistent with sound educational values and procedures. See *Booker v. Board of Education, City of Plainfield,* 45 *N.J.* 161, 212 *A.2d* 1 (1965).

"3. The racial distribution of non-white pupils in the Elementary Grades in October of 1964 was 47.3% and after a steady rate of increase was 72.5% in October of 1971 and there is no clear indication that this percentage can or will be reduced by efforts of petitioner if these efforts are limited to this school district alone.

"4. The racial distribution of non-white pupils in the eight school districts who are listed as respondents is listed in Schedule A attached hereto.

"5. By their present method of operating and maintaining separate school districts, the respondents have effected racial segregation and discrimination in the operation of public schools and school systems serving Plainfield, New Jersey, and the communities surrounding it.

"6. The respondents, acting individually or in concert, and their predecessors and otherwise, have engaged in acts, practices, customs and usages which have had the natural, probable, foreseeable and actual effect of incorporating into the schools and school systems serving the Plainfield area public and private residential racial segregation and discrimination in violation of and contrary to the express policies of the State Board of Education, the Constitution and Laws of the State of New Jersey, the decisions of the Supreme Court of the United States and the Supreme Court of New Jersey and reported opinions of the Commissioner of Education of the State of New Jersey.

"7. The respondents, acting individually or in concert, and their predecessors and otherwise, have allocated and permitted to be allocated educational resources in a manner that has had the natural, probable, foreseeable and actual effects in the Plainfield area of (a) discriminating on the basis of race against children attending the public schools within the Plainfield School District; and, (b) establishing and maintaining the pattern of racially separate schools and school systems as described in paragraph six (6) above, in violation of the policies and provisions of the Constitution of the State of New Jersey and its laws, the policies of the State Department of Education, the decisions of the Supreme Court of the United States and the Supreme Court of the State of New Jersey and the

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opinions of the Commissioner of Education of the State of New Jersey.

"8. The respondents' present method of operating and maintaining separate school districts in Middlesex, Somerset and Union Counties and the Plainfield area, with the discriminatory effects described herein, effectively prevents this Petitioner from complying with the laws of this State as prescribed by the Supreme Court of the State of New Jersey in *Booker v. Board of Education, Plainfield*, 45 *N.J.* 161, 212 *A.2d* 1 (1965), and is therefore in violation of the policies and provisions of the law as described in (6) and (7) above.

"9. The petitioner asserts and declares that the operation of its school district with the present racial imbalance that exists within the district is in frustration of the goals of equal educational opportunity as declared by the State Department of Education and is in frustration of the direct order of the Supreme Court of New Jersey as set out in *Booker, supra.*

"10. On April 30, 1968, this petitioner requested by letter attached hereto as Exhibit A, the Commissioner of Education of the State of New Jersey to form a study team to ascertain the facts in this and adjacent districts to determine how this district could better solve some of the fiscal, organizational and racial problems then existing, but never received the requested assistance.

"11. On November 5, 1969, the State Board of Education adopted a resolution concerning racial imbalance existing in the public schools in the State of New Jersey and determining that the Commissioner of Education, in cooperation with local school districts, undertake to determine in which school districts of the State of New Jersey racially imbalanced schools are maintained, and placing the Commissioner under the policy direction of the State Board and cooperating with local school districts to undertake such steps as he shall deem necessary to correct such conditions of racial imbalance as may be found.

"12. Petitioner has been repeatedly urged by parents of its pupils and interested groups within its district to explore ways of reducing racial imbalance in the district by exchanging pupils with adjacent districts, but is unable to do so if limited geographically to this school district and to the means provided by the School Law to exchange facilities and students with other districts.

"13. On November 18, 1971 petitioner forwarded to the Commissioner of Education of the State of New Jersey a formal resolution requesting certain relief, a copy of which is appended hereto as Exhibit B.

"14. On December 2, 1971, by letter dated November 30, 1971, attached hereto as Exhibit C, petitioner received from the Commissioner of Education of the State of New Jersey a formal denial of all relief requested in its resolution of November 18, 1971.

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"15. Petitioner asserts that the respondents, as well as the Commissioner of Education of the State of New Jersey, have taken no steps to achieve racial balance by reason of the mathematical composition of the geographical area which comprises the Plainfield area and have taken no steps to achieve racial balance or to assist the petitioner in achieving racial balance within its own school district nor have the respondents or the Commissioner of Education of the State of New Jersey attempted to redraw school district lines to achieve racial balance or to investigate various other methods to assist petitioner in achieving racial balance within its district.

"16. Petitioner asserts that the inaction of respondents as described in paragraph (15) is in violation of and contrary to the express policies of the State Board of Education, the Constitution and Laws of the State of New Jersey, the decisions of the Supreme Court of the United States and the Supreme Court of the State of New Jersey and the reported opinions of the Commissioner of Education of the State of New Jersey.

"WHEREFORE, petitioner prays that the Commissioner of Education of the State of New Jersey,

(a) declare the actions of respondents as described above to be in violation of the laws and Constitution of the State of New Jersey.

(b) declare the racial imbalance in the Plainfield schools and in the school districts of respondents to be contrary to law and the policies stated by the Commissioner of Education and the State Board of Education.

(c) direct the respondents, their agents, servants, employees and all persons in active concert or participation with them to cease and desist from all such actions directly or indirectly creating the racial imbalance in the schools serving the Plainfield area and respondents' districts.

(d) direct the respondents, their agents, servants, employees and all other persons in active concert with them to take forthwith all steps reasonably necessary to achieve racial balance in the schools serving the Plainfield area and respondents' districts, including if necessary:

"1. the merger or regionalization of some of the services, facilities, programs or other aspects of school operation and administration of some or all of the respondent school systems with that of petitioner.

"2. the withholding of funds or accreditation from respondent school districts and the exercise of other powers available to the Commissioner of Education to ensure the full cooperation of the respondents and the prompt accomplishment of said regionalization.

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"3. the adoption and implementation by all respondents of such agreements, contracts or other arrangements with respect to the operation of the educational systems in the Plainfield area as will reduce racial imbalance in petitioner's schools.

(e) to form a study team within 30 days after receipt of this petition or such other reasonable time to investigate the finances of this district and adjacent districts and into school organizational patterns, educational programs in existence, planned and under consideration in such districts, including an investigation into the racial distribution of pupils in this and adjacent districts to determine the possible impact of current and future building plans on the implementation of plans to share services and facilities and to exchange students across district lines in an effort to reduce the racial imbalance now existent in this district and to implement plans to regionalize certain services and facilities now existent in this district and respondents' districts.

(f) to investigate methods by which this district can share non-white pupils with adjacent districts regardless of municipal and county political divisions and in accordance with the recommendations of the State Office of Equal Educational Opportunity and the suggestions of the State Committee to Study the Next Steps of Regionalization and Consolidation in The School Districts of New Jersey, otherwise known as the Mancuso Report.

(g) to prepare a plan to reduce racial imbalance in this district utilizing the broad powers of the Commissioner of Education as recently defined by the Supreme Court of New Jersey.

(h) to deliver a copy of the Commissioner's preliminary findings to this Board of Education so that this district may have an opportunity to append its comments thereto prior to the issuance of the Commissioner's formal findings and report; and to the respondents to the same end."

"COUNT TWO

***

"2. Petitioner asserts that certain of the respondents are initiating new building programs and continuing those in process in their districts.

"3. Petitioner further asserts that the continuation of any building programs which will substantially increase the facilities in respondents' districts will seriously jeopardize the Commissioner of Education's ability to frame the relief requested by petitioner and seriously damage petitioner's continuing efforts to achieve racial balance within its district.

"WHEREFORE, petitioner prays that the Commissioner of Education of the State of New Jersey:

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(a) withhold further approval of all building programs in respondents' districts until the completion of the studies requested in Count One of this petition.

(b) enjoin the continuation of any building programs which will substantially increase the facilities in respondents' districts until the completion of the studies requested herein."

Respondents in this matter individually filed Motions to Dismiss the Plainfield Board's Petition on essentially four grounds developed in Briefs and at an oral argument before an Assistant Commissioner of Education at the State Library Building, Trenton, New Jersey, on March 8, 1972.

Respondents contend that this matter involves no controversy or dispute arising from a violation of school law, and that the Commissioner therefore lacks jurisdiction. They aver that petitioner merely asserts that (a) Plainfield has an intra-district problem of racial imbalance and (b) by complying with existing school laws respondents are contributing to this problem. Respondents contend that the facts stated by petitioner, the timing of its resolution and its letters of inquiry, indicate that petitioner considers that the Supreme Court decision in *Beatrice M. Jenkins et al. v. Township of Morris School District and Board of Education et al.*, 58 *N.J.* 483, 279 *A.2d* 619 (1971) gives the Commissioner jurisdiction over the instant matter. They opine that this apparent reliance on *Jenkins* contorts the Supreme Court's holding in that matter, noting that the Supreme Court sharply limited its holding with the following language:

"***For present purposes we need not pursue the issue in its broader aspects for the situation here is indeed a specially compelling one and in traditional judicial fashion our holding may be confined to it. As has already been pointed out, here we are realistically confronted not with multiple communities but with a single community having no visible or factually significant internal boundary separations, and with a record which overwhelmingly points educationally towards a single regional district rather than separate local districts.***" *Jenkins, supra,* at p. 505

Respondents assert that the Court further limited the applicability of *Jenkins* by describing the Morristown situation as one that "may realistically be viewed as a single community, probably a unique one in our state." Respondents in denying the applicability of *Jenkins* to the instant matter say that "Plainfield's petition fails to establish the relationship between the Petitioner and the Respondents or any one of them within the context of the situation found by the Supreme Court in *Jenkins.*"

In essence, respondents contend that under the guise of a controversy, petitioner is in reality asking for a declaratory judgment. They point out that New Jersey law precludes the assumption of jurisdiction for purposes of rendering a declaratory judgment in the absence of an actual controversy. *N.J. Tpke. Auth. v. Parsons,* 3 *N.J.* 235 (1949); *Milk Drivers & Dairy Employers, Local 680 v. Cream-o-land Dairy,* 39 *N.J. Super.* 163 (*App. Div.* 1956);

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Unsatisfied Claim and Judgment Fund Board v. Concord Insurance Co., 110 *N.J. Super.* 191 (*Law Div.* 1970) Respondents assert that there is no such controversy because they, individually or collectively, "have never been asked to do anything, study anything or refrain from doing anything" with or by petitioner regarding racial imbalance in the Plainfield area. Respondents contend that until such time as there is a specific controversy resulting from the failure of one or more of them to comply with a specific request based on school law, the Commissioner lacks jurisdiction. *Calhoun v. Long Branch Board of Education,* 1968 *S.L.D.* 187

Respondents aver that the Plainfield Board's Petition is so vague and general that they cannot reasonably frame a responsive pleading, and that even a liberal construction of the rules of pleading demands that one set forth the gist of a substantive ground of relief. *Jersey City v. Hague,* 18 *N.J.* 584 (1955); *Melone v. Jersey City Central Power & Light Co.,* 18 *N.J.* 163 (1955) Respondents argue that this defect is a fatal violation of Rule 4:6-4 which holds that it is basic to the law of pleading that a petition be sufficiently specific to inform an adversary as to what it is he is being called upon to concede or defend. Respondents claim that the Plainfield Board's Petition merely "aim[s] a scatter gun at every district touching upon its boundaries, express[es] its own problems and demand[s] that the Commissioner and Respondents solve that problem under the guise of a controversy and in the atmosphere of an adversary proceeding." Respondents believe that their Motions do not address themselves to a mere technical matter, but rather strike at the heart of the issue at hand. They aver that the question of racial imbalance is indeed a vital issue affecting the State and the Nation; however, they reject petitioner's attempt to seek a solution to this question as it affects the City of Plainfield in the present context of adversary proceedings limited to eight neighboring districts.

Respondents contend that if any justiciable controversy can be gleaned from the Plainfield Board's Petition, the alleged dispute is with the Commissioner, not with them. They aver that petitioner has manufactured a controversy in reaction to the Commissioner's decision not to act on petitioner's resolution of November 6, 1971. (Appendix A) Respondents further assert that other remedies are available to petitioner to resolve its dispute with the Commissioner. They suggest that the instant matter raises broad public questions, which are more properly the concern of the Legislature. In addition, respondents contend that this Petition presents no evidence, which should compel the Commissioner to enjoin school construction, deny public aid, or otherwise prevent respondents from operating in accordance with the current laws of the State.

Respondents further caution that the Commissioner's assumption of jurisdiction in this matter would first necessitate interminable and costly proceedings between petitioner and respondents. Respondents point out that unlike the *Jenkins* case, to effect an ultimate solution to the instant matter, eight separate, extended hearings might be required. Respondents also suggest that these hearings might not be limited to the present Respondent Boards of Education, adjacent to the City of Plainfield, but may logically be expanded to include other districts adjacent to respondents' districts. For example, they

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contend that if the Board of Education of Green Brook Township is joined in the instant matter, merely because 3.7% of its border is shared with the City of Plainfield, it would be just as logical to join Warren Township with which Green Brook shares some 22% of its border. Additionally, respondents contend that questions regarding the withdrawal of white students from the Plainfield Public Schools also involve nonpublic schools within the City of Plainfield, which receive State support. Respondents suggest that were the Commissioner to assume jurisdiction in this matter, such action would invite similar proceedings throughout the State.

For each and all of the reasons stated above, respondents pray that their Motions to Dismiss the Plainfield Board's Petition be granted.

Petitioner concedes that there is some merit to respondents' assertion that this matter is a dispute between the Commissioner and the Plainfield Board. However, it contends that respondents are joined in the Petition not because of obscure reasons, but because it is necessary to involve each respondent in order for the Commissioner to provide the relief sought. Petitioner avers that there is no reasonable doubt that this relief is opposed by respondents, who clearly resist participating in a study "with an eye toward determining how racial imbalance in Petitioner's district can be dealt with by techniques that would transcend school district lines." Petitioner asserts that such a study can be ordered by the Commissioner and that he in fact has the duty to so order. For under the circumstances presented by the facts in the Petition, petitioner avers, only the Commissioner has the full panoply of powers to at least order respondents to engage in studies of ways to assist petitioner in its efforts to alleviate the racial imbalance in its schools or, ideally, to initiate and put into effect such a study on his own while ordering respondents to cooperate. Petitioner avers further that:

> "The Commissioner does have the affirmative duty and the power to take action to assist petitioner to eliminate racial imbalance. He has ordered studies of segregation and racial imbalance in the past and we so request him to so order now. See *Jenkins v. Township of Morris School District, supra,* 279 *A. 2d* at 632 where the Court said:
>
> " '*** it may be noted that the Commissioner acted with unusual hesitancy when he merely recommended the study of regionalization in which the Township Board declined to participate; he could readily have directed its participation with the ample strength of an arsenal of powers including, *inter alia,* the power to withhold State aid *(N.J.S.A.* 18A:55-2) and the power to withhold approval of school construction. *N.J.S.A.* 18A:45-1; *N.J.S.A.* 18A:18-2.'***"

Petitioner also cites the following documents and cases: *New Jersey Constitution, Art. I, Par.* 5; *Art.* VIII, *Sec.* IV, *Par.* 1 (1947); *N.J.S.A.* 18A:4-23, 24; *N.J.S.A.* 18A:6-9; *Jenkins v. Township of Morris School District, supra; Board of Education of Elizabeth v. City Council of Elizabeth,* 55 *N.J.* 501, 262 *A. 2d* 881 (1970); *Board of Education, East Brunswick Township v. Township*

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Council, East Brunswick, 48 *N.J.* 94, 223 *A.* 2*d* 481 (1966); *Booker v. Board of Education, City of Plainfield, supra,* and cases cited therein.

Petitioner contends that, since the ordering of such a study is within the powers of the Commissioner, and since respondents will refuse to voluntarily join in such a study, this situation constitutes a justiciable controversy and the Motions to Dismiss must therefore fail. Petitioner further asserts that the Commissioner's duty, not only under *Jenkins, supra,* but under an entire series of cases cited under the New Jersey Constitution and case law is clear, and that by not acceding to petitioner's demand, the Commissioner places the seal of approval of his office on *de facto* segregation. Consequently, petitioner's argument continues, if the Commissioner finds that he cannot order school boards to join in a study to assist petitioner, he will in effect be approving a concept that is neither legal nor socially responsible. Thus, petitioner contends that having demonstrated that there is a cause of action upon which relief can be granted:

> "*** a justiciable controversy exists that is ripe for determination by the Commissioner of Education, *** therefore the motions to dismiss must fail. See *Rosenberg v. D. Kaltman & Company,* 28 *N.J. Super.* 459, 101 *A.* 2*d* 94 *(Chan. Div.* 1953); *N.J. Turnpike Authority v. Parsons,* 3 *N.J.* 235, 69 *A.* 2*d* 875 (1949); *Weissbard v. Potter Drug & Chemical Corporation,* 6 *N.J. Super.* 451, 69 *A.* 2*d* 559 *(Chan. Div.* 1949) aff'd 4 *N.J.* 115, 71 *A.* 2*d* 629 (1950). ***"

Petitioner argues further that:

> "*** In determining the disposition of a motion to dismiss a pleading for failure to state a cause of action upon which relief can be granted, courts have generally stated that the allegations of the complaint must be construed liberally in favor of the pleader. See *Di Cristofaro v. Laurel Grove Memorial Park,* 43 *N.J. Super.* 244, 128 *A.* 2*d* 281 *(App. Div.* 1957); *Grobart v. Grobart,* 5 *N.J.* 161, 74 *A.* 2*d* 294 (1950); *Mianulli v. Gunagan,* 32 *N.J. Super.* 212, 108 *A.* 2*d* 200 *(App. Div.* 1954); *Puccio v. Cuthbertson,* 21 *N.J. Super.* 544, 91 *A.* 2*d* 424 *(App. Div.* 1952).
>
> "Material matters of fact are for the purposes of deciding such a motion regarded as admitted. See *Grobart v. Grobart,* 5 *N.J.* 161, 167, 74 *A.*2*d* 294, 297 (1950); *Jersey City v. Hague,* 18 *N.J.* 584, 602, 115 *A.*2*d* 8, 19 (1955). See also *Di Cristofaro, supra,* at p. 252, where the Court said:
>
> > 'First, it is to be noted that on a motion as this -- one which, if successful, means sudden death to the action – the court searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.' ***"

Petitioner contends that the Commissioner's letter of November 30, 1971,

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(Appendix B) failed to grasp the main thrust of the Plainfield Board's request, which was, and still is, assistance from the State Department of Education in reducing the racial imbalance existing in petitioner's district, with the understanding that possible solutions to this problem could include plans reaching across school district lines. Petitioner avers that asking the Commissioner to withhold approval of new school facilities in adjacent districts was only one aspect of its initial request, and remains only a part of the relief possible.

Petitioner recognizes that it lacks statutory powers to involve the adjacent school districts in a study pursuant to *N.J.S.A.* 18A:13-34; however, it believes that both the Plainfield Board and the Respondent Boards are obligated to correct the present situation of racial imbalance, or at least attempt to reverse its worsening trend. Petitioner cites *Fisher et al. v. Board of Education of the City of Orange,* 1963 *S.L.D.* 123, as follows:

> "*** It is clear that the ultimate solution lies in the free choice of residence and the elimination of segregated housing which lie beyond the control of the board of education or the Commissioner. Nevertheless, the Commissioner is of the opinion that in the minds of Negro pupils and parents a stigma is attached to attending a school whose enrollment is completely or almost exclusively Negro, and that this sense of stigma and resulting feeling of inferiority have an undesirable effect upon attitudes related to successful learning. Reasoning from this premise and recognizing the right of every child to equal educational opportunity, the Commissioner is convinced that in developing its pupil assignment policies and in planning for new school buildings, a board of education must take into account the continued existence or potential creation of a school populated entirely, or nearly so, by Negro pupils. ***" (at p. 127)

In support of its position, petitioner further cites: *Bell v. City of Gary, Indiana,* 213 *F. Supp.* 819 (*N.D. Ind.* 1963), aff'd 324 *F. 2d* 209 *(7th Cir.), cert. denied* 377 *U.S.* 924, 12 *L. Ed. 2d* 215 (1964), where the Court said:

> "*** It is neither just nor sensible to proscribe segregation having its bases in affirmative state action while at the same time failing to provide a remedy for segregation which grows out of discrimination in housing, or other economic or social factors. Education is tax supported and compulsory, and public school educators, therefore, must deal with inadequacies within the educational system as they arise, and it matters not that the inadequacies are not of their own making. This is not to imply that the neighborhood school policy *per se* is unconstitutional, but that it must be abandoned or modified when it results in segregation in fact. ***" 237 *F. Supp.* at 546

Petitioner asserts that previous cases within New Jersey have decided that local school districts had the authority and the duty to reduce racial imbalance and to establish school attendance areas that make possible wherever feasible a student body that represents a cross section of the population of the entire

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district. It cites *Jenkins v. Township of Morris School District, supra; Christner et al. v. Board of Education of the City of Trenton*, 1970 *S.L.D.* 354; *Booker v. Board of Education, City of Plainfield, supra; Alston v. Union Township Board of Education*, 1964 *S.L.D.* 54, affirmed State Board of Education 60; *Morean v. Montclair Board of Education*, 1963 *S.L.D.* 154, affirmed State Board of Education 160, affirmed 42 *N.J.* 237, 200 *A. 2d* 97 (*Sup. Ct.* 1964); *Spruill v. Englewood Board of Education*, 1963 *S.L.D.* 141, affirmed State Board of Education 147; and *Fisher et al., supra.*

Therefore, Petitioner asserts that under the established laws of this State regarding racial imbalance these Motions to Dismiss must fail, because, as presently drawn, the Plainfield Board's Petition presents ample grounds for concluding that remedial relief could be granted. It cites *Mianulli v. Gunagan, supra*, where the Court stated:

> "*** In the determination of a motion of the present nature the basic inquiry, like that in the event of the former demurrer, is whether the defendent should be required to answer. Accordingly it has long been the rule that to prevail in such an attack upon the pleading, its insufficiencies to invoke relief must be clearly apparent and if there is any ground on which the pleading can be legitimately retained the endeavor to strike it must fail.***" (32 *N.J. Super.* at 215)

The Commissioner has carefully reviewed the Petition, the Briefs on the Motion to Dismiss and the record of oral argument in the instant matter. It is clear that both petitioner and respondents have relied heavily on their interpretation of *Jenkins, supra,* to form a rationale for their contentions. Respondent Boards of Education are unanimous in their opinion that the New Jersey Supreme Court limited its holding in that decision, if not to Morristown-Morris Township area alone, at least to districts presenting a similar factual situation. Respondents contend that the Court defined the Commissioner's jurisdiction regarding the amelioration of racial imbalance to exclude multiple communities and communities which had not heretofore been joined for educational purposes.

Petitioner takes a broader view of *Jenkins, supra,* and concludes that the Court's decision requires the Commissioner, as a constitutional officer, to take affirmative action across district lines, where such action is necessary to end or at least to prevent the advance of racial segregation. Respondents counter that the correction of racial imbalance across district lines is a problem for the State Legislature and not for the Commissioner. The Commissioner notes that he had taken a position similar to that of resondents in his initial decision in *Jenkins* by suggesting that the Legislature address itself to this problem. The New Jersey Supreme Court in its reversal of that position commented as follows:

> "*** But it seems to us that rather than suggesting an intolerable legislative default, he [the Commissioner] could and should more reasonably and suitably have found, as we did in *Booker, supra,* 45 *N.J.* at 173-81, faithful legislative fulfillment of the constitutional mandate in the

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> many broad implementing enactments delegating comprehensive powers to the Commissioner.***" (58 *N.J.* at 506)

In the Commissioner's judgment, the Supreme Court in *Jenkins, supra,* was extremely carefully to remind him of his constitutional obligations, as expressed in *Art.* I, *Par.* 5 of the New Jersey Constitution, as follows:

> "No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor *be segregated* in the militia or in the *public schools,* because of religious principles, race, color, ancestry or national origin."
>
> *(Emphasis added.)*

The Commissioner is also cognizant of the provisions of *Art.* VII, *Sec.* I, *Par.* 1 of the New Jersey Constitution, which reads as follows:

> "Every State officer, before entering upon the duties of his office, shall take and subscribe an oath or affirmation to support the Constitution of this State and of the United States and to perform the duties of his office faithfully, impartially and justly to the best of his ability."

The strong language of the Court in *Jenkins* left little doubt regarding the Commissioner's powers and obligations regarding racial imbalance in the public schools. The Court commented:

> "*** The Commissioner's flat disavowal of power despite the compelling circumstances may be sharply contrasted with the sweep of our pertinent constitutional and statutory provisions and the tenor of our earlier judicial holdings. See *N.J. Const.,* art. 1, para. 5; art. 8, sec. 4, para. 1 (1947); *N.J.S.A.* 18A:4-23, 24; *N.J.S.A.* 18A:6-9; *Bd of Ed. of Elizabeth v. City Coun. of Elizabeth,* 55 *N.J.* 501 (1970); *Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick,* 48 *N.J.* 94 (1966); *Booker v. Board of Education, Plainfield,* 45 *N.J.* 161 (1965); *Morean v. Bd. of Ed. of Montclair,* 42 *N.J.* 237 (1964); see also *In re Masiello,* 25 *N.J.* 590 (1958); *Laba v. Newark Board of Education,* 23 *N.J.* 364 (1957); *Schults v. Bd. of Ed. of Teaneck,* 86 *N.J. Super.* 29 *(App. Div.* 1964), *aff'd,* 45 *N.J.* 2 (1965).***" (58 *N.J.* at 493)

The Court further commented: (at p. 501)

> "*** Surely if those policies and the views firmly expressed by this Court in *Booker* (45 *N.J.* 161) and now reaffirmed are to be at all meaningful, the State Commissioner must have power to cross district lines to avoid 'segregation in fact' (*Booker,* 45 *N.J.* at 168), at least where, as here, there are no impracticalities and the concern is not with multiple communities but with a single community without visible or factually significant internal boundary separations.***"

The Court's reversal in *Jenkins* also contained, at pp. 503-504, the following passage lamenting the Commissioner's limited view of his own powers:

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> "*** While the earlier administrative rulings had that effect, they simply constituted the narrowing of a broad legislative provision in a manner comparable with other administrative self-limiting approaches which we have repeatedly rejected. *Cf. Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, supra,* 48 *N.J.* 94; *Booker v. Board of Education, Plainfield, supra,* 45 *N.J.* 161; *In re Masiello, supra,* 25 *N.J.* 590; *Laba v. Newark Board of Education, supra,* 23 *N.J.* 364. The Commissioner has been appropriately charged with high responsibilities in the educational field and if he is faithfully to discharge them in furtherance of the State's enlightened policies he must have corresponding powers. The Legislature has here granted them in broad terms and it would disserve the interests of the State to permit their administrative narrowing which in effect represents not only a disavowal of power but also a *disavowal of responsibility*.***" *(Emphasis ours.)*

In the Commissioner's judgment, the Court's opinion in *Jenkins, supra,* clearly directs him to consider the elimination of *de facto* segregation as a major responsibility of his office. He recognizes that in *Jenkins* the Court clearly dealt with a specific situation and as such did not direct the Commissioner to fundamentally alter the legislative scheme for the management of education in the State. In the Commissioner's judgment, however, the Court clearly enunciated a doctrine that school district lines are not *in themselves* an unassailable impediment to the elimination of racial imbalance. The Commissioner finds that he is required to analyze any controversy alleging racial imbalance to determine if the facts warrant the granting of relief in the form of ordering measures to prevent or ameliorate racial imbalance.

In the instant matter, the Plainfield Board of Education has asserted that the Commissioner has an affirmative duty to at least order a study of racial imbalance in the Plainfield area. The Commissioner notes that the Plainfield Board has, in its opposition to the Motion to Dismiss, emphasized relief in the form of a study. However, in considering the matter, the Commissioner recognizes that he must consider the Plainfield Board's entire Petition, including its own description of the purpose of the study: "to exchange students across district lines in an effort to reduce existing racial imbalance and to implement plans to regionalize certain services and facilities." In the Commissioner's judgment, directing districts to participate in such a study implies an authority to order the implementation of its results. Consequently, the relief requested by petitioner must ultimately result in the Commissioner's having, to some degree, jurisdiction regarding assignment of pupil personnel within the Plainfield area.

In this regard, the Commissioner concurs with respondents that petitioner's allegations and factual offerings are vague and illusory, and in their present form do not afford respondents an opportunity to present a meaningful rebuttal. Respondents have the right to expect that petitioner will provide them with a specific statement of charges to which they must reply. However, the Commissioner does not consider this lack of specificity in the pleadings to be a fatal defect in the Petition. He notes that the petitioner's Brief cites *Mianulli, supra,* where the Court held that "***if there is any ground on which the pleading can be legitimately retained the endeavor to strike it must fail***" and

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DiCristofaro, supra, which also provides wise counsel in suggesting that "***opportunity [be] given to amend if necessary.***"

The Commissioner finds and determines that, in its present form, the Petition is sufficient to give the appearance of a dispute and controversy over which the Commissioner maintains jurisdiction, pursuant to *N.J.S.A.* 18A:6-9. The Commissioner finds, however, that the Petition now lacks the specificity necessary to afford Respondent Boards of Education an opportunity to frame a cogent reply to the allegations stated in Count One, Charges 5, 6, 7, 8, 15, and 16. In addition, the relief sought in Count One, Points (c), (d), 1, 2, and 3, is based on an assertion so vague that neither the Commissioner nor respondents can be expected to frame an intelligent response.

Therefore, the Commissioner hereby remands this matter to the Plainfield Board of Education and directs it to resubmit, within thirty (30) days of receipt of this decision on the Motions to Dismiss, a more definitive Amended Petition to which adequate responsive pleading may be made. Respondent Boards of Education will have twenty (20) days from receipt of the Plainfield Board's Amended Petition to file their responsive pleadings. Accordingly, the Motions to Dismiss are denied.

APPENDIX A

"RESOLUTION

"1. WHEREAS, the maintenance of racially imbalanced schools by any school district is in violation of the law and public policy of the State of New Jersey; and

"2. WHEREAS, under Court Order, this School District is required to maintain pupil distribution plans that achieve the greatest dispersal of non-white students consistent with sound educational values and procedures; and

"3. WHEREAS, the racial distribution of non-white pupils in the Elementary Grades in October of 1964 was 47.3% and after a steady rate of increase was 72.5% in October of 1971 and there is no clear evidence that this percentage can or will be reduced by efforts limited to this district, and, whereas, this Board considers this degree of racial imbalance to be in frustration of the goals of equal educational opportunity; and

"4. WHEREAS, this Board, as the duly constituted authority in charge of administering public instruction in the school district of the City of Plainfield, desires to note its concern that under present law, it appears to lack the power to alter the racial distribution of elementary and other pupils so as to comply with the requirements of the law; and

"5. WHEREAS, by law, the State Department of Education of the State of New Jersey is vested with general supervision and control of public instruction subject to law; and, whereas, the Commissioner of Education has the supervision of elementary education and the supervision of

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business and financial matters affecting public instruction and is the chief executive and administrative officer of the State Department of Education and furthermore has the responsibility and the power to correct the de facto racial imbalance which is frustrating the goals of equal educational opportunity in this district; and

"6. WHEREAS, this district has been urged to explore further ways of reducing racial imbalance by exchanging pupils with adjacent districts; and, whereas, there is no clear means provided in the school law empowering this district to effectuate such an exchange under existing financial requirements and by the exercise of the powers granted to it; and

"7. WHEREAS, this Board, after consultation with its staff approved a letter to the State Commissioner of Education on April 30, 1968 suggesting a study be made of this district and adjacent districts to determine how this district could better solve some of the fiscal, organizational and racial problems then existing; and

"8. WHEREAS, the State Board of Education has adopted guide lines for developing equal educational opportunity and has directed local school boards to assess their problems and to take action to eliminate racial imbalance; and

"9. WHEREAS, the Supreme Court of New Jersey has recently defined the broad powers of the Commissioner of Education to include the power to cross district and municipal lines in order to correct racial imbalance; and

"10. WHEREAS, this Board of Education has studied this problem for some time and has consulted with its attorney, the City Corporation Counsel, the Mayor and Members of the City Council, and has requested meetings with the adjacent districts and has met with one district; and

"11. It is therefore resolved that this school district hereby requests the Commissioner of Education to take the following action:

(a) Withhold approval of further building of new school facilities by the adjacent districts until the completion of the investigation below;

(b) To investigate the finances of this district and adjacent districts and into school organizational patterns, educational programs in existence, planned and under consideration in such districts including an investigation into the racial distribution of pupils in this and adjacent districts to determine the possible impact of current and future building plans on the implementation of plans to share services and facilities and to exchange students across district lines in an effort to reduce the racial imbalance now existent in this district;

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(c) To investigate methods by which this district can share non-white pupils with adjacent districts regardless of municipal and county political divisions and in accordance with the recommendations of the State Office of Equal Educational Opportunity and the suggestions of the State Committee to Study the Next Steps of Regionalization and Consolidation in The School Districts of New Jersey otherwise known as the Mancuso Report.

(d) To prepare a plan to reduce racial imbalance in this district utilizing the broad powers of the Commissioner of Education as recently defined by the Supreme Court of New Jersey.

(e) To deliver a copy of the Commissioner's preliminary findings to this Board of Education so that this district may have an opportunity to append its comments thereto prior to the issuance of the Commissioner's formal findings and report.

"12. It is further resolved that the staff of this Board of Education is directed to cooperate with the office of the Commissioner of Education in providing data, materials, etc. in aid of such investigation as the Commissioner of Education may determine to make as a response to this resolution.

"13. The Secretary of the Board is instructed to forward a certified copy of this resolution to the Commissioner of Education forthwith."

APPENDIX B

"November 30, 1971

"Dear Mr. Gillingham:

"This will acknowledge receipt of the Resolution of the Plainfield Board of Education calling upon the Commissioner of Education to withhold approval of new school facilities in districts adjacent to Plainfield for purposes related to developing a plan to reduce racial imbalance in the City of Plainfield Schools.

"Be advised, that this Resolution cannot be acted upon it its present form. While I recognize its intent, all parties at interest must be involved in all phases of decision-making regarding this matter.

"It is apparent that strong differences of opinion exist in this situation; therefore, the fairest and most efficient method of dealing with it is to consider it a potential controversy arising under school law.

"Accordingly, I ask that you place your reliance on the process of

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appeal outlined in *N.J.S.A.* 18A:6-9 *et seq.* to obtain the relief you seek.

"Sincerely,

"Carl L. Marburger
"Commissioner of Education

"Mr. Evan S. Gillingham
Secretary, Plainfield
Board of Education
504 Madison Avenue
Plainfield, New Jersey"

COMMISSIONER OF EDUCATION

May 12, 1972

Board of Education of the City of Plainfield,

Petitioner,

v.

Boards of Education of the Borough of Dunellen, Township of Edison, Township of Piscataway, Borough of South Plainfield, Middlesex County; Boards of Education of the Borough of North Plainfield, Borough of Watchung, Township of Green Brook, Somerset County; Board of Education of Scotch Plains-Fanwood, Union County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION ON MOTION TO DISMISS

For the Petitioner, King and King (Victor E. D. King, Esq., of Counsel)

For the Borough of Dunellen, Johnson & Johnson, (Edward J. Johnson, Jr., Esq., of Counsel)

For the Township of Edison, R. Joseph Ferenczi, Esq.

For the Borough of South Plainfield, LeRoy P. Lusardi, Esq.

For the Township of Piscataway, Frank J. Rubin, Esq.

For the Borough of North Plainfield, Charles A. Reid, Jr., Esq.

For the Borough of Watchung, Robert J. T. Mooney, Esq.

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For the Township of Green Brook, Harman R. Clark, Jr., Esq.

For Scotch Plains-Fanwood, Johnstone & O'Dwyer (Jeremiah D. O'Dwyer, Esq., of Counsel)

The Board of Education of the City of Plainfield, hereinafter "Plainfield Board," asserts it is unable, as one Board standing alone, to remedy problems of racial imbalance existing within the Plainfield School District, and that such imbalance results in a denial of equal educational opportunity for the pupils of the district. It requests the Commissioner of Education, therefore, to investigate and study the charges contained in the Petition and devise a plan whereby pupils may be exchanged across district lines so that a more equitable racial balance may be achieved.

The Petition herein is an amended version of one originally advanced by the Plainfield Board on December 9, 1971, against eight districts which are contiguous with the Plainfield School District, and is responsive to the Commissioner's directive as contained in his decision of May 12, 1972 – that such amendments were required. The eight contiguous districts move again for dismissal of the Amended Petition on the principal grounds that it poses no justiciable controversy under the school laws contained in *N.J.S.A.* 18A.

An oral argument on the Motion to Dismiss was conducted on October 26, 1972 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The instant Amended Petition is responsive to a finding by the Commissioner (contained in his decision on Motion to Dismiss, May 12, 1972) that the original Petition advanced by the Plainfield Board

> "*** lacks the specificity necessary to afford Respondent Boards of Education an opportunity to frame a cogent reply to the allegations stated in Count One, Charges 5, 6, 7, 8, 15 and 16. In addition, the relief sought in Count One, Points (c), (d), 1, 2, and 3, is based on an assertion so vague that neither the Commissioner nor respondents can be expected to frame an intelligent response.***" (Motion to Dismiss, 1974 *S.L.D.*__)

Thereafter, the Commissioner directed the Plainfield Board to resubmit

> "*** a more definitive Amended Petition to which adequate responsive pleading may be made.***" *(Id.* at p.__)

Succeeding Appeals and Cross-Appeals of the Commissioner's decision of May 12, 1972, were stayed in abeyance pending decision on the instant Amended Petition.

The Commissioner's decision of May 12, 1972, contained a complete recital of the original Petition advanced by the Plainfield Board in this matter together with a lengthy exposition of the views of the respective parties.

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However, the report of the hearing examiner contained herein will be a summary of both the original Petition and the views previously advanced by the respective parties. Such views have received some elaboration in Briefs of counsel and at the oral argument, *ante*, but remain essentially the same as those originally expressed.

The Plainfield Board is charged with responsibility for the maintenance of a thorough and efficient system of education in Plainfield and has been given certain directions by the Supreme Court of New Jersey to insure racial balance in its schools. *Booker v. Board of Education, City of Plainfield,* 45 *N.J.* 161 (1965) However, the Plainfield Board avers its ratio of nonwhite to white pupils has climbed steadily over the years to a figure exceeding seventy percent and that this high ratio is attributable to the present method of operating and maintaining school districts in the Plainfield area. In the view of the Plainfield Board,

> "The present method of operating and maintaining in the Plainfield area, school districts separated by political boundaries, produces racial segregation in the Plainfield district constituting invidious discrimination in the schools serving Plainfield." (Amended Petition of Appeal, Charge 5)

Further, the Plainfield Board avers that:

> "*** Respondent[s] *** have various plans for rebuilding old structures, for constructing new buildings and for reorganizing their respective school curricula and attendance patterns. Such plans and building and educational programs projected and in progress, including some before the State Dept. of Education, if fully implemented will have an adverse effect on such remedies as may be necessary by way of sharing use of buildings and programs among two or more of the districts in the area encompassed by petitioner and respondents. Respondents' building programs, if fully implemented, may seriously prejudice any plan for the sharing of district facilities and resources between petitioner and respondents.***" (Amended Petition of Appeal, Charge 6)

The Plainfield Board then argues, in effect, that its large ratio of nonwhite pupils compared to the large ratio of white pupils enrolled in respondents' schools constitutes a result contrary to the prescription of the Constitution of the State of New Jersey and its laws, but a result which the Plainfield Board alone is powerless to alter. The Plainfield Board maintains that such powers to alter the racial balance among school districts is vested in the Commissioner and the State Board of Education and that such powers should be exercised to insure an integrated educational environment in Plainfield.

In its prayer for relief the Plainfield Board petitions the Commissioner to:

(a) Find that, in respect to respondents' districts, the racial composition of the schools in Plainfield is racially out of balance and constitutes an invidious discrimination;

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(b) Find that this alleged discrimination acts as a bar to equal educational opportunity in an integrated environment;

(c) Direct that a study of the charges contained in the Petition be made in such manner and by such procedures as the Commissioner shall determine to be appropriate;

(d) Form a study team to investigate all pertinent data (financial, educational, racial) concerned with each of the districts named herein and to implement plans to regionalize certain services and facilities now existent in this district and in respondents' districts;

(e) Investigate and explore the methods and ways available to Plainfield for the sharing of nonwhite pupils with neighboring districts;

(f) Prepare a plan, and direct its implementation, to reduce racial imbalance in Plainfield;

(g) Direct respondents to cooperate with the Commissioner's study team and provide it with all relevant data;

(h) Deliver copies of the Commissioner's findings to the parties in the instant matter.

Additionally, the Plainfield Board requests the Commissioner to enjoin the continuation of any building programs in any of respondents' districts or, in the alternative, to withhold all new approvals for such building programs pending completion of the requested studies reported, *ante.*

The eight respondents to the Amended Petition, *sub judice,* jointly maintain again that the Plainfield Board fails to state a controversy under the school laws of the State of New Jersey and they aver that there are no specific allegations that any one of the named districts has engaged in an unlawful activity. They further maintain that the Amended Petition is too vague to enable them to frame an Answer. In most respects their respective Motions to Dismiss the Amended Petition rely on the Briefs filed in support of the Motions they advanced prior to the time of the Commissioner's decision on May 12, 1972 with respect to the original Petition filed by the Plainfield Board in this matter.

Accordingly, to assure completeness of the present report, the contentions of the respective parties are detailed again as follows in the exact delineation of the Commissioner's decision of May 12, 1972:

"***Respondents contend that this matter involves no controversy or dispute arising from a violation of school law, and that the Commissioner therefore lacks jurisdiction. They aver that petitioner merely asserts that (a) Plainfield has an intra-district problem of racial imbalance and (b) by complying with existing school laws respondents are contributing to this problem. Respondents contend that the facts stated by petitioner, the timing of its resolution and its letters of inquiry, indicate that petitioner

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considers that the Supreme Court decision in *Beatrice M. Jenkins et al. v. Township of Morris School District and Board of Education et al.*, 58 *N.J.* 483, 279 *A.* 2*d* 619 (1971) gives the Commissioner jurisdiction over the instant matter. They opine that this apparent reliance on *Jenkins* contorts the Supreme Court's holding in that matter, noting that the Supreme Court sharply limited its holding with the following language:

> '*** For present purposes we need not pursue the issue in its broader aspects for the situation here is indeed a specially compelling one and in traditional judicial fashion our holding may be confined to it. As has already been pointed out, here we are realistically confronted not with multiple communities but with a single community having no visible or factually significant internal boundary separations, and with a record which overwhelmingly points educationally towards a single regional district rather than separate local districts.***' *Jenkins, supra,* at p. 505

"Respondents assert that the Court further limited the applicability of *Jenkins* by describing the Morristown situation as one that 'may realistically be viewed as a single community, probably a unique one in our state.' Respondents in denying the applicability of *Jenkins* to the instant matter say that 'Plainfield's petition fails to establish the relationship between the Petitioner and the Respondents or any one of them within the context of the situation found by the Supreme Court in *Jenkins.*'

"In essence, respondents contend that under the guise of a controversy, petitioner is in reality asking for a declaratory judgment. They point out that New Jersey law precludes the assumption of jurisdiction for purposes of rendering a declaratory judgment in the absence of an actual controversy. *N.J. Tpke. Auth. v. Parsons,* 3 *N.J.* 235 (1950); *Milk Drivers & Dairy Employers, Local 680 v. Cream-o-land Dairy,* 39 *N.J. Super.* 163 (*App. Div.* 1956); *Unsatisfied Claim and Judgment Fund Board v. Concord Insurance Co.,* 110 *N.J. Super.* 191 (*Law Div.* 1970) Respondents assert that there is no such controversy because they, individually or collectively, 'have never been asked to do anything, study anything or refrain from doing anything' with or by petitioner regarding racial imbalance in the Plainfield area. Respondents contend that until such time as there is a specific controversy resulting from the failure of one or more of them to comply with a specific request based on school law, the Commissioner lacks jurisdiction. *Calhoun v. Long Branch Board of Education,* 1968 *S.L.D.* 187

"Respondents aver that the Plainfield Board's Petition is so vague and general that they cannot reasonably frame a responsive pleading, and that even a liberal construction of the rules of pleading demands that one set forth the gist of a substantive ground of relief. *Jersey City v. Hague,* 18 *N.J.* 583 (1955); *Melone v. Jersey City Central Power & Light Co.,* 18 *N.J.* 103 (1955) Respondents argue that this defect is a fatal violation of Rule 4:6-4 which holds that it is basic to the law of pleading that a petition be

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sufficiently specific to inform an adversary as to what it is he is being called upon to concede or defend. Respondents claim that the Plainfield Board's Petition merely 'aim[s] a scatter gun at every district touching upon its boundaries, express[es] its own problems and demand[s] that the Commissioner and Respondents solve that problem under the guise of a controversy and in the atmosphere of an adversary proceeding.' Respondents believe that their Motions do not address themselves to a mere technical matter, but rather strike at the heart of the issue at hand. They aver that the question of racial imbalance is indeed a vital issue affecting the State and the Nation; however, they reject petitioner's attempt to seek a solution to this question as it affects the City of Plainfield in the present context of adversary proceedings limited to eight neighboring districts.

"Respondents contend that if any justiciable controversy can be gleaned from the Plainfield Board's Petition, the alleged dispute is with the Commissioner, not with them. They aver that petitioner has manufactured a controversy in reaction to the Commissioner's decision not to act on petitioner's resolution of November 6, 1971. (Appendix A) Respondents further assert that other remedies are available to petitioner to resolve its dispute with the Commissioner. They suggest that the instant matter raises broad public questions, which are more properly the concern of the Legislature. In addition, respondents contend that this Petition presents no evidence, which should compel the Commissioner to enjoin school construction, deny public aid, or otherwise prevent respondents from operating in accordance with the current laws of the State.

"Respondents further caution that the Commissioner's assumption of jurisdiction in this matter would first necessitate interminable and costly proceedings between petitioner and respondents. Respondents point out that unlike the *Jenkins* case, to effect an ultimate solution to the instant matter, eight separate, extended hearings might be required. Respondents also suggest that these hearings might not be limited to the present Respondent Boards of Education, adjacent to the City of Plainfield, but may logically be expanded to include other districts adjacent to respondents' districts. For example, they contend that if the Board of Education of Green Brook Township is joined in the instant matter, merely because 3.7% of its border is shared with the City of Plainfield, it would be just as logical to join Warren Township with which Green Brook shares some 22% of its border. Additionally, Respondents contend that questions regarding the withdrawal of white students from the Plainfield Public Schools also involve nonpublic schools within the City of Plainfield, which receive State support. Respondents suggest that were the Commissioner to assume jurisdiction to this matter, such action would invite similar proceedings throughout the State.

"For each and all of the reasons stated above, respondents pray that their Motions to Dismiss the Plainfield Board's Petition be granted.

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"Petitioner concedes that there is some merit to respondents' assertion that this matter is a dispute between the Commissioner and the Plainfield Board. However, it contends that respondents are joined in the Petition not because of obscure reasons, but because it is necessary to involve each Respondent in order for the Commissioner to provide the relief sought. Petitioner avers that there is no reasonable doubt that this relief is opposed by respondents, who clearly resist participating in a study 'with an eye toward determining how racial imbalance in Petitioner's district can be dealt with by techniques that would transcend school district lines.' Petitioner asserts that such a study can be ordered by the Commissioner and that he in fact has the duty to so order. For under the circumstances presented by the facts in the Petition, petitioner avers, only the Commissioner has the full panoply of powers to at least order respondents to engage in studies of ways to assist petitioner in its efforts to alleviate the racial imbalance in its schools or, ideally, to initiate and put into effect such a study on his own while ordering respondents to cooperate. Petitioner avers further that:

> " 'The Commissioner does have the affirmative duty and the power to take action to assist petitioner to eliminate racial imbalance. He has ordered studies of segregation and racial imbalance in the past and we so request him to so order now.' See *Jenkins v. Township of Morris School District, supra,* 27 *A.* 2*d* at 632 where the Court said:
>
> " '*** it may be noted that the Commissioner acted with unusual hesitancy when he merely recommended the study of regionalization in which the Township Board declined to participate; he could readily have directed its participation with the ample strength of an arsenal of powers including, *inter alia,* the power to withhold State aid (*N.J.S.A.* 18A:55-2) and the power to withhold approval of school construction. *N.J.S.A.* 18A:45-1; *N.J.S.A.* 18A:18-2'

"Petitioner also cites the following documents and cases: *New Jersey Constitution, Art.* I, *Par.* 5; *Art.* VIII, *Sec.* IV, *Par.* 1 (1947); *N.J.S.A.* 18A:4-23, 24; *N.J.S.A.* 18A:6-9; *Jenkins v. Township of Morris School District, supra; Board of Education of Elizabeth v. City Council of Elizabeth,* 55 *N.J.* 501, 262 *A.* 2*d* 881 (1970); *Board of Education, East Brunswick Township v. Township Council, East Brunswick,* 48 *N.J.* 94, 223 *A.* 2*d* 481 (1966); *Booker v. Board of Education, City of Plainfield, supra,* and cases cited therein.

"Petitioner contends that, since the ordering of such a study is within the powers of the Commissioner, and since respondents will refuse to voluntarily join in such a study, this situation constitutes a justiciable controversy and the Motions to Dismiss must therefore fail. Petitioner further asserts that the Commissioner's duty, not only under *Jenkins, supra,* but under and entire series of cases cited under the New Jersey Constitution and case law is clear, and that by not acceding to petitioner's demand, the Commissioner places the seal of approval of his

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office on *de facto* segregation. Consequently, petitioner's argument continues, if the Commissioner finds that he cannot order school board to join in a study to assist petitioner, he will in effect be approving a concept that is neither legal nor socially responsible. Thus, petitioner contends that having demonstrated that there is a cause of action upon which relief can be granted:

> '***a justiciable controversy exists that is ripe for determination by the Commissioner of Education, *** therefore the motions to dismiss must fail. See *Rosenberg v. D. Kaltman & Company*, 28 *N.J. Super.* 459, 101 *A.2d* 94 (*Chan. Div.* 1953); *N.J. Turnpike Authority v. Parsons*, 3 *N.J.* 235, 69 *A.2d* 875 (1949); *Weissbard v. Potter Drug & Chemical Corporation*, 6 *N.J. Super.* 451, 69 *A.2d* 559 (*Chan. Div.* 1949) aff'd 4 *N.J.* 115, 71 *A.2d* 629 (1950).***'

"Petitioner argues further that:

> '*** In determining the disposition of a motion to dismiss a pleading for failure to state a cause of action upon which relief can be granted, courts have generally stated that the allegations of the complaint must be construed liberally in favor of the pleader.' See *DiCristofaro v. Laurel Grove Memorial Park*, 43 *N.J. Super.* 244, 128 *A.2d* 281 (*App. Div.* 1957); *Grobart v. Grobart*, 5 *N.J.* 161, 74 *A.2d* 294 (1950); *Mianulli v. Gunagan*, 32 *N.J. Super.* 212, 108 *A.2d* 200 (*App. Div.* 1954); *Puccio v. Cuthberson*, 21 *N.J. Super.* 544, 91 *A.2d* 424 (*App. Div.* 1952).
>
> 'Material matters of fact are for the purposes of deciding such a motion regarded as admitted. See *Grobart v. Grobart*, 5 *N.J.* 161, 167, 74 *A.2d* 294, 297 (1950); *Jersey City v. Hague*, 18 *N.J.* 584, 602, 115 *A.2d* 8, 19 (1955). See also *DiCristofaro, supra*, at p. 252, where the Court said:
>
> > 'First, it is to be noted that on a motion as this – one which, if successful, means sudden death to the action – the court searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'***

"Petitioner contends that the Commissioner's letter of November 30, 1971, (Appendix B) failed to grasp the main thrust of the Plainfield Board's request, which was, and still is, assistance from the Department of Education in reducing the racial imbalance existing in petitioner's district, with the understanding that possible solutions to this problem could include plans reaching across school district lines. Petitioner avers that asking the Commissioner to withhold approval of new school facilities in

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adjacent districts was only one aspect of its initial request, and remains only a part of the relief possible.

"Petitioner recognizes that it lacks statutory powers to involve the adjacent school districts in a study pursuant to *N.J.S.A.* 18A:13-34; however, it believes that both the Plainfield Board and the Respondent Boards are obligated to correct the present situation of racial imbalance, or at least attempt to reverse its worsening trend. Petitioner cites *Fisher et al. v. Board of Education of the City of Orange,* 1963 *S.L.D.* 123, as follows:

> '*** It is clear that the ultimate solution lies in the free choice of residence and the elimination of segregated housing which lie beyond the control of the board of education or the Commissioner. Nevertheless, the Commissioner is of the opinion that in the minds of Negro pupils and parents a stigma is attached to attending a school whose enrollment is completely or almost exclusively Negro, and that this sense of stigma and resulting feeling of inferiority have an undesirable effect upon attitudes related to successful learning. Reasoning from this premise and recognizing the right of every child to equal educational opportunity, the Commissioner is convinced that in developing its pupil assignment policies and in planning for new school buildings, a board of education must take into account the continued existence or potential creation of a school populated entirely, or nearly so, by Negro pupils.***' (at p. 127)

"In support of its position, petitioner further cites: *Bell v. City of Gary, Indiana,* 213 *F. Supp.* 819 (*N.D. Ind.* 1963), aff'd 324 *F.2d* 209 *(7th Cir.), cert. denied* 377 *U.S.* 924, 12 *L.Ed.2d* 215 (1964), where the Court said:

> '*** It is neither just nor sensible to proscribe segregation having its bases in affirmative state action while at the same time failing to provide a remedy for segregation which grows out of discrimination in housing, or other economic or social factors. Education is tax supported and compulsory, and public school educators, therefore, must deal with inadequacies within the educational system as they arise, and it matters not that the inadequacies are not of their own making. This is not to imply that the neighborhood school policy *per se* is unconstitutional, but that it must be abandoned or modified when it results in segregation in fact.***' *F. Supp.* at 546

"Petitioner asserts that previous cases within New Jersey have decided that local school districts had the authority and the duty to reduce racial imbalance and to establish school attendance areas that make possible wherever feasible a student body that represents a cross section of the population of the entire district. It cites *Jenkins v. Township of Morris School District, supra; Christner et al. v. Board of Education of the City of Trenton,* 1970 *S.L.D.,* 354; *Booker v. Board of Education, City of Plainfield, supra; Alston v. Union Township Board of Education,* 1964 *S.L.D.* 54, affirmed State Board of Education 60; *Morean v. Montclair Board of Education,* 1963 *S.L.D.* 154, affirmed State Board of Education

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160, affirmed 42 *N.J.* 237, 200 *A.2d* 97 (*Sup. Ct.* 1964); *Spruill v. Englewood Board of Education,* 1963 *S.L.D.* 141, affirmed State Board of Education 147; and *Fisher et al., supra.*

"Therefore, petitioner asserts that under the established laws of this State regarding racial imbalance these Motions to Dismiss must fail, because, as presently drawn, the Plainfield Board's Petition presents ample grounds for concluding that remedial relief could be granted. It cites *Mianulli v. Gunagan, supra,* where the Court stated:

> " '*** In the determination of a motion of the present nature the basic inquiry, like that in the event of the former demurrer, is whether the defendent should be required to answer. Accordingly it has long been the rule that to prevail in such an attack upon the pleading, its insufficiencies to invoke relief must be clearly apparent and if there is any ground on which the pleading can be legitimately retained the endeavor to strike it must fail.' (32 *N.J. Super.* at 215)***"

This concludes a recital of the contentions of the parties to the dispute, *sub judice,* which was contained in the decision of the Commissioner on the Motion to Dismiss of May 12, 1972. These contentions are still viable with respect to the Amended Petition reported, *ante.*

Additionally, in support of their respective Motions to Dismiss the Amended Petition, the Board of Education of the Township of Green Brook, hereinafter "Green Brook Board," and the Borough of Watchung, hereinafter "Watchung Board," offer some additional comments in Briefs of counsel.

The Green Brook Board avers that the Plainfield Board's original Petition set forth an alleged problem and accused respondents of causing it, but that the Amended Petition considered herein, while setting forth the same problem, fails to accuse Respondent Green Brook Board in a similar manner. In the view of the Green Brook Board, the Plainfield Board seems to be arguing that *Jenkins, supra,* ought to be applied to some or all of the respondent school districts. However, the Green Brook Board avers that, if this is the case, Plainfield should set forth specific allegations which would bring the *Jenkins* decision "*** to bear in this case"; i.e., that Plainfield and Green Brook were a single municipal unit, that a sending-receiving relationship had existed between the two districts, that Plainfield is the social and commercial center for the Green Brook, etc. In this view,

> "*** If Plainfield is alleging that Jenkins should apply to Green Brook, or any of the other Respondents, then it would seem that it ought to allege the elements or some facts to attempt to make Jenkins apply.***" (Green Brook Board's Brief, at p. 4)

Since, in the Green Brook Board's opinion, there are none of the elements of

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Jenkins herein and no allegations against Green Brook, there is no controversy or dispute as to Green Brook.

The Watchung Board supports the position of the Green Brook Board and avers that paragraph 5 of the Amended Petition (reported in full, *ante*) deletes a contention advanced in the Plainfield Board's original Petition – that respondents' acts effect racial segregation in Plainfield – and merely state a "***wrongful result effected by New Jersey's statutory scheme for the operation of independent school districts.***" (Watchung Board's Brief, at p. 2) The Watchung Board also avers that:

> 1. Paragraph 6 of the Amended Petition similarly abandons an allegation of illegal acts, but states that "building programs" of respondent districts may prejudice a plan for facility sharing.
>
> 2. Paragraph 8 of the Amended Petition similarly abandons an allegation that the present plan for the operation of school districts in the Plainfield area prevents petitioner from complying with the direction of the Court in *Booker, supra,* and expounds the view that it is the present statutory method of operating separate school districts that has created certain racial imbalance.
>
> 3. "*** The Amended Petition redrafts the prayer for relief directing it solely (Count One, Points (c), (d), 1, 2, and 3) against the Commissioner and fails to request any specific relief against any acts or practices of Respondent.***" (Watchung Board's Brief, at p. 5)

Additionally, the Watchung Board argues that where, as here, *de facto* segregation exists through "*** no discriminatory action on the part of state authorities such discrimination is beyond the ambit of the Fourteenth Amendment***." (Watchung Board's Brief, at p. 7) In support of this position the Watchung Board cites *Spencer v. Kugler,* 326 *F. Supp.* 1235 (*D. N.J.* 1971), 404 *U.S.* 1027 (1972); and *Bradley v. School Board of the City of Richmond,* 338 *F. Supp.* 67 (4th *Cir.* 1972). In *Spencer, supra,* according to the Watchung Board, black plaintiffs had sought to compel a joinder of school districts to avoid segregation and achieve racial balance and the Court held that *de facto* segregation which exists without discriminatory action by state authorities poses no cause for intervention by the Courts. This decision was affirmed by the Supreme Court of the United States without opinion. Similarly, in *Bradley, supra,* the Watchung Board avers that the Fourth Circuit Court found no constitutional violation in the operation of three contiguous school districts, although one of those districts was composed of a majority of nonwhite citizens while the neighboring districts had majorities of whites.

The hearing examiner observes that the basic fact of this matter is not a subject of contention nor the subject of proofs. Plainfield has become a school district largely composed of nonwhite citizens and it is bounded on all sides by school districts composed of citizens who are white. The issue posed for the Commissioner's determination is whether this factor of racial separateness

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existing between and among districts may or should be altered by a decision of the Commissioner of Education.

* * * *

The Commissioner has reviewed the report of the hearing examiner and observes that the instant matter requires a decision grounded on the elements of a Petition which are dependent for their analysis on the principles enunciated by the Court in *Jenkins.* In that case the Court decided that in the circumstances the statutes pertinent to sending-receiving relationships, or to the merger of school districts, constituted only a part of the total legislative authority that could be used to prevent the frustration of constitutional goals. Specifically, in this regard, the Court said in *Jenkins, supra:*

> "***In *Booker* we held that the Commissioner had the responsibility and power of correcting *de facto* segregation or imbalance which is frustrating our State constitutional goals; we pointed out that where the Commissioner determines that the local officials are not taking reasonably feasible steps towards the adoption of a suitable desegregation plan in fulfillment of the State's policies, he may either call for a further plan by the local officials or 'prescribe a plan of his own.' 45 *N.J.* at 178. *There was no specific statutory language to that effect but we found sufficient legislative authority in the various general statutes which have been adopted by the Legislature from time to time and are now embodied in the 1968 Revision of the Education Law (L.* 1967, *c.* 271). In particular, we referred to the Commissioner's long standing and comprehensive power under *N.J.S.A.* 18A:6-9, pertinent here, to decide all controversies under the school laws or under the rules of the State Board of Education or the Commissioner (45 *N.J.* at 175), and we cited *Blumrosen, supra,* 19 *Rutgers L. Rev.* at 261 where many other pertinent powers of the Commissioner are enumerated. These include, as set forth earlier in this opinion, many broad supervisory powers designed to enable him, with the approval of the State Board of Education, to make necessary and appropriate steps for fulfillment of the State's educational and desegregation policies in the public schools. *Booker, supra,* 45 *N.J.* at 173-181; *N.J.S.A.* 18A:4-22, 23, 24, 25, 29.***" *(Emphasis supplied.)* (58 *N.J.* at 506-507)

Thus it is clear that the Commissioner's powers with respect to a "fulfillment" of the State's educational policies are not alone contained within the parameters of "specific statutory language." Instead the Court stated that the office of the Commissioner of Education is vested with "broad supervisory powers" (which were later characterized by the Court as "*** the ample strength of an arsenal of powers *** " (at page 507)) and that such powers could be employed by the Commissioner, in the circumstances of *Jenkins,*

> "*** to direct a merger on his own if he finds such course ultimately necessary for fulfillment of the State's educational and desegregation policies in the public schools." (at p. 508)

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Similarly, the basic question in the instant matter is again whether the facts herein are those which warrant the employment by the Commissioner of his "arsenal of powers," to which the Court referred, in order to effectuate the State's educational policies or whether more specific statutory procedures should be followed. Faced with such a question recently *In the Matter of the Board of Education of the Borough of South River for the Termination of the Sending-Receiving Relationship with the School District of Spotswood, Middlesex County,* 1972 *S.L.D.* 286, the Commissioner said:

> "*** The Commissioner observes that the New Jersey Supreme Court's decision in *Jenkins* was one that enunciated a clear constitutional principle and related it to a precise factual and unique situation. The clash between the principle and the situation mandated the resultant decision by the Court that the statutes, which control relationships between districts, are not absolute if, as a result of the statutes' prescription, a constitutional right is abridged. However, the Commissioner believes that the Court's decision, that statutes pertinent to the severance of school district sending-receiving should be set aside in *Jenkins,* was not meant to '*** permanently abridge ***' existing law. To the contrary, the Court said, at page 500:
>
> > ' *** It seems clear to us that, similarly, governmental subdivision of the state may readily be bridged when necessary to vindicate state constitutional rights and policies. This does *not entail any general departure from the historic home rule principles* and practices in our State in the field of education ***.' *(Emphasis supplied.)*
>
> "The 'home rule principles' applicable to the instant matter are that South River is, or ought to be, free, if it chooses to be so, to present '*** good and sufficient reason ***' (*N.J.S.A.* 18A:38-13) why it should be allowed to terminate a relationship whereby it receives students from a sending district. ***" (at p. 289)

However, it is noted here that in *South River* there was no racial factor present and no other clear evidence that it was necessary to employ an "arsenal of powers" to fulfill the State's educational goals and thus render inapplicable those specific statutes with relevance to the voluntary merger of districts. *N.J.S.A.* 18A:13 Thereafter, the Commissioner directed that the relationship between South River and Spotswood be terminated.

Thus, on that occasion the decision in *Jenkins, supra,* was not deemed by the Commissioner to mean that all statutes and laws pertinent to sending-receiving relationships could, or should be set aside, although the Court did rule that governmental subdivisions "*** may readily be bridged ***" if necessary to conform to the mandate of the New Jersey Constitution.

The Petition herein is similarly concerned with "governmental subdivisions," but its demand, unlike *Jenkins,* is not that of an old relationship between two districts be continued, but that a new relationship which never

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existed before be studied and, perhaps, ultimately directed for nine districts by an administrative order. However, the instant Petition, as *Jenkins*, is founded on the same constitutional admonition against segregation in the free public schools of the State of New Jersey.

Thus, for the second time since *Jenkins* the Commissioner is requested to weigh and judge the scope and thrust of that decision -- to assess its relationship to another set of circumstances. This request comes as the result of eight Motions that say in effect, that there is no justiciable controversy herein which may be adjudicated under the school laws since the parties to this Petition have never been associated together as school districts before. Respondents jointly aver that they have done no harm to petitioner and there is no relief the Commissioner can afford.

The Commissioner opines that on the surface such an avowal may appear to have some merit in this instance; since if one district as herein is able, for whatever reason, to select, almost at random, those other districts with which it desires a relationship, other districts of the State must be afforded similar privileges. It might appear that the ultimate outcome of such freedom of selection, if unrestricted, would vitiate entirely the present statutorily prescribed relationships among districts (*N.J.S.A.* 18A:38) and promote new relationships on demand which are founded in a vacuum -- without the logical form or a valid variety of reasons which should be the foundation stone of such proposals.

However, while postulating the view that there may be no justiciable dispute herein, and thus no relief the Commissioner can afford, the Commissioner is constrained to state that a positive decision to this effect at the present juncture would be both premature and unwarranted in light of *Jenkins*. The Plainfield Board has charged that racial imbalance in the Plainfield area constitutes "invidious discrimination" which acts as a bar to "equal educational opportunity in an integrated environment" and it requests the Commissioner to so find. In these respects, at least, the Commissioner holds that the Plainfield Board is entitled to proceed with its proofs and to establish the facts, if any, on which the charge, if a charge it is, is founded. In such a proceeding the Board is entitled to employ a variety of discovery techniques.

This holding is taken while cognizant of the contention of respondents that the Court in *Jenkins* limited the applicability of that decision to a "specially compelling situation"; a "single community" without "visible or significant internal boundary separations"; a "unique" set of circumstances. Respondents jointly aver that the instant matter is not such a situation or set of circumstances and *Jenkins* should, therefore, be construed narrowly to bar such petitions as that herein before the Commissioner.

In this regard the Commissioner observes that an espousal of such a view at this juncture would imply a disregard for those other quoted sections of *Jenkins* in which the Court discussed the "breadth" of the Commissioner's powers. Further, in addition to the previously recited sections from *Jenkins*, the Commissioner notes, in particular, that paragraph of the Court's opinion wherein it is said:

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> "*** The Commissioner has been appropriately charged with high responsibilities in the educational field and if he is faithfully to discharge them in furtherance of the State's enlightened policies he must have corresponding powers. The Legislature has here granted them in broad terms and it would disserve the interest of the State to permit their administrative narrowing which in effect represents not only a disavowal of power but also a disavowal of responsibility.***" (58 *N.J.* at 504)

The "administrative narrowing" to which the Court made reference is no less an issue herein since respondents would recommend just such a narrowing in the Commissioner's interpretation of *Jenkins.* Their argument herein, if given effect, would require the Commissioner to disavow both the "power" and the "responsibility" to which the Court referred. However, the Commissioner finds no merit in such argument on Motion in the absence of any proofs or a hearing of any kind; it is not clear at this juncture that the instant Petition does not state a claim for relief under *Jenkins.*

As the Plainfield Board logically avers in its Brief, quoted in part, *ante,* such Motions as the one herein must be construed "***liberally in favor of the pleader."

Having held, *ante,* that the Plainfield Board is entitled to proceed with proofs to support certain charges and prayers for relief, the Commissioner directs his hearing examiner to proceed at the convenience of the parties to a hearing on the proofs which are relevant to such charge and prayer. However, the Commissioner dismisses those applications ("c" through "h," *ante*) which the Petition contains in its prayer for relief, wherein the Commissioner is requested to form a "study team" and "investigate" and "explore" those elements of the relationship now existing between and among the districts named in this Petition. The Commissioner holds that a study team is neither warranted nor justified until such time as it is more clearly apparent that some of the State's educational goals are being thwarted. An adversary hearing may serve as the prerequisite in this regard.

Having held that petitioner is left to his proofs to support a contention that *Jenkins, supra,* has a specific applicability herein (*i.e.* that Plainfield and its neighbors constitute a "single community," or that there are a "unique" set of circumstances, etc.), the Commissioner is constrained to say that the proofs are not limited to such specifics; *Jenkins* may have created a broader precedent within which the facts of the instant matter may be ultimately judged as compelling further action by the Commissioner.

Accordingly, respondents' Motion for Dismissal which is considered herein must fail except as noted, *ante.* The Petition remains viable with respect to those portions which allege that there is a racial imbalance in the Plainfield area and that such imbalance constitutes an invidious discrimination which acts as a bar to equal educational opportunity in an integrated environment.

COMMISSIONER OF EDUCATION

March 28, 1973

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In the Matter of the Passaic County Regional High School District No. 1, Little Falls, Passaic County.

This is to certify that I have determined, pursuant to the provisions of Title 18A:13-20 of the New Jersey Statutes, that in my judgment, the following amount is necessary to provide a thorough and efficient system of public education in the School District of Passaic County Regional High School District No. 1, Passaic County, for the school year beginning July 1, 1973 and ending June 30, 1974, and that such amount is to be included in the tax levied for the municipalities of the Township of Little Falls, the Borough of Totowa, and the Borough of West Paterson for such purpose:

Current Expenses $3,113,058.91

This amount is in addition to the amount of $74,845.45 for Capital Outlay, and $378,016.00 for Debt Service previously certified.

Sincerely,

COMMISSIONER OF EDUCATION

March 30, 1973

Board of Education of the Town of Montclair, Essex County,

Petitioner,

v.

Mayor and Commissioners of the Town of Montclair, Essex County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Petitioner, Charles R. L. Hemmersley, Esq.

For the Respondents, Robert B. Shepard, Jr., Esq.

Petitioner, the Board of Education of the Town of Montclair, hereinafter "Board," has appealed the action of the Mayor and Commissioners of the Town of Montclair, hereinafter "Town," certifying to the County Board of Taxation a lesser sum of moneys for local school purposes than that proposed by the Board.

The Board's Petition of Appeal sets forth five separate causes of action which may be stated in summary as follows: (1) that the Town's action reducing the amount of local taxes for school purposes as proposed by the Board was improper and illegal; (2) that the Town's action leaves insufficient funds to

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provide a thorough and efficient system of public education; (3) that the Town is attempting to improperly impede, obstruct, hinder or contravene the decision of the Commissioner of Education in *Rice et al. v. Board of Education of the Town of Montclair*, 1967 *S.L.D.* 312, 1968 *S.L.D.* 192, affirmed State Board of Education 1968 *S.L.D.* 199; (4) that the Town is engaged in a course of conduct in violation of the Constitution and laws of the State of New Jersey and an Order of the Commissioner in implementation thereof; and (5) that the Town is engaged in acts, practices and a course of conduct in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

By notice of Motion to Dismiss, the Town now applies to the Commissioner for an Order dismissing the third, fourth and fifth causes of action set forth in the Board's Petition of Appeal.

The Montclair branch of the National Association for the Advancement of Colored People, together with twenty-nine parents as guardians *ad litem* for their minor children, have filed a Motion to Intervene on behalf of the Board in this matter.

For the purpose of oral argument, these two Motions were combined, and counsel for both parties, as well as counsel for the proposed intervenors, presented oral argument on August 13, 1973, before a representative of the Commissioner, at the State Department of Education, Trenton.

The record in the instant matter, including the transcript of the oral argument on the two Motions, is before the Commissioner.

First, the Commissioner will consider the arguments presented by the parties regarding the Motion to Dismiss.

The Town admits the Board's right to appeal the budget reduction and further concedes the authority of the Board to determine an appropriate plan for the assignment of pupils to the various public schools within the district. However, the Town argues that it has the statutory right to appoint members to the Board, and it has the constitutional right to express publicly its dissatisfaction with the policies of the Board. In the Town's view, the Board's allegations set forth in the third, fourth and fifth causes of action in its Petition are premature at this time.

The Board states that its Petition alleges specific acts by the Town which constitute interference with the Board's attempts to implement an appropriate pupil assignment plan. Further, the Board alleges that the Town's actions are designed to create *de jure* segregation within the school district and, therefore, the aforementioned three causes of action should not be dismissed without a hearing by the Commissioner. The Board states that the Commissioner does have jurisdiction over the allegations raised in its Petition, even though the Town claims that its public statements and actions are cloaked by constitutional provisions for freedom of speech.

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The Board points out that its President has submitted an affidavit verifying the allegations set forth in its Petition. According to the President, the Town enacted an ordinance in August 1972, increasing the membership of the Board from five to seven members as part of the Town's pledge to the citizens to restore neighborhood schools to Montclair. The President's affidavit also states that the Mayor has publicly announced his intention to appoint to the Board, citizens who are decisively opposed to the "forced busing" of public school pupils and who are determined advocates of neighborhood schools, in order to control the Board and defeat the Board's pupil assignment plan. This, says the President, is not a hollow threat nor empty boast, because the Town does have the power to seize control of the Board.

The Town replies that the Board is making an unwarranted assumption that it may, in the future, be forced to adopt a pupil assignment plan which would be improper. Also, the Town argues that any new plan adopted by the Board would be subject to review and approval by the State Department of Education and the Commissioner.

The proposed intervenors presented argument that they desire relief against the Board, because they want a constant plan of pupil assignment. In the opinion of the intervenors, the budget reduction subverts the Board's plan, and if the Town's actions evidence an intention to subvert or in fact do subvert the Board's plan, then the intervenors have the right to protect the interests of the citizens under the Commissioner's decision in *Rice et al. v. Board of Education of the Town of Montclair, supra.* Intervenors assert that the sum total of the Town's actions threatens the constitutional rights of public school children, because the reversion to a strictly neighborhood school plan would create enrollments in two public schools which would be ninety-five percent nonwhite. Intervenors further argue that, although the Town has the statutory right to act to reduce the school budget, it may not make overt pronouncements intended to restore racial segregation to the public schools.

The Commissioner has reviewed the large and lengthy record in this matter and observes that the Town reduced the amount to be raised by local taxation for school purposes for 1973-74 by $150,000, from $10,072,111 to $9,922,111. The Town has itemized specific items totaling $150,000, which it believes may be reduced without impairing the educational program. The Board appeals this reduction and intends to prove the necessity for the restoration of the $150,000. This is set forth under the first and second causes of action in the Board's Petition of Appeal.

In the judgment of the Commissioner, the Board's appeal of the $150,000 budget reduction is the first and foremost matter requiring determination. If the Commissioner were to permit the Board to go forward with all five of the causes of action, set forth in its Petition, the final determination of the Board's 1973-74 school budget would be needlessly delayed.

The Commissioner finds and determines that the third, fourth and fifth causes of action set forth in the Board's Petition of Appeal are not necessary for

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the determination of the Board's 1973-74 budget. Therefore, the Commissioner hereby dismisses the third, fourth and fifth causes of action, without prejudice, from the Board's budget appeal, and directs that the earliest possible, mutually agreeable date be set down for hearing regarding the reductions to the 1973-74 school budget.

Intervenors' participation in the determination of the Board's budget appeal is not necessary. The Board, as the representative body for the citizens of the school district, is both able and qualified to properly and adequately present its case. Therefore, the Motion to Intervene in the Board's budget appeal is denied.

COMMISSIONER OF EDUCATION

November 9, 1973

Board of Education of the Boroughs of Caldwell-West Caldwell,

Petitioner,

v.

Mayor and Council of the Borough of Caldwell, and Mayor and Council of the Borough of West Caldwell, Essex County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Stickel, Kain and Stickel (Harold M. Kain, Esq., of Counsel)

For the Respondent Borough of Caldwell, William C. Slattery, Esq.

For the Respondent Borough of West Caldwell, John J. McDonough, Esq.

Petitioner, hereinafter "Board," appeals from the action of respondents, hereinafter "Councils," taken pursuant to *N.J.S.A.* 18A:22-37, certifying to the Essex County Board of Taxation a lesser amount of appropriations for school purposes for the 1973-74 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing conducted on July 12, 1973 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election held February 13, 1973, the voters rejected the Board's proposals to raise $5,751,340 by local taxes for current expenses and $87,074 for capital expenditures. The budget was then sent to the Councils,

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pursuant to *N.J.S.A.* 18A:22-37, for their determination of the amount of local tax funds required to maintain a thorough and efficient local school system.

After consultation with the Board and a review of the budget, Councils made their determination and certified to the Essex County Board of Taxation an amount of $5,298,813 for current expenses and $47,074 for capital outlay. The pertinent amounts may be shown as follows: (Petitioner's Exhibit 4, at p. 3.66)

	CURRENT EXPENSE	CAPITAL OUTLAY	TOTALS
Board's Proposal	$5,751,340	$87,074	$5,838,414
Councils' Certification	5,298,813	47,074	5,345,887
Reduction	$ 452,527	$40,000	$ 492,527

The Board contends that the actions of Councils resulting in the reduction of its budget were "illegal, inaccurate" and based on "inadequate, insufficient and erroneous knowledge of legal, financial, and educational considerations." The Board contends further that Councils' actions were arbitrary, capricious, and not based on the guidelines established in *Board of Education of East Brunswick v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966) where the Court commented as follows:

> "*** The governing body, may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons.***" (at p. 105)

The Court also defined the function of the Commissioner when, after the governing body has made its determination, the Board appeals from such action:

> "***the Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action

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by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R.S.* 18:7-83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness.***" (at p. 107)

Councils deny that their reductions were arbitrary or capricious and aver that the amounts certified were made "*** in good conscience with full and complete deliberation with respect to the needs of the Board***." Councils aver also that the remaining funds will be sufficient to operate and maintain a thorough and efficient system of public schools within the district.

After examining the record in its entirety and weighing the testimony of the witnesses, the hearing examiner finds that Councils' reductions were neither arbitrary nor capricious. The hearing examiner recommends, therefore, that the Commissioner make his determination on the basis of the analysis of the supporting statements, documentation, and testimony about the specific budgetary items now in contention.

As part of their determination, Councils suggested items of the budget in which they believed economies could be effected without harm to the educational program as follows:

CURRENT EXPENSES

Account	Item	Board's Budget	Councils' Appropriation	Reduction
110	Admin.-Sals.	$175,390	$162,917	$12,473
120	Negotiations	8,600	7,600	1,000
120	Curric. Workshops	5,840	5,120	720
130A	Local Servs.	725	500	225
130B	Meeting Exp.	970	600	370
130F	Meeting Exp.	1,400	1,000	400
130F	Personal Car Reimbur.	900	825	75
130F	Travel Exp.	200	100	100
130L	Travel	320	120	200
130M	Newsletters	3,100	2,100	1,000
130N	Miscellaneous	4,656	3,156	1,500
210	Instr.-Sals.	4,206,672	4,080,697	125,975
210	Interns	22,800	–0–	22,800
210	Supp. Tchrs.	155,000	118,000	37,000
210	Sub. Tchrs.	60,000	56,000	4,000
210	Admin. Asst.	15,500	–0–	15,500
230A	Elem. Sch. Lib. Books	17,255	16,805	450
230C	Elem. Sch. Films	5,727	4,000	1,727

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230C	Elem. Sch. Recordings	2,831	2,000	831
240	H. S. Supls.	32,050	30,450	1,600
240	Jr. High Supls.	27,375	25,975	1,400
240	Elem. Sch. Supls.	47,278	45,150	2,128
250A	H. S. Supls.	2,644	2,141	503
250A	Elem. Sch. Prof. Books	1,537	1,200	337
250B	Travel Exp.	18,658	11,747	6,911
250C	H. S. Misc. Exp.	16,210	15,000	1,210
250C	Jr. High Misc. Exp.	2,815	2,681	134
250C	Elem. Sch. Misc. Exp.	5,214	5,040	174
410	Health-Sals.	79,505	76,410	3,095
420	Health-Other Exp.	22,308	18,433	3,875
520	Transportation	96,206	93,830	3,376*
520	Public Carrier	16,650	13,742	2,908
610	Custodial-Sals.	338,238	289,260	48,978
630	Heat	59,550	58,290	1,260
640	Utilities	98,514	88,245	10,269
660	Plant-Other Exp.	3,251	2,525	726
710	Maint.-Sals.	172,445	136,361	36,084
720A	Harrison Sch. Shrubs	681	300	381
720A	H. S. Benches	600	300	300
720A	Wilson Sch. Shrubs	473	200	273
720B	Field Hse. Painting	1,575	–0–	1,575
720B	A. V. Shades Rm. 202	176	–0–	176
720B	Folding Door – Gym	1,300	–0–	1,300
720B	Prospect Bldg. Roof	5,225	2,000	3,225
720B	Washington Sch. Clock	887	287	600
720	Miscellaneous	41,906	36,605	5,301
730	Repl. of Equip.	33,355	32,289	1,066
740	Bldg. & Grounds Mat.	34,189	29,538	4,651
810	Employee Ret. Contr.	123,023	109,200	13,823
820	Insurance	198,130	177,892	20,238

*Error in Joint Information of Councils – Schedule II

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870	Tuition	152,139	128,450	23,689
930	Food Serv. Deficit	12,150	5,000	7,150
1010	Student Activs.-Sals.	55,502	50,500	5,002
1020	Athletic Department	31,180	20,617	10,563
1030	Deficit in Student Pub.	5,500	4,250	1,250
1110	Community Serv.-Sals.	6,800	6,150	650
	TOTAL CURRENT EXPENSES			$452,527
	CAPITAL OUTLAY			
1220C	Football Field Sprink.	1,725	–0–	1,725
1220C	Benches	580	290	290
1230A	Washington Sch. Architect	2,500	–0–	2,500
1230C	New Univents	4,500	–0–	4,500
1230C	Prospect Bldg. Remod.	2,500	–0–	2,500
1230C	Incandescent Fixtures	1,860	–0–	1,860
1230	Miscellaneous	23,637	22,012	1,625
1240B	Supt. Off.-New Equip.	1,575	–0–	1,575
1240C	Instr.-New Equip.	34,387	16,500	17,887
1240D	Health-New Equip.	4,919	2,000	2,919
1240	Miscellaneous	5,991	3,372	2,619
	TOTAL CAPITAL OUTLAY			$40,000

The hearing examiner will consider the contested items, as delimited in the table, *ante*.

CURRENT EXPENSES:

The total reduction of salaries by Councils is shown in the following table:

Account	Item	Reduction
J110	Administrative-Sals.	$ 12,473
210	Instructional-Sals.	205,275
410	Attendance & Health-Sals.	3,095
610	Operation-Sals.	48,978
710	Maintenance-Sals.	36,084
1010	Student Activities-Sals.	5,002
1110	Community Service-Sals.	650
	Total	$311,557

(Joint Answer, Schedule II – Information of Councils)

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The Board testified that the municipal officials substituted their judgment for that of the Board's and ignored the negotiated settlement of salaries for central administration, principals, teachers, secretaries, maintenance, and operational personnel, irrespective of *Chapter* 303, *P.L.* 1968, which provides, *inter alia,* for negotiated salaries, and *N.J.S.A.* 18A:29-4.1, which reads as follows:

> "A board of education of any district may adopt a salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law. Such policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of two years from the effective date of such policy but shall not prohibit the payment of salaries higher than those required by such policy or schedules nor the subsequent adoption of policies or schedules providing for higher salaries, increments or adjustments. Every school budget adopted, certified or approved by the board, the voters of the district, the board of school estimate, the governing body of the municipality or municipalities, or the commissioner, as the case may be, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year."

The Board argued that all of its salary proposals were negotiated in good faith pursuant to *Chapter* 303, *P.L.* 1968, and thereafter they were adopted as Board policy pursuant to *N.J.S.A.* 18A:29-4.1. Contrary to Councils' allegation, the Board argues further that two vice-principals are not retiring this school year, therefore a reduction of their salaries is erroneous and not properly based on fact.

The Board concedes that it can eliminate $9,000 which it proposed for teaching interns. However, it testified in detail about the need, and not the desirability, for its other salary proposals. Despite Councils' argument that the Board has exceeded the guidelines of Executive Order No. 11615, and the written testimony of its expert witness in interpreting that Executive Order, the Board avers that its salary policies are "*** clearly within and in keeping with Pay Board regulations.***" (Petitioner's Reply Memorandum, at p. 7)

Councils aver that the Board's salary policies provide for larger increases than the 5.5% limit imposed by Executive Order No. 11615, and that the Board's policy provides for increases in excess of those given to municipal employees. Councils aver further that the Board's reliance on *N.J.S.A.* 18A:29-4.1 is misplaced, and that the Executive Order placed a freeze on wages and salaries which was later modified, but limited to 5.5% as described in the Pay Board's guidelines. Councils aver also that the certification they made for salaries is more than adequate to keep these salaries competitive with teachers' and administrators' salaries in school districts in Essex County and in the State. (Joint Information of Councils, Schedule III)

The hearing examiner notes that under the mandate of *Chapter* 303, *P.L.* 1968, now embraced in the provisions of *N.J.S.A.* 34:13A-1 *et seq.,* the Board

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negotiated salaries for 1973-74 with all of its various employees prior to the submission of this budget to the electorate in February 1973. (Negotiated Agreement, adopted April 10, 1972 for the school years 1972-73 and 1973-74) Councils, however, attempt to deny this right to negotiate and establish salary policy. Disputes of this kind have been addressed in other budget decisions, and it has been uniformly held that the right to make salary judgments for teaching staff members and others is that of the board of education. In *Board of Education of the Township of South Brunswick v. Township Committee of the Township of South Brunswick,* 1968 *S.L.D.* 168, the Commissioner said:

> "*** It is clear that the funds necessary to the implementation of *salary policies* adopted by a board of education must be provided and are not subject to curtailment. *N.J.S.* 18A:29-4.1 See also *Board of Education of Cliffside Park v. Mayor and Council of Cliffside Park****." (*Emphasis supplied.*) (at p. 172)

The salary policies referred to, *ante,* are clearly to be provided for all of those personnel listed as full-time teaching staff members. This is plainly stated in *N.J.S.A.* 18A:29-4.1:

> "A board of education of any district may adopt a salary policy, including salary schedules for *all* full-time *teaching staff members****. Every school budget adopted, certified or approved by the board, the voters of the district, the board of school estimate, the *governing body of the municipality* or municipalities, or the commissioner, as the case may be, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year." (*Emphasis supplied.*)

The adoption of a salary policy by a board of education for its employees is not limited to teaching staff members, but extends also to all employees of a board of education eligible to negotiate their salaries pursuant to *N.J.S.A.* 34:13A-1 *et seq.*

In the hearing examiner's judgment, the Board had the authority to establish its salary policy on behalf of its employees. Councils' reasons for reducing the aforementioned salary accounts fail to prove that the salary policies are excessive or improper. Nor does the record prove that the Board violated Executive Order No. 11615.

Councils have presented no convincing testimony nor argument to refute the need for the salaries that the Board has established. On the other hand, petitioner has presented clear and well-supported analyses of its needs which are entirely credible. Salary policies previously adopted are mandatory. *Board of Education of the City of Newark v. City Council and the Board of School Estimate of the City of Newark, Essex County,* 1970 *S.L.D.* 197

With the exception of the $9,000 conceded by the Board for teaching interns, the hearing examiner recommends that the balance of the reduction, or $302,557, be restored.

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J120 Negotiations and Curriculum Workshops

The Board testified that it anticipates increased costs for negotiations when the entire agreement must be renegotiated during the 1973-74 school year.

Councils' reduction of $1,720 in these accounts is nominal and Councils aver that this is not such a necessary expenditure that its reduction would cause any adverse educational impact in the school system.

The hearing examiner concurs with Councils' reduction and recommends that their reduction of $1,720 be sustained.

J130A,B,F,L,M,N Local Services, Meeting Expenses, Travel Reimbursement Expenses, Newsletter, Miscellaneous

Councils' reduction of $3,870 in this account is made for the same reasons as expressed in the J120 account, *ante*. The hearing examiner recommends that this reduction be sustained and notes that the Board's pre-audit report shows a balance in these accounts of more than $12,000 as of June 30, 1973.

J230A,C Elementary School Library Books, Films, Recordings

Councils' reduction in these accounts totals $3,008 and the Board's tentative audit shows a balance of more than $4,000. Councils' contention that this reduction would not adversely affect the thoroughness of the school system is, therefore, adopted by the hearing examiner. The Board argues that the increase is necessary to provide for a minimal 4.5% increase in costs.

The hearing examiner recommends that Councils' reduction be sustained.

J240 High School, Junior High School, and Elementary School Supplies

These are consumable teaching supplies which are necessary for the operation of the school system. The tentative free balance in this account is nominal. Councils' reduction of $5,128, which represents the increase in this account, over last year's appropriation, would not permit any increase for supplies. The hearing examiner recommends that the $5,128 reduction be restored.

J250A,B,C High School Supplies, Elementary School Professional Books, Travel Expense, Miscellaneous Expenditures

The Board argues that these funds are necessary and that $6,000 of the $9,269 reduction recommended by the Councils was a negotiated travel cost expenditure. Councils contend that no increase is justified and note a tentative balance of more than $3,500 in the account.

The hearing examiner recommends that the negotiated $6,000 be restored to the budget and that the Commissioner sustain a reduction of $3,269.

J420 Attendance and Health Services – Other Expenditures

The Board avers that the $3,875 increase in this account is needed for: (1)

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diagnostic testing of pupils as required by statute, and a modest increase for consulting fees in special cases; (2) increased expenses for alternate programs for classified children; and, (3) testing materials.

Councils aver that its reductions are modest and will not impair the educational process.

The hearing examiner recommends that the $3,875 reduction be restored.

J520 Transportation, Public Carrier

Councils reduced this account in the amount of $3,376 which is a non-aided transportation route on which busing is provided by the Board for the reason of hazard. At the hearing, Councils withdrew their objection to continuance of this expenditure; therefore, the hearing examiner recommends that it be restored.

An additional reduction of $2,908 was made for transportation by public carrier. The Board avers that these moneys are mandated expenditures. Pursuant to *Chapter* 29, *P.L.* 1968, boards are required to furnish transportation to pupils attending private, nonprofit schools and to pupils who live remote from those schools. The law further provides for the payment of $150 to the parents of some pupils, in special situations, in lieu of transportation.

The record shows that the Board's budget in this account is barely adequate and that a transfer of funds within the J520 account, in the 1972-73 school year, was necessary to meet its required expenditures for private school busing and reimbursement pursuant to the statute.

The hearing examiner recommends that the $2,908 reduction be restored.

J630 Heat

Councils reduced this account by $1,260. The written testimony gives no reason for the reduction and the record shows that this account was nearly exhausted in the 1972-73 school year. The hearing examiner recommends that this amount of $1,260 be restored because of the reasons stated and in light of the drastic increases in fuel costs which have occurred during the 1973 calendar year.

J640 Utilities

Councils reduced this account by $10,269 and aver that the Board cannot substantiate the projected cost increase. Councils state also that more prudent management in the Board's telephone service alone could substantially reduce the amount required in the Board's proposal.

The Board cites the steady increase in the cost of electric power which it avers was 12.84% from 1970 to 1972, and that there has been a Public Service request for a price increase for 1973 exceeding this percentage. It avers that gas has also increased 4.3% with a projected price increase for 1973. The projected

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increases were not calculated in its proposal for the 1973-74 Utilities Account; therefore, avers the Board, its budget herein is barely adequate.

The hearing examiner notes that the Board's expenditures in this account exceeded its budget in the 1971-72 and the 1972-73 school years, and that the amount budgeted for 1973-74 is barely adequate when compared to the amount spent in 1972-73. The hearing examiner recommends that the $10,269 reduction be restored.

J660 Plant – Other Expense

Councils reduced this account by $726, but gave no written testimony nor documentation to support its reduction.

The Board avers that these funds are necessary for many miscellaneous expenses which it must incur, such as: laundry and mop services, refuse removal, annual boiler inspection, employee boiler license renewal, etc.

The hearing examiner recommends that this $726 be restored.

J720 A,B, Maintenance

The Board avers that necessary repairs and replacements must be made in its district on such items as shrubs, painting a field house, rebuilding a folding gym door, replacing a roof on an old building, replacing a master clock, and placing shades in rooms to facilitate the use of audiovisual aids.

Councils feel that all the maintenance desired need not be accomplished in one year and that some of the Board's proposed expenditures can be delayed without impairing the educational process.

The hearing examiner is of the opinion that, as necessary as these repairs appear to be, the evidence is insufficient to show that they cannot be deferred for another year. The hearing examiner recommends, therefore, that Councils' reduction in the aggregate of $13,131 in these accounts be sustained.

J730 Replacement of Equipment

The Board avers that the cut of $1,066, from the $33,355 it proposed for this account, should be set aside. It is necessary to replace equipment used by and for pupils which "has seen its day." Councils aver that the replacement is not necessary and can be deferred.

The hearing examiner recommends that this reduction be sustained. The Board will have $32,289 remaining in this account and Councils' reduction should not impair the educational process of the school system in any way.

J740 Building and Grounds Materials

Councils reduced the Board's proposal in this account to the same appropriation made by the Board in its 1972-73 budget. No detailed reasons for the reduction are shown on the record.

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The Board avers that the $4,651 is required in part because of the tremendous increase in the cost of lumber and allied building materials which are essential supplies of the repair and maintenance program. The Board avers further that a good repair program prevents deterioration of the school plant and results in a long-term savings to the taxpayer.

The hearing examiner recommends that the $4,651 reduction be restored.

J820 Insurance

This account provides appropriations for insurance premiums for property, employees, liability and fidelity bond. The Board avers that the appropriation provided by the Councils does not even meet the mandated estimated expenditure for the current school year.

Councils aver that bidding could significantly reduce the Board's insurance expense and state that the increase since the 1971-72 school year is enormous.

The record shows that insufficient funds were appropriated in this account for the 1972-73 school year and that the Board has obligations to its employees which it must meet. The Board also has obligations it has made in purchasing insurance which it has determined is necessary and in the best interest of the school district. Councils have not shown that the budgeted amount is not required, whereas the Board has provided adequate credible evidence disclosing the need for the increased expenditure.

The hearing examiner recommends that the $20,238 reduction be restored.

J870 Tuition

The Board states that this account includes expenditures for pupils attending handicapped classes outside the school district and that Councils' reduction of $23,689 is based on the erroneous conclusion by Councils that "this reduction is justified by the substantial reduction in school attendance anticipated by the Board for 1973-74." (Joint Answer of Councils, Rider to Resolution, at p. 5) The Board argues that attendance of pupils placed in handicapped classes will not decrease in 1973-74, and that per pupil costs for these classified pupils are increasing annually.

In the hearing examiner's opinion, the amount of contractual orders shown in the pre-audit account submitted by the Board, is necessary to meet the special needs of the handicapped pupils in the district. He recommends, therefore, that $137,108 of the $152,139 budgeted by the Board be sustained, and that the Commissioner sustain, also, a reduction in the amount of $15,031.

J930 Food Service (Deficit)
J1030 Student Publications (Deficit)

The Board argues that these accounts were over-expended during the

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1972-73 school year and that its increased budget proposals in these areas are justified and necessary.

Councils argue that the respective cuts of $7,150 for Food Service and $1,250 for Student Publications would still allow sufficient funds in these accounts, and that their elimination from the budget will not impair the educational process.

The hearing examiner recommends that these reductions be sustained.

J1020 Athletic Department

The Board increased its proposal in this account by $10,563. The amount budgeted for the 1972-73 school year was $20,617 which the Board estimates will be over-expended. It avers, also, that additional anticipated expenses for supplies, equipment repair, and reduced gate receipts from its earlier projections, justify the need for the increase in this account.

Councils argue this program does not involve a large number of participants, and that it can be cut back without harm to the educational quality in the school district.

The hearing examiner finds that the Board has not established a need for this increase, although it would be desirable to enhance its athletic program. The hearing examiner recommends that Councils' reduction of $10,563 be sustained.

CAPITAL OUTLAY:

L1220C Football Field Sprinkler
L1220C Benches

Councils' reduction in this account eliminates $1,725 for the sprinkler system which it declares is not necessary for the educational quality of the school district, and also eliminates $290 for benches which is one-half of the Board's request for that item.

The hearing examiner finds that the reduction is justified and that the items, while desirable, are not necessary for the operation of a thorough and efficient system of the public schools. He recommends, therefore, that the $1,725 and $290 reductions be sustained.

L1230 A,C Architect Fees, Equipment, Remodeling, Miscellaneous

The Board stresses its needs in detail for its proposed expenditures in these accounts. It specifically stresses the need for new univents in a school building to replace the original ones which were installed in 1929-30. It has provided also for architect fees to study the needs of an old school building which requires remodeling. Additional needs are described as new lighting, basement corridor tiles which have been loosened by a recurrent leak, air-conditioning equipment, new non-skid tile and other renovations.

Councils have reduced the entire Capital Outlay account by $40,000,

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reasoning that many of the suggested items are desirable but not necessary to maintain a quality educational program.

The hearing examiner recommends that the Commissioner approve the following proposed expenditures:

Architect and Engineering Fees	$ 6,600
Univents–Replace	4,500
Tile–Replace and Library Conversion	1,200
	$12,300

and sustain the balance of Councils' reduction in the L1230 account.

L1240 B,C,D Supt.'s Office Equipment, Instructional Equipment, Health Equipment, Miscellaneous

These accounts include items such as new furniture and other educational and non-educational equipment not described in detail by the Board. Part of its justification for these expenditures was the purchase of new cleaning equipment, not previously available, to provide for a more thorough maintenance program.

The hearing examiner recommends that Councils' reductions in the Board's Capital Outlay account L1240 be sustained with the exception of the approval of funds recommended in the L1230 account, *ante*.

This recommendation is summarized as follows:

Account	Board's Budget	Councils' Reduction	To be Restored by Commissioner
L1240 A,B,C,D	$87,074	$40,000	$12,300

The hearing examiner recommends, therefore, that $27,700 be reduced from the Board's Capital Outlay account.

The following tables summarize the report, findings and recommendations of the hearing examiner:

CURRENT EXPENSES

Account	Item	Councils' Reduction	Amount Restored	Amount Not Restored
110	Admin.-Sals.	$ 12,473	$ 12,473	$ –0–
120	Negotiations	1,000	–0–	1,720
120	Curric. Workshops	720		
130A	Local Servs.	225	–0–	3,870
130B	Meeting Exp.	370		
130F	Meeting Exp.	400		
130F	Personal Car Reimbur.	75		

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130F	Travel Exp.	100		
130L	Travel	200		
130M	Newsletters	1,000		
130N	Miscellaneous	1,500		
210	Instr.-Sals.	125,975	196,275	9,000
210	Interns	22,800		
210	Suppl. Tchrs.	37,000		
210	Sub. Tchrs.	4,000		
210	Admin. Asst.	15,500		
230A	Elem. Sch. Lib. Books	450	–0–	3,008
230C	Elem. Sch. Films	1,727		
230C	Elem. Sch. Recordings	831		
240	H. S. Supls.	1,600	5,128	–0–
240	Jr. High Supls.	1,400		
240	Elem. Sch. Supls.	2,128		
250A	H. S. Supls.	503	6,000	3,269
250A	Elem. Sch. Prof. Books	337		
250B	Travel Exp.	6,911		
250C	H. S. Misc. Exp.	1,210		
250C	Jr. High Misc. Exp.	134		
250C	Elem. Sch. Misc. Exp.	174		
410	Health-Sals.	3,095	3,095	–0–
420	Health-Other Exp.	3,875	3,875	–0–
520	Transportation	3,376	3,376	–0–
520	Public Carrier	2,908	2,908	–0–
610	Custodial Sals.	48,978	48,978	–0–
630	Heat	1,260	1,260	–0–
640	Utilities	10,269	10,269	–0–
660	Plant-Other Exp.	726	726	–0–
710	Maint.-Sals.	36,084	36,084	–0–
720A	Harrison Sch. Shrubs	381	–0–	13,131
720A	H. S. Benches	300		
720A	Wilson Sch. Shrubs	273		
720B	Field Hse. Painting	1,575		
720B	A-V Shades Rm. 202	176		
720B	Folding Door – Gym	1,300		
720B	Prospect Bldg. Roof	3,225		
720B	Washington Sch. Clock	600		
720	Miscellaneous	5,301		
730	Repl. of Equip.	1,066	–0–	1,066

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740	Bldg. & Grnds. Material	4,651	4,651	–0–
810	Empl. Retire. Contr.	13,823	13,823	–0–
820	Insurance	20,238	20,238	–0–
870	Tuition	23,689	8,658	15,031
930	Food Serv. Deficit	7,150	–0–	7,150
1010	Student Activs.-Sals.	5,002	5,002	–0–
1020	Athletic Department	10,563	–0–	10,563
1030	Deficit in Student Pub.	1,250	–0–	1,250
1110	Community Serv.-Sals.	650	650	–0–
	TOTALS	$452,527	$383,469	$69,058

CAPITAL OUTLAY

1220C	Football Field Sprink.	$ 1,725		
1220C	Benches	290		
1230A	Washington Sch. Archit.	2,500		
1230C	New Univents	4,500		
1230C	Prospect Bldg. Remod.	2,500	12,300	27,700
1230C	Incandescent Fixtures	1,860		
1230	Miscellaneous	1,625		
1240B	Supt. Off.-New Equip.	1,575		
1240C	Instruction-New Equip.	17,887		
1240D	Health-New Equip.	2,919		
1240	Miscellaneous	2,619		
	TOTALS	$40,000	$12,300	$27,700

The total reductions and restorations recommended by the hearing examiner are as follows:

CURRENT EXPENSES

Councils' Certification	Reduction Sustained	Restored by Comm.
$5,298,813	$69,058	$383,469

CAPITAL OUTLAY

$ 47,074	$27,700	$ 12,300

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This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, the report of the hearing examiner, and the exceptions thereto as filed by the Board and by the Councils of Caldwell and West Caldwell.

It is noted that Councils' principal exception is to the Board's alleged violation of Executive Order No. 11615 which, effective August 15, 1971, limited salary increases, exclusive of longevity provisions, to 5.5% annually. In this regard, the Commissioner determines that the Board is answerable to the Federal Pay Board and that such matters, absent proper jurisdiction of the Commissioner, may not properly be adjudicated herein, but should be referred to the federal agency established to review and determine such matters.

The Commissioner agrees with the conclusions and recommendations of the hearing examiner and finds and determines that, in order to provide for a thorough and efficient system of education, the amount of $383,469 must be added to the previously certified sum of $5,298,813 for the current expenses of the district, so that the total amount of the tax levy for current expenses shall be $5,682,282; and that the amount of $12,300 must be added to the previously certified sum of $47,074 for the capital outlay of the district, so that the total amount of the tax levy for capital outlay shall be $59,374. Accordingly, the Commissioner directs the Councils of Caldwell and West Caldwell to certify to the Essex County Board of Taxation the amounts of $5,682,282 for current expenses and $59,374 for capital outlay of the school district for the 1973-74 school year.

COMMISSIONER OF EDUCATION

January 4, 1974

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Board of Education of the Borough of Milltown,

Petitioner,

v.

Mayor and Council of the Borough of Milltown, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Russell Fleming, Jr., Esq.

For the Respondent, Charles V. Booream, Esq.

Petitioner, the Board of Education of the Borough of Milltown, hereinafter "Board," appeals from an action of the Mayor and Council of the Borough of Milltown, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37, certifying to the Middlesex County Board of Taxation a lesser amount of appropriations for school purposes for the 1973-74 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing conducted on June 26, 1973 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. Supplemental information was subsequently filed by the parties. The report of the hearing examiner is as follows:

At the annual school election held on February 13, 1973, the Board submitted to the electorate a proposal to raise $1,263,945 by local taxation for 1973-74 current expense costs for the school district. Subsequent to the defeat of that proposal by the voters, the Board submitted its proposed budget to the Council for its determination of the amount necessary for the operation of a thorough and efficient school system in the Borough of Milltown for the 1973-74 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A.* 18A:22-37.

After appropriate consultation between the parties, Council made its determination and certified to the Middlesex County Board of Taxation an amount of $1,213,345 for current expenses, a reduction of $50,600 from the amount originally proposed to the voters by the Board.

At this juncture, the hearing examiner notes that the Board is a party in the matter of *Board of Education of the City of New Brunswick v. Board of Education of the Township of North Brunswick, Middlesex County,* currently being heard by the Commissioner. On November 30, 1973, the Commissioner, in a Decision on Motion, directed that, as an interim plan pending final determination of the larger issue therein, all tenth grade pupils, with few exceptions, including those from the Borough of Milltown, would be transferred to the North Brunswick High School for their education instead of continuing in attendance at New Brunswick High School.

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Council for the Board asserts, by letter dated October 12, 1973, that such a pupil transfer, with possibly attendant increased pupil transportation costs and higher tuition costs, are factors which warrant consideration in the matter, *sub judice.* By way of an answering letter, dated October 24, 1973, Mayor and Council aver that by virtue of the Board's $250,000 unexpended current expense balance as of June 30, 1973–verified by the hearing examiner to be exactly $250,860.76 from the Board's 1972-73 audit report filed at the State Department of Education–the Board has more than sufficient funds to meet unanticipated expenditures.

The hearing examiner notes that the free balance represents slightly more than 16% of the Board's proposed current expense budget of $1,531,325, prior to Council's recommended reductions. If, as the Board represents in its advertised budget, $20,000 of that balance is to be applied to the 1973-74 school budget, the unappropriated free balance would stand at $230,860.76, or slightly more than 15% of its total current expense operating budget. The hearing examiner is aware that sound accounting and business practice require a reasonable reserve to be maintained for unanticipated obligations. However, in this instance, an unappropriated free balance of $230,860 is out of proportion to what reasonably should be carried for such occurrences.

In that regard, it is pointed out that the total recommended reduction by Council amounts to $50,600, of which amount Council recommends that $32,500 be appropriated from the free balance, with the remaining $18,100 to be reduced in specific line item accounts.

The specific line items recommended for reduction by Council are as follows:

J110f Salaries – Superintendent's Office

The Board proposed an amount of $25,733 for this line item, while Council recommends a total amount of $24,233, a reduction of $1,500. The Board avers that the total amount proposed is necessary to meet its commitments to its regular Superintendent of Schools and its Acting Superintendent of Schools. The Board explains that its present Superintendent had a severe heart attack during the summer of 1971 which limited his on-the-job attendance. Thus, a person was engaged to perform as Acting Superintendent of Schools during the convalescence of the Superintendent.

As of September 1, 1973, however, the Superintendent decided to retire. The Board determined to employ the Acting Superintendent to be the Superintendent of Schools as of that date. Although the Acting Superintendent was compensated at the rate of $19,000 for the 1972-73 school year, the Board engaged him at the rate of $22,000 to serve as Superintendent for the 1973-74 and 1974-75 school years by contract dated March 21, 1973. The remaining $3,733 is to compensate the now former Superintendent of Schools until his retirement. (Tr.11)

Council asserts that its recommended reduction of $1,500 – specifically

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from the $22,000 salary of the new Superintendent – still leaves sufficient moneys for the Board to grant a $1,500 increase over his former $19,000 salary. Such an increase, Council contends, is extremely reasonable in light of the person's limited experience in the Milltown community.

The hearing examiner finds that a contractual agreement was entered into by the Board and the Superintendent for a total of $22,000 which, by law, must be honored.

While the hearing examiner finds that need has been established for the proposed amount in this account, he recommends that the amount of $1,500, recommended for reduction by Council, be appropriated by the Board from its free balance. Therefore, it is recommended that Council's reduction herein be sustained.

J213A.1 Administrative Assistant

The Board proposed an amount of $12,000 in this line item it established for a new position of Administrative Assistant. Council avers that the position is unnecessary and, accordingly, recommends its elimination, thereby effectuating a savings of $12,000.

The position is necessary, the Board contends, in order to provide assistance to the Superintendent in the following areas: guidance for eighth grade pupils, organization of school activities, supervision and writing of federal programs, pupil scheduling and discipline, curriculum assistance, and some instructional assignment.

Furthermore, the Superintendent testified that this position is essential, because on many occasions his presence is required away from the Joyce Kilmer School, one of two schools in the district, where his office is located. Without a principal there, or an administrative assistant who would be an acting building principal during his absence, a classroom teacher would have to be assigned to run the school, which leaves a classroom empty. In addition, the Superintendent asserts that a teaching principal should not be assigned because the school needs full-time administrative attention which is impossible for a teaching principal to provide. It is pointed out that while the other school in the district, Parkview School, has a teaching principal, he teaches one period per day. Finally, the Superintendent contends that unless this position–be it entitled building Principal or Administrative Assistant–is created, the educational program will suffer.

Council asserts that the Board's description of the proposed new position has been, at best, "vague." (Tr. 64) The chairman of Council's finance committee states that the responsibilities and, in fact, the title of the position are not clear, since the position was first entitled Administrative Assistant; however, the Superintendent testified at the hearing that the position is more of a building principal. (Tr. 64, 72)

At this juncture, the hearing examiner finds that whatever the title of the

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position, the functions of that position are those of a building principal. As such, the proposed item should have been part of account J211.

The hearing examiner finds that the Board did establish a need for this position. However, it is recommended that the amount herein requested be appropriated by the Board from its unexpended free balance. Accordingly, it is recommended that Council's reduction be sustained.

J520D Transportation Contingency

The Board, based on past experience, proposed an amount of $8,000 for unforeseen obligations it feels it might incur during the 1973-74 school year. Council recommends a reduction of $3,000 in this item, which would still leave $5,000 for unanticipated expenditures.

In its testimony, the Board cites five examples of unanticipated expenditures it had to absorb into unspecified J520 accounts during the 1972-73 school year as its rationale for continuing this "contingency" account. The Superintendent testified that he has received indications that the Board will have to assume the obligation of transporting three pupils to the Katzenbach School for the Deaf, and that he believes an increased number of special education pupils will transfer into the district and will require transportation. The Superintendent testified that the problem is compounded by the loss of a nearby school which had facilities for special education pupils, so that it may be necessary to transport special education pupils to more distant facilities. Additionally, the Superintendent believes that there will be unanticipated obligations in transportation for the 1973-74 school year. (Tr. 36)

In an effort to determine how the Board arrived at a "contingency" figure of $8,000 for this line item, the hearing examiner propounded several questions to the Superintendent which were objected to by counsel for the Board. (Tr. 37)

In summary, the hearing examiner finds: (1) that the Board did not prove a real need for the proposed amount in this line item, and (2) if a real need had existed, the Board more properly should have anticipated such expenditures under the appropriate J500 accounts.

Accordingly, it is recommended that the reduction of $3,000 be sustained, and that the Board be required to abolish this account and transfer the $5,000 remaining to the appropriate line item of J520a, b or c.

J550a Gasoline – Pupil Transportation Services

The Board proposed an amount of $1,600 for this line item, while Council recommends a reduction of $600.

The Board states that it originally budgeted $1,600 based on the assumption that it would purchase a minibus. Its older minibus purchased in 1970 is more economical to run (miles per gallon of gasoline) than a newer vehicle, because of mandated emission control devices on newer vehicles. Thus,

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although it appropriated $1,500 for 1972-73, because of the danger of increased cost per gallon of gasoline, it proposes $1,600 for 1973-74.

The hearing examiner finds that the Board has established a need for the amount it proposed in this account; however, he recommends that the $600 reduction be absorbed by the Board from its unappropriated free balance. Accordingly, it is recommended that Council's reduction of $600 be sustained.

J740 Other Expenses

The Board proposes an amount of $6,600 for this line item, while Council recommends a reduction of $1,000. The Board contends that the amount is necessary to support unanticipated emergencies that occur during the year in regard to school buildings. Additionally, the Board provided a list of items which were purchased with funds from this account during the 1972-73 school year.

In 1970-71, the amount of $5,737 was appropriated while $6,600 was expended; in 1971-72, the amount of $4,947 was presumably expended; in 1972-73, the amount of $6,600 was appropriated, while $3,046 was expended. Even with Council's reduction of $1,000, the Board still would have $5,500 remaining in this line item. The hearing examiner finds no compelling reason why the amount reduced by Council is essential for the operation of the schools and, accordingly, recommends that the proposed reduction be sustained.

Unappropriated Balance – Current Expenses

As reported earlier in this report, the Board had an unexpended free balance in the current expense account of $250,860.76 as of June 30, 1973. While the Board's advertised budget, published prior to the election on February 13, 1973, represents that $20,000 of unexpended funds were appropriated as revenue to the 1973-74 school budget, its audit report for that same period discloses that because the 1973-74 budget is currently in litigation, no decision has been made as to the amount of money to be appropriated.

Council recommends that an additional sum of $32,500 (along with the $20,000 originally proposed by the Board) be appropriated from the free balance, which would still leave a significant unappropriated free balance.

The Superintendent urges that the free balance funds not be touched, because of the possibilities of increased numbers of pupils, increased rates of tuition, and the possible closing of a private school. While the hearing examiner has reviewed that testimony thoroughly (Tr. 46-62), he cannot find sufficient reasons to agree with the Board's or the Superintendent's positions.

Accordingly, the hearing examiner recommends that a total amount of $52,500 be appropriated by the Board from its unexpended free balance as revenue to the 1973-74 school budget.

In summary, then, the hearing examiner recommends that the total reduction of $50,600 suggested by Council be sustained and that the Board fund

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those items to the extent it originally proposed, and still deems necessary, to the voters on February 13, 1973, out of the remaining unexpended free balance.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter and the report and recommendations of the hearing examiner. It is noted that no exceptions to the hearing examiner's report were filed within the time specified for such response.

The Commissioner is in full concurrence with the recommendations of the hearing examiner with respect to the line items and unappropriated balance as controverted herein. Accordingly, he sustains the total reduction by Council of $50,600 and directs the Board to appropriate from the unappropriated balance in its current expense account such sums as are found necessary to maintain a thorough and efficient program of education for the 1973-74 school year in the schools of the Borough of Milltown.

COMMISSIONER OF EDUCATION

January 4, 1974

Board of Education of the Borough of Dunellen,

Petitioner,

v.

Mayor and Council of the Borough of Dunellen, Middlesex County,

Respondent.

HEARING EXAMINER REPORT

For the Petitioner, Johnson and Johnson (Edward J. Johnson, Jr., Esq., of Counsel)

For the Respondent, Dennis J. Cummins, Jr., Esq.

Petitioner, the Board of Education of the Borough of Dunellen, hereinafter "Board," appeals from the action of respondent, the Mayor and Council of the Borough of Dunellen, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37, certifying to the Middlesex County Board of Taxation an amount of appropriation for current expense purposes for the 1973-74 school year $37,000 less than the amount proposed by the Board in its budget which was rejected by the voters.

The Board charges that Council's action was arbitrary, capricious, and unreasonable, or that the cut was motivated by improper political

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considerations. The Board avers that the amount certified by Council is insufficient to provide a thorough and efficient system of public schools in the Dunellen School District and prays for relief in the form of full restoration by the Commissioner of Education of the reduced amount of $37,000 for current expenses for the school year 1973-74.

The facts of the matter were educed at a hearing before a hearing examiner appointed by the Commissioner on June 7, 1973 at the State Department of Education, Trenton. The report of the hearing examiner follows:

At the annual school election held on February 13, 1973, the voters of the district rejected the Board's proposal to raise $1,690,033.48 for current expenses.

After reviewing the defeated budget and consulting with the Board, Council passed a resolution dated April 5, 1973, certifying $1,653,033.48 to the Middlesex County Board of Taxation for current expenses, a total reduction of $37,000.

The reduction is shown as follows:

CURRENT EXPENSE

Board's Budget	$1,690,033.48
Council's Certification	$1,653,033.48
Reduction	$ 37,000.00

Council denies that its cut was arbitrary, capricious, unreasonable or directed by any political motivation. Council avers that it met with the Board after the budget defeat in an effort to arrive at an agreeable amount of reduction in some of the items mentioned in the budget submitted by the Board. When those efforts proved to be unproductive, Council avers that it finally decided to reduce the budget "*** by the sum of $37,000.00 and said Council purposely did not specify reductions in any specific line items because it was felt that this best could be done by the members of the Board who were more familiar with the priorities to be considered. However, it was made clear that if the Board refused to cut on any particular line items, the total amount of $37,000.00 could very easily be taken from surplus or unexpended balances existing in said budget without any detriment or curtailment of any of the necessary or desirable items the Board included in said budget. There are, however, items which could be reduced or eliminated without affecting any part of the educational program or in any way reducing the quality thereof.***" (Respondent's Answer, at pp. 2-3)

At the hearing, the Board offered a Motion for Summary Judgment on the basis of Council's reduction of $37,000, and its suggestion that the reduction be made in the Board's current expense unappropriated free balance. The Board

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argued that Council's cut in the budget was not accompanied by supporting reasons nor did it submit a breakdown by line item showing where the cuts were to be made.

On April 11, 1973, the Assistant Commissioner of Education in charge of Controversies and Disputes sent a letter to Council which reads in pertinent part as follows:

> "*** In accordance with the directive of the New Jersey Supreme Court in the case of *East Brunswick Board of Education v. East Brunswick Township Council,* 48 *N.J.* 94 (1966), you are directed to include in your Answer two copies of a detailed statement setting forth the governing body's underlying determinations and supporting reasons for its action to reduce the budget of the Board of Education. ***"

The record shows that the supporting reasons indicating where cuts were to be made were not filed with the Board. Thereafter, on May 2, 1973, both parties were notified and directed to follow the procedures set forth in the Assistant Commissioner's letter of April 11, 1973, *ante,* in order to complete the case submission. The Board complied by letter dated May 11, 1973, which was received on May 22, 1973. (P-1) Council complied by letter on June 1, 1973, which was received on June 5, 1973. (R-1)

Council's letter (R-1) was handed to the Board at the hearing on June 7, 1973. The Board had not received it earlier and did not have an opportunity to study it in any detail; however, the Board avers that Council's letter (R-1) which it saw first at the hearing, reflects a shift in Council's "*** position with respect to the school budget and instead of limiting their proposed cut to the surplus, they added certain other line items where they figured cuts could be made." (P-2)

In the hearing examiner's opinion, Council did not follow the directive of the New Jersey Supreme Court in the case of *East Brunswick Board of Education v. East Brunswick Township Council,* 48 *N.J.* 94 (1966). In that decision the Court held that:

> "*** The governing body may, of course, seek to effect savings which will not impair the educational process. *But its determinations must be independent ones properly related to educational considerations* rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and *its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient* in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, *it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons.****" (*Emphasis supplied.*) (at p. 105)

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The Court held also in *East Brunswick* that the Commissioner would be "*** called upon to determine *** the strict issue of arbitrariness***." (at p. 107)

Except for Council's original assertion in its Answer to the Board's Petition of Appeal in this matter, in which Council suggested the reduction be taken from surplus, its further procedure in the instant matter appears defective and not in accordance with *East Brunswick, supra.*

Although Council denies that its reduction was improperly motivated, it did set forth the following explanation in its Answer:

> "*** 8. In making its deliberations the Mayor and Council had to consider the rulings made by the Tax Board of Middlesex County which will result in local assessments being adjusted this year requiring the tax assessor to use a multiplier of two for any industrial and commercial property. This creates an emergency problem as it relates to home owners in the Borough of Dunellen.
>
> "9. The Mayor and Council feel that it is the prerogative, as determined by law, for the voters of any municipality to have the right to reject a school budget, and if and when such an event occurs, it is the duty of the Governing Body to give careful consideration to the wishes of the voters as so expressed. This, they submit, they have done and with considerable deliberation in doing so and without affecting the quality of our educational program. On the other hand, the Board of Education has discounted the voices of the voters and have refused to budge from their stand on any item mentioned in said budget, and they have voiced this opinion through their representatives at every meeting held and by way of the public press. The Mayor and Council feel that this type of representation is not in the best interest of our government and they expressly feel that since the reduction could come entirely out of surplus, which is money actually owned by the taxpayers of the Borough of Dunellen, the Board of Education has failed in its duty by intentionally and obstinately refusing to make any effort to adjust the budget items in any respect whatsoever.***" (Respondent's Answer, at pp. 3-4)

It is the hearing examiner's recommendation, therefore, that the Commissioner consider this budget appeal solely on the basis of the recommendation by Council that the reduction be made in the Board's unappropriated free balance. The hearing examiner finds that Council's supporting reasons for reductions in specific line items, submitted to the Board at the hearing, were not submitted or considered in accord with the principles enunciated in *East Brunswick, supra,* when Council passed its resolution certifying an amount to be raised by taxes for school purposes to the Middlesex County Board of Taxation.

The audit report of the Board of June 30, 1973, on file in the office of the Commissioner, shows that the Board has an unappropriated free balance in its

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current expense account which totals $78,991.08. Council's reduction of $37,000, if left undisturbed, will reduce that free balance to $41,991.08. The total revenue of the Board in current expense and capital outlay accounts as presented to the voters was $1,959,332.

The Board contends that, if the reduction of $37,000 is allowed to stand, the unappropriated free balance will be dangerously inadequate as a reserve to finance contingent expenses which it faces. It listed several items such as legal expenses, inflation, increased maintenance problems in old schools, an engineering survey showing the need to correct hazardous conditions in two schools, and several other possible contingencies for which it avers no moneys have been budgeted, and asserts its need to preserve adequate unappropriated funds for such purposes.

The Commissioner must determine, therefore, whether or not the reduction by Council will leave the Board with sufficient unappropriated funds, consonant with sound business procedure and practice, for the 1973-74 school year.

The June 30, 1973 *Audit Report* on file at the State Department of Education shows a free appropriations current expense balance of $78,389.49, on June 30, 1973.

There is no statutory authority for a board to carry such a balance from one year to the next; however, good business practice and common sense dictate otherwise. There has been no proof that the free appropriations balance shown by the Board is unreasonable or unrealistic. A further reduction in this balance would produce a very limited reserve of $41,389.49. Considering the maintenance problems inherent in older schools, inflation, and unforeseen emergencies, the hearing examiner recommends that the Commissioner direct the Mayor and Council to add $37,000 to the amount previously certified to the County Board of Taxation to be raised by local taxes.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter including the hearing examiner's report and the exceptions thereto filed by Council and the Board. He concurs with the recommendation of the hearing examiner that the matter should be adjudicated on the basis of Council's suggestion that the Board's unappropriated free balance should be reduced.

The Commissioner determines that Council's reasoning in reducing the Board's budget is inconsistent in certain respects with the Court's mandate in *East Brunswick, supra,* wherein it was stated that the governing body must make

> "*** independent [determinations] *** properly related to educational considerations rather than voter reactions.***" (at p. 105)

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Herein, Council failed to adhere to the specific directive of the Court in *East Brunswick, supra,* wherein it was held that:

> "*** Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons***." (at p. 105)

Only after the hearing began did the Board receive Council's supporting reasons for specific line item reductions. That procedure is not in accordance with the guidelines in *East Brunswick, supra,* and it will be set aside.

The Commissioner observes that the unappropriated free balance in the Board's current expense account as of the June 30, 1973 audit is in fact $78,991.08 (note discrepancy June 30, 1973 Audit Report, *ante*) from which the Board has appropriated to the 1973-74 budget $22,601.52 leaving an effective free balance of $56,389.56 available for use by the Board on July 1, 1973.

There is no statutory provision for a board of education to carry an unappropriated free balance, nor is there any policy of the State Department of Education which sets forth the parameters of an adequate free balance as a percentage of the total budget. However, the Commissioner has commented previously on the need for an adequate free balance and opines that each case must be governed by its own circumstances. See *Board of Education of Penns Grove-Upper Penns Neck Regional School District v. Mayor and Council of the Borough of Penns Grove and Township Committee of the Township of Upper Penns Neck, Salem County,* 1971 *S.L.D.* 372.

The Commissioner, after consideration of the facts set forth herein, determines that the transfer of $37,000 from the Board's free balance will not leave a sufficient operating margin for the sound operation of the public schools. He directs, therefore, that the $37,000 reduction by Council not be sustained.

Accordingly, it is ordered that Council certify to the Middlesex County Board of Taxation the additional amount of $37,000 to be raised by taxation for current expenses of the Board for school purposes for the 1973-74 school year, so that the total amount of certification for current expenses of the district shall be $1,690,033.48.

COMMISSIONER OF EDUCATION

January 10, 1974

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Board of Education of the Borough of Demarest,

Petitioner,

v.

Mayor and Council of the Borough of Demarest, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Kiefer, Bollermann & Kaplowitz (Christian Bollermann, Esq., of Counsel)

For the Respondent, Gruen, Sorkow and Sorkow (Marvin Olick, Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from an action of the Mayor and Council of the Borough of Demarest, hereinafter "Council," certifying to the Bergen County Board of Taxation a lesser amount of appropriations than the amount proposed by the Board in its budget for the school year 1973-74, which was defeated by the voters.

A hearing in this matter was held on August 23, 1973 before a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

At the annual school election on February 13, 1973, the legal voters of the school district of Demarest rejected the Board's proposed budget, whereupon Council determined to reduce the amounts proposed by the Board to be raised by local taxation for school purposes as follows:

	Board's Budget	Council's Certification	Reduction
Current Expenses	$954,530	$919,530	$35,000
Capital Outlay	6,500	6,500	–0–
Total	$961,030	$926,030	$35,000

Within the time prescribed by law, Council conferred with the Board and determined to reduce the amount to be raised by local taxation for current expenses by $35,000. No reduction was made in the capital outlay account. Thereupon, Council certified to the Bergen County Board of Taxation a total of $919,530 to be raised by local taxes for current expense purposes for 1973-74 for the school district of Demarest. As part of its determination, Council suggested items of the budget in which it believes economies could be effected without harm to the educational program. Such reductions are listed below:

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Account Number	Item	Board's Proposal	Council's Proposal	Proposed Reduction
J130	Other Exp. Adm.	$ 8,650	$ 7,870	$ 780
J213.1	Teachers – Sals.	553,000	545,000	8,000
J220	Textbooks	8,300	7,470	830
J230	Library & A-V Mats.	11,550	7,095	4,455
J240	Supplies	25,000	22,500	22,500
J250	Other Exp. Instr.	21,800	19,940	1,860
J420	Other Exp. Health	4,750	3,275	1,475
J520b	Field Trips	4,200	–0–	4,200
J610	Operations-Sals.	77,200	73,950	3,250
J730c-1	Equip. – Instr.	8,430	5,520	2,910
J820a	Insurance, Property	3,000	–0–	3,000
J1020	Student Activs.	2,000	90	1,910
	TOTALS	$727,880	$692,710	$35,170*

*Note: The proposed reductions by Council exceed by $170 the reduction in amount certified to the Bergen County Board of Taxation by Council.

The hearing examiner will proceed, herewith, to deal *seriatim* with Council's proposed reductions in line accounts of the Board's budget and to make recommendations with regard thereto for consideration by the Commissioner.

J130 Other Administration Expenses *Reduction $780*

Council recommends 10% reductions in the following portions of this line item: Board Members' Expenses, Board Secretary Office Expenses, Superintendent's Office Expenses, Printing, Miscellaneous.

The Board states that, since the preparation of the budget, its N.J.S.B.A. dues have been raised, payroll and postage costs have increased, as have those for printing, publication, travel, advertising and negotiations, all of which must be provided for within this account.

The hearing examiner notices that expenditures within this account for the 1972-73 school year exceeded the amounts budgeted by the Board for 1973-74. He further recognizes that the expenses for dues, supplies and services for 1973-74 have increased appreciably. Consequently, the hearing examiner recommends restoration of $780 to this account.

Summary:	Reduction by Council	$780
	Amount Restored	780
	Amount not Restored	–0–

J213.1 Teachers – Salaries *Reduction $8,000*

Council alleges that a contingency fund of $5,000 provided during teacher negotiations has proven to be unnecessary, and that $3,000 provided as a further contingency for a teacher on maternity leave, is likewise superfluous. The Board

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presented testimony that a teacher on maternity leave has indeed returned at an increased cost to the Board of $3,000. Additionally, the Board states that increased enrollments in first grade may necessitate an additional teacher, and requests that the $5,000 contingency be restored.

The hearing examiner finds that slightly less than $5,000 of the Board's budgeted figure is uncommitted in this account. Therefore, in recognition of the relatively low unappropriated balance of $28,044 shown by the 1972-73 audit to be available to the Board in its current expense account, the hearing examiner recommends restoration of $5,000 to this account to allow for contingencies which may arise during the course of the school year, and an additional $3,000 to provide for one teacher who returned from maternity leave.

Summary:	Reduction by Council	$8,000
	Amount Restored	8,000
	Amount not Restored	–0–

J220 Textbooks *Reduction $830*

Council alleges that this line item may be reduced by 10% without impairment of the educational process. The Board, however, advances specific program changes requiring additional textbooks as justification for increases in this account.

The hearing examiner recognizes the probable merits of such program changes, but believes that such changes, in the face of the budget defeat at the polls, must be limited. Therefore, he recommends that the reduction be sustained in full.

Summary:	Reduction by Council	$830
	Amount Restored	–0–
	Amount not Restored	830

J230 Library and Audiovisual Materials *Reduction $4,455*

Council reduced $2,900 from audiovisual materials and further reduced the provisions for radio, library books, periodicals and other expenses by $555.

The Board shows expenditures of $8,625.02 in this account for 1972-73 and sets forth a plan to meet ALA standards over a period of years, which plan would require $11,550 for the 1973-74 school year.

With regard to such an increase of 60% above the Board's 1972-73 budget in this line item, the hearing examiner believes that such a desirable improvement should await acceptance by the electorate. Accordingly, he recommends restoration to this line item the amount of $1,530, an amount sufficient to allow for expenditures equal to those found necessary by the Board in 1972-73.

Summary:	Reduction by Council	$4,455

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Amount Restored	1,530
Amount not Restored	2,925

J240 Instructional Supplies *Reduction $2,500*

Council maintains that a reduction of 10% of the Board's budgeted figure in this account will not jeopardize a thorough and efficient education in the Demarest schools.

In this regard, the Board shows that $22,903.36 was expended in 1972-73, and offers unit price increases of such supplies amounting to 13.5% annually as justification of the budgeted figure of $25,000.

The evidence supports the finding that inflationary trends make necessary the increase proposed by the Board to maintain an efficient and thorough program of education. Therefore, he recommends that the Commissioner restore the amount of $2,500.

Summary:	Reduction by Council	$2,500
	Amount Restored	2,500
	Amount not Restored	–0–

J250 Other Instructional Expenses *Reduction $1,860*

Council seeks to totally eliminate $1,500 for pupil field trip admission fees, and to reduce by 10% the amounts proposed by the Board for miscellaneous supplies and the principal's convention expenses.

The Board offers the clarification that only $300 of this line item is available for the principal's convention expenses, that certain staff travel and miscellaneous supply items have been agreed to by the Board, and that the amount of $1,500 has been budgeted for admission costs for pupil field trips.

While there is no question of the desirable outcomes of well-planned pupil field trips, the extension of provisions for such activities should await acceptance by the electorate at the polls. The hearing examiner finds that an increase in this line item in excess of 25% over the 1972-73 budgeted figure is untimely, and recommends that the reduction be sustained in full.

Summary:	Reduction by Council	$1,860
	Amount Restored	–0–
	Amount not Restored	1,860

J420 Other Expenses, Health *Reduction $1,475*

Council proposes that the Board reduce the salary of its physician who, they allege, has agreed to accept $1,000. Council further seeks a reduction of 10% in the overall account.

The Board, while not denying Council's argument with respect to the physician's salary, states that the services of a neurologist must be provided for

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its child study team, and that reduction of the physician's salary is more than offset by increases for other employees of the child study team.

The hearing examiner finds the action of Council in reducing the Board's budget by $1,000 (physician's salary), then imposing a 10% reduction on the Board's total budgeted figure for this line item, to be inconsistent and overly severe. He further finds that the Board has issued a contract to its physician for $1,500, consistent with its salary policies. Therefore, it appears clear that salaries and supplies for this line item are consistent with continued efficient and thorough services, necessitating restoration of $1,155.

Summary:	Reduction by Council	$1,475
	Amount Restored	1,155
	Amount not Restored	320

J520b Field Trips *Reduction $4,200*

Council recommends that the Board totally eliminate field trips from its budget provisions. However, the Board asserts that field trips are an integral part of its educational program and assumes full responsibility for costs of such trips as required by the State Department of Education. The total excisement of all field trips would be unduly harsh. However, in view of the budget defeat, and in recognition of current recommendations of the Commissioner with regard to the energy crisis, it is recommended that only a limited restoration of $2,000 be made to this line item.

Summary:	Reduction by Council	$4,200
	Amount Restored	2,000
	Amount not Restored	2,200

J610 Operations – Salaries *Reduction $3,250*

Council's reduction would provide for 5.5% increments and for one half-time additional custodial position. The Board desires to add one full-time custodian, giving as reason therefore, the reduction of such staff in prior years. It further states that the present staff is unable to satisfy minimal needs, which condition has resulted in complaints from Council regarding maintenance of school grounds.

In view of the budget defeat, the provision of one additional half-time custodian is a reasonable step toward meeting the Board's operational needs. Therefore, it is recommended that the reduction be sustained.

Summary:	Reduction by Council	$3,250
	Amount Restored	–0–
	Amount not Restored	3,250

J730c-1 Instructional Equipment *Reduction $2,910*

In this line item, Council maintains that only those items assigned a *priority one* classification by the schools' administrators should be provided.

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On the other hand, the Board states that several thousands of dollars had been eliminated from teachers' budget requests before the budget was finalized.

The hearing examiner finds that those items assigned to *priorities two and three* by agents of the Board are not indeed essential to a thorough and efficient elementary program of education, even though they are desirable. He, therefore, recommends to the Commissioner that the reduction be sustained.

Summary:	Reduction by Council	$2,910
	Amount Restored	–0–
	Amount not Restored	2,910

J820a Property Insurance *Reduction $3,000*

Council maintains that the three-year premium for property insurance was paid in January 1973, and that no premium is due for the 1973-74 school year.

In this regard, the Board shows that indeed only one year of the three-year premium was paid in January 1973, and that a subsequent premium increase of $1,200 necessitates restoration of an additional $1,200, or a total of $4,200.

The hearing examiner finds that the Board is obligated to pay an annual property insurance premium in excess of $4,000 and recommends restoration of $3,000, the total amount of reduction.

Summary:	Reduction by Council	$3,000
	Amount Restored	3,000
	Amount not Restored	–0–

J1020 Student Activities *Reduction $1,910*

Council's proposed reduction would provide the Board with only $90 for pupil activities. The Board responds that the 1972-73 budgeted amount was $700 and that certain uniforms are old and need replacement. It further proposes to provide certain mini-courses and uniforms for the benefit of its pupils.

With respect to this account, the hearing examiner finds that expenditures during the past two years have not exceeded $450. Therefore, in recognition of the electorate's demands for economies as expressed at the polls, he finds a 350% increase in this budgeted item to be untimely and recommends a limited restoration of $610.

Summary:	Reduction by Council	$1,910
	Amount Restored	610
	Amount not Restored	1,300

The following table summarizes the recommendations of the hearing examiner:

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Account Number	Item	Council's Reduction	Amount Restored	Amount not Restored
J130	Other Exp. Adm.	$ 780	$ 780	$ –0–
J213.1	Teachers – Sals.	8,000	8,000	–0–
J220	Textbooks	830	–0–	830
J230	Library & A-V Mats.	4,455	1,530	2,925
J240	Supplies	2,500	2,500	–0–
J250	Other Exp. Instr.	1,860	–0–	1,860
J420	Other Exp. Health	1,475	1,155	320
J520b	Field Trips	4,200	2,000	2,200
J610	Operations-Sals.	3,250	–0–	3,250
J730c-1	Equip. – Instr.	2,910	–0–	2,910
J820a	Insurance, Property	3,000	3,000	–0–
J1020	Student Activs.	1,910	610	1,300
	TOTALS	$35,170	$19,575	$15,595

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record, findings, and recommendations of the hearing examiner, and the exceptions thereto as filed by the Board.

The Commissioner finds that the exception expressed regarding line item J230 is valid. The computational error stemming from the erroneous use of $11,550 as the Board's budgeted figure, as opposed to its actual budgeted figure of $10,550, requires an upward adjustment of $1,000 in the recommended amount to be restored for the Board's use.

In all other points the Commissioner concurs with the recommendations of the hearing examiner and finds and determines that the amount of $20,575 must be added to the amount previously certified by Council to be raised for the current expenses of the School District of Demarest, in order to provide sufficient funds to maintain a thorough and efficient system of public schools in the district for the school year 1973-74. He, therefore, directs the Council of the Borough of Demarest to add to the previous certification to the Bergen County Board of Taxation of $919,530 for the current expenses of the school district, the amount of $20,575, so that the total amount of the local tax levy for current expenses for 1973-74 shall be $940,105.

COMMISSIONER OF EDUCATION

January 14, 1974

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Board of Education of the Town of Belleville,

Petitioner,

v.

Town of Belleville and Board of Commissioners, Essex County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Max N. Schwartz, Esq.

For the Respondent, John R. Scott, Esq.

Petitioner, hereinafter "Board," appeals from an action of the Board of Commissioners of the Town of Belleville, hereinafter "respondents," pursuant to *N.J.S.A.* 18A:22-37 certifying to the Essex County Board of Taxation a lesser amount of appropriations for the 1973-74 school year than the amounts proposed by the Board in its budget, which was rejected by the voters. The facts of the matter were educed at a hearing conducted by a hearing examiner appointed by the Commissioner of Education on August 8, 1973 and August 17, 1973 at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

At the annual school election held February 13, 1973, the voters rejected the Board's proposal to raise by district taxation the following amounts for the stated accounts:

Current Expense	$5,924,456
Capital Outlay	34,543

The budget was then sent to respondents to determine the amount to be raised to provide a thorough and efficient school system.

After a review of the budget, and consultation with the Board, respondents made their determination and certified the sum of $5,508,119 for current expense to the Essex County Tax Board to be raised by local taxation during the 1973-74 school year. The Board's proposed sum of $34,543 for capital outlay was totally deleted by respondents, thus effecting a total reduction of $450,880 of the amounts proposed by the Board. As part of its determination, respondents suggested items of the budget in which they believed economies could be realized without harm to the educational program. A listing of these is noted below:

CHART I

Account Number	Item	Board's Proposal	Council's Proposal	Proposed Reduction
100	ADMINISTRATION			
J120b	Legal Expenses	$2,000	$1,000	$1,000

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J120d	Other Contr. Servs.	9,500	1,000	8,500
J130m	Printing Expenses	700	–0–	700
200	INSTRUCTION			
J213	Teachers' Sals. (New)	99,000	–0–	99,000
J230a	Library References	18,808	17,000	1,808
J230c	Audiovisual	10,534	7,700	2,834
J240	Teaching Supp.	105,340	93,315	12,025
J250a	Other Expenses	13,500	13,000	500
J250c	Misc. Expenses	18,275	12,500	5,775
400	HEALTH SERVICES			
J410	Salaries	90,613	75,613	15,000
500	PUPIL TRANSPORTATION			
J510	Salaries	5,540	1,740	3,800
J520a	Contr. Services	100,000	83,000	17,000
J520c	Field Trips	3,000	1,000	2,000
J530	Repl. of Vehicles	6,340	–0–	6,340
600	OPERATION			
J620	Contr. Services	600	–0–	600
J630	Heat-New Offices	7,200	5,000	2,200
700	MAINTENANCE			
J710	Salaries	113,716	103,716	10,000
J720	Contr. Services	175,255	34,000	141,255
J730	Repl. of Equip.	60,000	10,000	50,000
800	FIXED CHARGES			
J820b	Insurance	242,020	232,020	10,000
1000	STUDENT ACTIVITIES			
J1020	Other Exp.-Athletics	60,472	34,472	26,000
	SUBTOTALS	$1,142,413	$726,076	$416,337
1200	CAPITAL OUTLAY			
L1220	Site Improvement	$8,300	$1,300	$7,000
L1230	Buildings	76,400	63,357	13,043
L1240	Furniture, Equip.	17,500	3,000	14,500
	SUBTOTALS	$102,200	$67,657	$34,543
TOTALS		$1,244,613	$793,733	$450,880

The hearing examiner herewith sets forth *seriatim* each item for which respondents' suggested reduction exceeds $3,800, along with the Board's response thereto and the recommendations of the hearing examiner. Lesser items are presented, *inter alia*, with the hearing examiner's recommendations in Chart II for consideration by the Commissioner.

J120d Other Contracted Services *Reduction $8,500*

Respondents maintain that the sum budgeted for 1972-73 is sufficient in this line item. However, the Board President testified that the electrical services in its ten older schools, the principal portions of which have an average age of 59.6 years, are in a state of disrepair requiring the preparation of detailed architectural drawings, preparatory to a building referendum. (Tr. I-23) In this

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regard, the Board President further testified that budget defeats in nine out of the last ten years have stymied Board efforts to establish and maintain an on-going program of renovation.(Tr. I-42)

The hearing examiner recognizes the potential hazard to life and property presented by such conditions as herein described, and as attested to by electrical engineers employed by the Board, wherein they recommended that the Board should:

> "***as soon as possible***get formal detailed drawings and submit it to the general public on referendum***." (Tr. I-23)

Accordingly, the hearing examiner recommends that the Commissioner restore the amount of $8,500 to this account.

Summary:	Reduction by Respondents	$8,500
	Amount Restored	8,500
	Amount not Restored	--0--

J213 Teachers' Salaries (10 new teachers) *Reduction $99,000*

Respondents contend that the Board has failed to justify the addition of ten new teaching staff members.

In this regard the Superintendent testified that an increase of 137 pupils enrolled at the senior high school required three additional subject matter teachers; that classification of eighteen additional special education pupils required two additional teachers; that it was desirable to reduce certain department heads' teaching load from five to four classes; and that plans were being made to establish a work-study program with five supervisors in the junior and senior high schools.

The hearing examiner recognizes the relatively high prevailing class load in the senior high school and recommends the establishment of the three subject matter teachers, *ante*. He further finds it more economical to establish two special education classes than to pay tuition and transportation costs for these pupils outside the district. However, in the light of the budget defeat, the hearing examiner recommends that the newly proposed work-study program, desirable as it may be, should wait future implementation.

Summary:	Reduction by Respondents	$99,000
	Amount Restored	49,500
	Amount not Restored	49,500

J240 Teaching Supplies *Reduction $12,025*
J250c Miscellaneous Expenses *Reduction $5,775*

Respondents reduced the Board's recommended amounts in these line items to the 1972-73 budgeted level, alleging that the increases were not justified by the Board.

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The Superintendent and the Board President testified to inflationary pressures on general school supply costs, as well as on the costs of computer scheduling, Xerox rentals, microfilming, awards, test scoring, printing of diplomas, programs and handbooks, and certain other rental machines provided within the scope of these lines items.

Recognizing the validity of such inflationary factors, the hearing examiner recommends the restoration of reductions to the extent of 10% of the 1972-73 budgeted amounts.

Summary: (J240)	Reduction by Respondents	$12,025
	Amount Restored	9,325
	Amount not Restored	2,700
Summary: (J250c)	Reduction by Respondents	$5,775
	Amount Restored	1,250
	Amount not Restored	4,525

J410 Salaries – Health *Reduction $15,000*

Respondents maintain that the Board has over-budgeted for nurses' salaries as a result of a misinterpretation of *Chapter* 64 of the *Laws* of 1972, an act concerning compensation of school nurses and supplementing *Chapter* 29 of Title 18A of the New Jersey Statutes.

However, the Board presented testimony that three of the six school nurses were ordered by an arbitrator to be placed on the teachers' salary guide, resulting in an average increase of $3,200 over the 1972-73 budgeted amounts.

It is recommended that, on the basis of documents in the record and testimony presented at the hearing, $9,000 be restored to this account to provide for such adjustments for the three nurses and for salary adjustments for other employees in this category.

Summary:	Reduction by Respondents	$15,000
	Amount Restored	9,000
	Amount not Restored	6,000

J520a Contracted Services *Reduction $17,000*
J530 Replacement of Vehicle *Reduction $6,340*

Respondents aver that their proposed reduced amounts are adequate.

The Board President testified that expenditures during 1972-73 in the J520a account totaled $97,723.12, an amount greatly exceeding the 1972-73 budgeted figure for pupil transportation contracts resulting from increased costs of Public Service and other carriers. (Tr. I-27) Recognizing the present inflationary costs of vehicle operation, the hearing examiner finds only $2,300 in the Board's proposed amount of $100,000 not firmly committed at the time of hearing. Accordingly, he recommends restoration of the full amount for use by the Board in 1973-74.

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With regard to the replacement of a school-owned 1970 station wagon, the Board alleges mechanical difficulties necessitating frequent repairs. In the light of the budget defeat by the electorate, and recognizing the limited years of usage of this vehicle, the hearing examiner recommends that this reduction be sustained.

Summary:	(J520a)	Reduction by Respondents	$17,000
		Amount Restored	17,000
		Amount not Restored	—0—
Summary:	(J530)	Reduction by Respondents	6,340
		Amount Restored	—0—
		Amount not Restored	6,340

J710 Salaries *Reduction $10,000*

Respondents maintain that the Board's proposal to add one new position, that of an electrician, is unnecessary.

The Board alleges that the addition of such position would enable the maintenance staff to do more repairs.

Absent a clear showing by the Board of the economy of such an additional position, the hearing examiner recommends that the Commissioner sustain the reduction in full.

Summary:	Reduction by Respondents	$10,000
	Amount Restored	—0—
	Amount not Restored	10,000

J720 Contracted Services *Reduction $141,255*

Respondents state that the increase of $141,255 in this budgeted item as compared to the 1972-73 budgeted amount contains $50,000 for a new folding door in the high school gymnasium, although the existing door, it is alleged, has been repaired. It is further alleged by respondents that the remaining $91,255 of the increase was not justified by the Board.

The Board President testified that the Board has agreed to withdraw the request for the folding door, *ante.* (Tr. I-51) With regard to the other proposed expenditures totaling $125,255, the Board presents detailed, building-by-building proposals for maintenance contracts. (P-1)

Among the Board's proposed expenditures for such purposes are those that would correct hazardous conditions, termite infestations, roof leakage, inefficient heating systems, and the numerous items of painting, repair and replacements that are necessary to maintain all buildings, particularly older ones. However, in recognition of the expressed will of the electorate calling for economies in school operations, the hearing examiner believes that certain modernizations and replacements can reasonably be deferred. Accordingly, he

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recommends that $83,645 (including the agreed-upon reduction of $50,000 for gym doors) of respondents' proposed reduction be sustained, and that $57,610 be restored.

Summary:	Reduction by Respondents	$141,255
	Amount Restored	57,610
	Amount not Restored	83,645

J730 Replacement of Equipment *Reduction $50,000*

Respondents aver that an expenditure in this line item $50,000 greater than that budgeted in J730 for 1972-73 is unwarranted.

However the Board Secretary testified at the hearing that all purchases of new equipment, formerly budgeted in the L1240 account, must now be charged to J730 as directed by the State Department of Education. She further stated that half of the amount proposed by the Board in this account was for new equipment, which is substantiated by the Board's detailed proposal of expenditures. (P-1, at 730-1)

The hearing examiner recognizes the verity of the statement that a redefinition of accounts was mandated for 1973-74 school budgets with respect to new equipment purchases being incorporated into the current expense J730 account. Additionally, the hearing examiner notes the proposal of expenditures of many thousands of dollars for new equipment in the form of audiovisual projectors, additional files, administrative office furniture, cafeteria equipment, carpeting, musical instruments, and other items far in excess of the amounts budgeted in 1972-73 in accounts J730 and L1240, which totaled in that year $23,500. Desirable as they may be aesthetically and educationally, they are not all necessary to maintain an efficient system of public schools. It is therefore recommended that the Commissioner restore the amount of $22,500 to this account.

Summary:	Reduction by Respondents	$50,000
	Amount Restored	22,500
	Amount not Restored	27,500

J820b Insurance *Reduction $10,000*

Respondents state that such a reduction in employees' insurance coverage premiums would be effected with the reduction of the ten new teaching staff members which respondents had proposed, *ante*. The Board Secretary agreed with this at the hearing, stating further that the matter is in the hands of the Commissioner, and that if the new employees are not authorized, the $10,000 would not be needed.

The hearing examiner, having recommended that five new teaching staff members be provided for, recommends that $5,000 of the reduction be restored.

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Summary:	Reduction by Respondents	$10,000
	Amount Restored	5,000
	Amount not Restored	5,000

J1020 Other Expenses – Athletics *Reduction $26,000*

Respondents allege that an increase of $32,372 in the Board's budget for this line item as compared to the 1972-73 budgeted figures is exorbitant.

The Board defends its budgeted figure by stating that: soccer was to be added at an expenditure of $3,700; girls' softball and basketball were added in the spring of 1973; a proposed boat for the crew team would cost $2,368; and totally new equipment was proposed for the varsity squads of football, basketball and baseball for 1973-74.

The amount available to the Board in this line item following respondents' reduction is $5,900 greater than the 1972-73 budgeted figure, and represents a percentage increase of 21%. In consideration thereof, and recognizing the voters' demand for economies, the hearing examiner recommends that the reduction be sustained in full.

Summary:	Reduction by Respondents	$26,000
	Amount Restored	–0–
	Amount not Restored	26,000

L1220 Site Improvement *Reduction $7,000*

Respondents argue that money was actually raised in the 1972-73 budget to provide a backtop surface for the Junior High School parking lot and driveway but such funds were not expended.

The Board agrees that such funds were raised but states that bids received for such work exceeded available funds by three thousand dollars and, therefore, the work was not authorized.

The hearing examiner finds that unappropriated funds available to the Board in the proper accounts as of July 1, 1973, were totally sufficient to authorize the work described. Inasmuch as the Board is free to appropriate these funds for this purpose, the hearing examiner recommends that the reduction be sustained in full.

Summary:	Reduction by Respondents	$7,000
	Amount Restored	–0–
	Amount not Restored	7,000

L1230 Buildings *Reduction $13,043*

Respondents contend that the $45,000 budgeted by the Board to replace the roof on the old portion of the Junior High School is exorbitant.

The Board maintains that the roof's interior parapet walls are a constant source of leakage, and that the exterior parapet walls are a hazard to passersby.

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They suggest that the correction of these along with other related conditions and the replacement and repair of 13,400 feet of roofing would, by estimate of the Board's architect (P-6), cost $44,000, including a reasonable item for contingencies.

The hearing examiner finds that the photographs of such defects and interior damages resulting therefrom, as presented by the Board in evidence (P-3), are thoroughly supportive of the urgent need to accomplish such repairs as proposed by the Board. Accordingly, the hearing examiner recommends that $12,043 be restored and $1,000 of the reduction be sustained.

Summary:	Reduction by Respondents	$13,043
	Amount Restored	12,043
	Amount not Restored	1,000

L1240 Furniture and Equipment *Reduction $14,500*

Respondents aver that the expenditure of $14,500 to install a new intercommunications system in the Junior High School and a new console in the Senior High School is without justification.

The Board desires to have the present Senior High School console rebuilt and installed in the Junior High School, and to purchase a new console in the Senior High Schoool. By so doing, they maintain that the efficiency of the daytime school operation will be improved and that the burglar alarm feature of the systems will assure greater security against vandals and thieves.

The hearing examiner is cognizant of security needs not now assured by the existent systems, and therefore recommends restoration of $14,500 to this account.

Summary:	Reduction by Respondents	$14,500
	Amount Restored	14,500
	Amount not Restored	–0–

For items suggested for reduction by respondents, which are individually in amounts less than $3,800, the hearing examiner has carefully reviewed the arguments raised by the parties and balanced the evidence favoring retention of the reduction against facts supporting the necessity for restoration. The recommendations of the hearing examiner with respect to each of these lesser line items are incorporated in chart form with the items hereinbefore considered.

The following chart summarizes the total recommendations of the hearing examiner:

CHART II

CURRENT EXPENSE

Account Number	Item	Board's Proposal	Council's Reduction	Amount Restored	Amount not Restored
J120b	Legal Exp.	$ 2,000	$ 1,000	$ 800	$ 200
J120d	Other Contr. Exp.	9,500	1,000	8,500	–0–

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J130m	Printing Exp.	700	–0–	–0–	700
J213	Teachers Sals. (New)	99,000	–0–	49,500	49,500
J230a	Library Ref.	18,808	17,000	808	1,000
J230c	Audiovisual	10,534	7,700	1,000	1,834
J240	Teaching Supp.	105,340	93,315	9,325	2,700
J250a	Other Exp.	13,500	13,000	–0–	500
J250c	Misc. Exp.	18,275	12,500	1,250	4,525
J410	Salaries-Health	90,613	75,613	9,000	6,000
J510	Salaries	5,540	1,740	3,000	800
J520a	Contr. Servs.	100,000	83,000	17,000	–0–
J520c	Field Trips	3,000	1,000	1,000	1,000
J530	Repl. of Veh.	6,340	–0–	–0–	6,340
J620	Contr. Servs.	600	–0–	–0–	600
J630	Heat-New Offices	7,200	5,000	1,200	1,000
J710	Salaries	113,716	103,716	–0–	10,000
J720	Contr. Servs.	175,255	34,000	57,610	83,645
J730	Repl. of Equip.	60,000	10,000	22,500	27,500
J820b	Insurance	242,020	232,020	5,000	5,000
J1020	Other Exp. Athl.	60,472	34,472	–0–	26,000
	SUBTOTALS	$1,142,413	$726,076	$187,493	$228,844
	CAPITAL OUTLAY				
L1220	Site Improve.	$8,300	$1,300	$ –0–	$7,000
L1230	Buildings	76,400	63,357	12,043	1,000
L1240	Furn. & Equip.	17,500	3,000	14,500	–0–
	SUBTOTALS	$102,200	$ 67,657	$ 26,543	$ 8,000
TOTALS		$1,244,613	$793,733	$214,036	$236,844

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, the findings and recommendations included in the report of the hearing examiner, and the exceptions thereto as filed by counsel. With respect to respondents' contention that the Commissioner has no jurisdiction to amend the school budget, the Commissioner does not agree. It is clearly stated in *N.J.S.A.* 18A:6-9 that:

> "The Commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws***."

In the matter, *sub judice,* such a controversy has clearly arisen as a result of the inability of the Board and respondents to arrive at an amicable determination of the school budget subsequent to the rejection thereof by the voters. The proceedings before the Commissioner have been in accord with statutory requirements for such hearings as enumerated in *N.J.S.A.* 18A:6-9 through *N.J.S.A.* 18A:6-26. Additionally, the Commissioner points to the case of *Board of Education of Elizabeth v. Board of School Estimate et al.*, 95 *N.J. Super.* 284 (*App. Div.* 1967) which affirms a Law Division holding that:

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> "*** when an amount approved by Council is not sufficient to provide 'for the maintenance and support of free public schools' ***, the remedy is by appeal to the Commissioner of Education."

Further clarification was provided by the Court in *Board of Education of the Township of East Brunswick v. Township Council of the Township of East Brunswick*, 48 *N.J.* 94 (1966), wherein it was said:

> "*** that the function of the Commissioner under *R.S.* 18:3-14 is not to sit as an original budget-making body***. His function is admittedly to sit as a reviewing body which, however, is charged with the overriding responsibility of seeing to it that the mandate for a thorough and efficient system of free public schools is being carried out.***" (at p. 106)

The Commissioner, in agreement with the recommendations of the hearing examiner, finds and determines that the amount of $187,493 must be added to the amount previously certified to be raised for current expenses, and that the amount of $26,543 must be added to the amount previously certified to be raised for capital outlay of the school district of Belleville in order to provide sufficient funds for a thorough and efficient system of public schools in the district for the school year 1973-74. He, therefore, directs the Commissioners of the Town of Belleville to certify to the Essex County Board of Taxation the amount of $5,695,612 as the total amount of the local tax levy for current expenses and the amount of $26,543 as the total amount of the local tax levy for capital outlay for 1973-74.

COMMISSIONER OF EDUCATION

January 14, 1974

Stipulation of Dismissal granted by State Board of Education, May 1, 1974

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Reiss and Celia Tiffany, parents and guardians ad litem of Marla Tiffany, a minor,

Petitioners,

v.

Board of Education of the Township of Cinnaminson; Dr. Ray Blank, Superintendent of Schools, Cinnaminson Township Public Schools; George D. Paternoster, Principal, Cinnaminson High School; and Mrs. Alice Shultz, Faculty Advisor, National Honor Society Chapter at Cinnaminson High School, Burlington County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION ON MOTION TO DISMISS

For the Petitioner, D. Ellen Stimler, Attorney at Law

For the Respondent, George Purnell, Esq.

Petitioners allege that on a given day their daughter, a pupil enrolled in the eleventh grade of Cinnaminson High School, hereinafter "High School," received a notice from the principal and faculty of the High School which stated that she had been elected to the High School chapter of the National Honor Society. It is further alleged that on the day scheduled for her induction, she was notified by the principal and the faculty advisor to the Honor Society that her nomination had been rescinded for "breach of character" on her part.

In lieu of a formal Answer to the Petition, Respondent Board of Education of the Township of Cinnaminson, hereinafter "Board," filed a Motion to Dismiss, and requests Summary Judgment in its favor, on the grounds that the Commissioner lacks jurisdiction in the instant matter. Petitioners filed a Memorandum of Law in opposition to the Motion and pray that the Commissioner assert jurisdiction.

At a conference of counsel, it was agreed that the question of jurisdiction would be referred to the Commissioner on the basis of the Motion to Dismiss and petitioners' Memorandum of Law.

In its Motion, the Board argues, without elaboration, that the alleged controversy does not arise under the school laws, nor under the rules and regulations of the State Board of Education, and that the Commissioner of Education has no jurisdiction to hear and determine the matter.

Petitioners argue that the Commissioner's decision in *Harris v. Teaneck Board of Education,* 1970 *S.L.D.* 311, affirmed State Board of Education, April 7, 1971, is dispositive of the jurisdictional question regarding the instant matter. Petitioner cites the following statement at p. 314:

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"***There can be no differentiation of the Board's authority to govern academic programs on the one hand, and athletics on the other. Intra-school and interscholastic athletics are integral parts of the total school experience. Athletic programs are authorized and financed by the Board, and the Board, therefore, is the authority which must make all rules and regulations pertaining to student eligibility for participation in athletics as they make rules of eligibility for other authorized school programs.' "

The assertion is made by petitioner that the High School's National Honor Society program is nothing more nor less than one of many extracurricular programs available for the enrichment of the pupils' total school experiences. The logic expressed in *Harris, supra,* is equally applicable in the instant matter, petitioner opines.

The second and third points argued in the Memorandum, *ante,* regarding the Commissioner's jurisdiction in the instant matter are:

1. That the Board provides compensation for the faculty advisor of the National Honor Society, in a similar manner to which it provides for teachers of other extracurricular activities; thus, the Honor Society is as much a part of the total school program as are other extracurricular activities.

2. That all activities relating to the National Honor Society take place on respondent's premises and are supervised and controlled by respondents' faculty and administrative staff. Thus, the Board considers the Honor Society a part of the total High School program.

Since the school districts of New Jersey are under the control and jurisdiction of the State, their authority must be conferred by enactments of the Legislature. *N.J.S.A.* 18A:11-1 sets forth the primary enabling authority conferred upon local boards as follows:

"The board shall–

a. Adopt an official seal;

b. Enforce the rules of the state board;

c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, ***

d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district."

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In dealing with the Commissioner's authority to hear and determine controversies and disputes arising under school law as provided by *N.J.S.A.* 18A:6-9, as opposed to the legislative authority conferred upon boards of education by *N.J.S.A.* 18A:11-1, *supra,* the Commissioner denied a Motion to Dismiss, March 24, 1971, for lack of jurisdiction in *Singer et al. v. Collingswood Board of Education et al.,* 1971 *S.L.D.* 394. The Commissioner stated the following at p. 8:

> "*** the scope of the Commissioner's review is not to substitute his judgment for that of the local board but to determine whether their conclusions had a reasonable basis.
>
> "It is well established that the Commissioner of Education will not substitute his judgment for that of the elected or appointed representatives of the citizens of the school district who comprise the local board of education. [Cases cited] ***"

However, further on (at p. 9), the Commissioner observed that:

> "***The Commissioner has in numerous instances been called upon, in his quasi-judicial capacity, to make determinations regarding the reasonableness of the actions of local boards of education. The Commissioner will, in determining controversies under the school laws, inquire into the reasonableness of the adoption of policies, resolutions, or by-laws, or other acts of local boards of education in the exercise of their discretionary powers ***. See 62 *C.J.S., Municipal Corporations,* § 203, *Cf. Kopera v. West Orange Board of Education, supra.*" [60 *N.J. Super.* 288, *App. Div.* 1960]

In a previous decision, *Clinton F. Smith et al. v. Board of Education of the Borough of Paramus et al.,* 1968 *S.L.D.* 62, affirmed State Board of Education, February 5, 1969, appeal dismissed Appellate Division, New Jersey Superior Court, September 8, 1969, the Commissioner found and determined, *inter alia,* the following at p. 69:

> "*** (2) extracurricular or cocurricular activities comprise all those events and programs which are sponsored by the school and may reasonably be characterized as a supplement to the established program of studies in the classroom in order to enrich the learning and self-development opportunities of pupils ***"

The Commissioner determines, in the instant matter, that activities of local chapters of the National Honor Society are "a supplement to the established program of studies" and fall, therefore, within the purview of authority granted local boards of education by *N.J.S.A.* 18A:11-1.

The Commissioner further determines that the instant controversy does, in fact, arise under school law. Accordingly, the Motion for Dismissal and for Summary Judgment is denied. The Board of Education is directed to file its

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Answer within ten days of receipt of this decision in order to move the proceedings to a plenary hearing.

COMMISSIONER OF EDUCATION

August 11, 1972

Reiss and Celia Tiffany, parents and guardians ad litem of Marla Tiffany, a minor,

Petitioners-Appellants,

v.

Board of Education of the Township of Cinnaminson et al., Burlington County,

Respondents-Appellees.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 11, 1972

For the Petitioners-Appellants, D. Ellen Stimler, Attorney at Law

For the Respondents-Appellees, Brown, Connery, Kulp, Wille, Purnell & Green (George Purness, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

January 3, 1973

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Reiss and Celia Tiffany, parents and guardians *ad litem* of Marla Tiffany, a minor,

Petitioners,

v.

Board of Education of the Township of Cinnaminson; Dr. Ray Blank, Superintendent of Schools, Cinnaminson Township Public Schools; George D. Paternoster, Principal, Cinnaminson High School; and Mrs. Alice Shultz, Faculty Advisor, National Honor Society Chapter at Cinnaminson High School, Burlington County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, D. Ellen Stimler, Attorney at Law

For the Respondents, Brown, Connery, Kulp, Wille, Purnell & Greene (George Purnell, Esq., of Counsel)

Petitioners are the parents of a daughter, hereinafter "Marla," enrolled at the Cinnaminson High School. They allege that the Cinnaminson Board of Education, hereinafter "Board," acted arbitrarily, capriciously, and unreasonably in regard to its rescission of Marla's invitation to membership in its local school chapter of the National Honor Society. The Board denies, categorically, all allegations against it herein, and asserts that the National Honor Society and the local chapter of that Society must be named parties respondent herein.

In lieu of filing formal answer to the charges herein, the Board moved to dismiss on jurisdictional grounds. The Commissioner, in a written decision dated August 11, 1972, denied the Board's Motion and asserted jurisdiction herein. The Board appealed to the State Board of Education which, on January 3, 1973, affirmed the Commissioner's written opinion. Thereafter, the Board filed its formal Answer, thus joining the issues, *sub judice.*

A hearing was conducted in this matter on April 10, 1973 at the office of the Burlington County Superintendent of Schools, Mount Holly, by a hearing examiner appointed by the Commissioner.

The report of the hearing examiner is as follows:

At this juncture, a brief review of the organization of the National Honor Society and its local chapters is in order to place the reporting of this dispute in its proper context. According to the *Handbook of the National Honor Society*[1] (R-1), the National Honor Society was organized by the National Association of Secondary School Principals in 1921 to counteract, at that time, a prevalent

[1]National Association of Secondary School Principals, *Handbook of the National Honor Society.* Washington, 1966.

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tendency among secondary schools to place undue emphasis upon individual performance in various athletic events. Thus, the National Honor Society was formed to promote and encourage the fundamental virtues of character, leadership, scholarship, and service[2], the attainment of those four virtues being requisite for individual membership. At the present time, should any secondary school wish to establish a local chapter of the National Honor Society (provided the school itself is approved by its own individual State Department of Education, or by a regional accrediting association), all it need do is file an application, accompanied by the proposed local constitution formulated after a model suggested by the National Honor Society, by which the local chapter agrees to operate, and the registration fee. Upon recognition by the National Honor Society, the local chapter is granted all privileges of membership including the right to elect members, to secure the official insignia, and to secure other materials of the Society, which are available only through the national office.[3]

Cinnaminson High School has a local chapter of the National Honor Society, entitled by its local constitution (R-5) as the "Cinnaminson High School Chapter of the National Honor Society of Secondary Schools," hereinafter "Society."

During the 1971-72 school year, Marla was in eleventh grade at the high school. Near the first week of April 1972, Marla's parents were informed through a mailed announcement that Marla had been elected "*** TO MEMBERSHIP IN THE CINNAMINSON CHAPTER OF THE NATIONAL HONOR SOCIETY ***." (P-1) Her parents were invited to attend installation ceremonies for new members – which included Marla – to be held at the high school on April 13, 1972 at 7:30 p.m.

However, during the afternoon of installation day, April 13, Marla learned that a decision had been made not to allow her installation because of an alleged breach of character (Tr. 136, 139) on her part, which made the "character" requirement for membership on Marla's part questionable. (Tr. 116, 136) Marla was informed of this decision by the faculty advisor to the Society in the presence of the high school principal. (Tr. 83, 134-135) Marla informed her parents of this action and they, accordingly, did not attend the installation ceremonies. (Tr. 23)

The factual recitation leading to the alleged "breach of character" is as follows:

Marla, by way of affidavit (P-2), admits to "*** dating a male teacher [of the high school faculty] during a period in the fall of 1971.***" This relationship, described as more than a teacher/pupil relationship (R-4) (Tr. 96), terminated at the end of November 1971. (R-4) (Tr. 90) In regard to the dispute, *sub judice,* this relationship did not become known by the high school principal until approximately April 10, 1972. On that date, a friend of Marla's,

[2] *Ibid.*, pp. 5, 12.
[3] *Ibid.*, pp. 13-14.

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S.P., testified he complained to the high school principal about the same male teacher dating his girl friend – identified at this hearing as "Miss X," another pupil at the high school. S.P. had known, since October, that this male teacher had dated Miss X. However, because Miss X, in S.P.'s judgment, was not dating the teacher anymore, he did not report the situation to anyone (Tr. 38) until the time came close for his own school graduation. He then reasoned that Miss X, his girl friend, would be a senior at the high school while he would be attending college. Thus, the male teacher would still be at the high school and S.P. wouldn't be able to "*** keep an eye on*** [his] girl friend ***." (Tr. 38) In order to satisfy his concern, he decided to report the situation to the principal on April 10, 1972. Although the principal testified he had heard rumors for some time regarding a male teacher having relationships with female pupils, he did not know who that teacher was until pointed out by S.P. on April 10, 1972. (Tr. 104) Because of the seriousness of the accusation, S.P. was requested to obtain, by way of proof, a signed statement from Miss X. On cross-examination, S.P. testified that because Miss X and Marla were very close friends, he had learned of Marla's relationship with the male teacher from Miss X. S.P., at the meeting of April 10, *ante,* informed the principal that Marla had also been dating the male teacher. (Tr. 46) It is pointed out that, while not a party to this action, Miss X had also been elected to membership in the Society, but never installed as a member for the same reasons articulated herein. (Tr. 46)

Subsequent to this meeting, S.P. talked with both girls and convinced them to report their relationship with the teacher to the principal. In this regard, Marla wrote out a statement (R-4) dated April 11, 1972, in which she described her personal relationship with the teacher and submitted it to the principal. (Tr. 93) Information Marla gave to the principal was to be confidential and was not to be used against her. (Tr. 40, 79-80, 108)

Marla did not meet again with the principal until Thursday, April 13, 1972, the morning of the day set for Marla's induction into the Society. During this morning meeting, the principal asked both Marla and Miss X for more specific information regarding their relationship to the teacher. The principal testified that this was necessary, because after talking with the teacher on the strength of R-4, *ante,* and S.P.'s allegations, *ante,* there was some clarification necessary. (Tr. 111) The principal testified that as late as the morning of April 13, 1972, he was not personally aware that Marla was a nominee for induction into the Society that evening. However, sometime during the course of that day, he did learn of her induction from the faculty advisor to the Society. The faculty advisor testified that "*** a member of the faculty came to me and asked whether I knew that the young ladies [Miss X and Marla] were involved with [the male teacher] ***." (Tr. 132) To verify the accuracy of that assertion, she went to the principal who confirmed the content of the allegation. Subsequent to this confirmation, both pupils were called to the principal's office where they admitted again to the principal, and now to the faculty advisor, their involvement with the teacher. (Tr. 135)

Consequently, a tentative decision was reached not to induct the nominees into the Society that evening. Although the faculty advisor testified she did not know what the frequency of such involvement with the teacher was (Tr. 138),

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she did maintain that the apparent conduct of Marla did not live up to the standards of the Society. (Tr. 138)

This tentative decision to postpone the induction was affirmed by the Faculty Council to the Society that afternoon. A meeting of the full Faculty Council to the Society was scheduled for the following morning, at which time the pupils involved would be given the opportunity to present their side. It is noted that the principal of the high school is a member of this Faculty Council. However, for the formal induction ceremonies set for the evening of April 13, 1972, Marla was not allowed to participate and the invitation extended to her parents, *ante,* was rescinded. (Tr. 139) Because programs had already been made up for the evening's ceremonies, and Marla's name had been included thereon as a nominee, the faculty advisor had other pupils attempt to cross out Marla's name. After having second thoughts about this procedure, the faculty advisor determined not to use the programs upon which Marla's name had been crossed out and attempted to retrieve them. Inexplicably, some of those programs were distributed to the assembled parents that evening with Marla's name crossed out. (Tr. 140)

At the Friday morning meeting, certain specific questions were asked of Marla regarding her relationship with the teacher. The action of the full Faculty Council to the Society, subsequent to this meeting, was to affirm the earlier decisions of postponing – the hearing examiner believes canceling – Marla's election to the Society for that school year.

Although the principal admitted telling Marla that information given him regarding her involvement with the teacher would be confidential and not used against her (Tr. 108), on Thursday afternoon, April 13, 1972, he did provide the Faculty Council with information that: (Tr. 128)

> "*** [There was] involvement with two of the members [those persons elected to the Society but not yet inducted] and a teacher that we [it is believed by the hearing examiner the pronoun 'we' refers to the principal himself and the faculty advisor] considered very serious and in violation, and that they wouldn't qualify to be inducted [into the Society that evening] .***"

The principal avers that the preceding was not the information given him by Marla. Nor could he testify that the teacher, who is no longer in the employ of the Board, gave him that information. (Tr. 128-129) In fact, he asserted that the Faculty Council members had already known of the incident and they were asking him if it were true. (Tr. 129) How those members acquired such knowledge could not be explained by the principal. (Tr. 129)

The hearing examiner believes it important to report that while the principal testified (Tr. 109) that both girls, upon reporting to him of their involvement with the teacher, displayed "good character," he also testified that at the same time such involvement was a "breach of character," notwithstanding the fact that the incident occurred months earlier.

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In its Answer filed herein, the Board, as its fourth and fifth separate defenses, moved to join the National Honor Society and the Cinnaminson Chapter of the National Honor Society as parties defendant to this action, supplemented by letter Brief dated April 9, 1973. During its opening statement on the day of hearing in this matter, the Board moved again to join those two parties, in addition to moving for the Faculty Council of the Cinnaminson Chapter of the National Honor Society to be joined as defendants herein. The Board grounds such Motions on the assertion that the action complained of in this matter, was taken by the Faculty Council to the Cinnaminson Chapter of the National Honor Society, which itself is under the aegis of the National Honor Society. It avers that there are no proofs, testimony or otherwise, from the proceedings herein, that place on it any responsibility in this matter. As such, there is no basis whatever, upon which the Commissioner may order the Board to grant the relief requested.

Counsel for Marla argues that by virtue of the Commissioner's earlier decision on Motion, *ante,* the Commissioner himself held that the National Honor Society is an extracurricular activity subject to the authority of a local board of education. The hearing examiner refers the Board's Motions, *ante,* to the Commissioner for his determination. From the testimony and proofs offered, petitioners contend that the school authorities were arbitrary in excluding Marla from membership in the Society. The determination of what constitutes a breach of character is a personal judgment subject to varied interpretations. Counsel for petitioners avers that Marla's involvement with the teacher was a matter of poor judgment and nothing more than an adolescent experiment. Morever, the school authorities, it is argued, treated Marla unfairly by promising not to use her admission against her and then so doing; by questioning her about her involvement without her parents being present or notified; by attempting to cross her name off the program unsuccessfully so that parents who received those programs could still determine it was Marla's name; and, finally, by using the incident herein to categorize Marla's action as a breach of character.

The Board, to the contrary, argues that the Faculty Council treated Marla fairly and based its decision to disqualify Marla on the evidence before it. The Board urges that the Commissioner not interfere with that determination.

Based on the testimony and the record before him, the hearing examiner finds that the decision not to allow Marla to be inducted into the Society was based on the content of her admission (R-4) to the principal on April 11, 1972. While not commenting on the processes used by the principal, the faculty advisor, and the whole of the Faculty Council in arriving at the collective determination of breach of character on Marla's part, the fact remains that Marla did have a relationship during the fall of 1971. It is pointed out that Marla was offered membership in the Society during the 1972-73 academic year; however, she declined that offer.

Petitioners request that the Board be directed to add Marla's name to the membership roster of the Cinnaminson Chapter of the National Honor Society

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as of April 13, 1972, and that a suitable announcement to that effect be made at the next initiation ceremony to be held. Lastly, petitioners request that Marla's school records be expunged of all notations regarding the cancellation of her invitation to membership in the Society.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, the report of the hearing examiner, and the exceptions thereto, as filed by the Board in accord with *N.J.A.C.* 6:24-1.16.

With respect to the Board's Motion to join the National Honor Society and the Cinnaminson Chapter of the National Honor Society as parties defendant to the action, the Commissioner holds that the local board of education is responsible for the administration and supervision of all extracurricular, as well as curricular, events and programs sponsored by the school, and may properly be held accountable for the conduct thereof. For this reason and for the reasons set forth in the earlier decision on Motion to dismiss, the Commissioner denies the Motions to dismiss.

In the matter, *sub judice,* the Commissioner accepts the findings of the hearing examiner, and finds no evidence of arbitrary, capricious or illegal action on the part of the Board or its agents wherein Marla was denied membership in the Cinnaminson Chapter of the National Honor Society in April of 1972. It is indeed regrettable that unnecessaary embarrassment resulted from the lack of finesse with which the National Honor Society induction invitations and programs were issued and subsequently modified by agents of the Board, thus causing petitioners unnecessary embarrassment and discomfiture. Such results serve no good purpose in matters of this kind and should be scrupulously avoided. However, it is clear that the Faculty Council of the Cinnaminson Chapter of the National Honor Society made its decision on the basis of reliable information as required by the Society's constitution.

Absent a clear showing of any statutory violation or other violation of the rights of petitioners, the Commissioner finds and determines that the Petition is without merit. Accordingly, it is dismissed.

COMMISSIONER OF EDUCATION

January 16, 1974

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In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board of Education, Russo & Courtney (James P. Courtney, Jr., Esq., of Counsel)

For the Respondent, Starkey, Turnbach & White (Edward J. Turnbach, Esq., of Counsel)

The Board of Education of the Township of Jackson, hereinafter "Board," filed charges of conduct unbecoming a teacher with the Commissioner of Education on January 18, 1973, certifying that the charges would be sufficient, if true in fact, to warrant dismissal of respondent as a teacher in the School District of the Township of Jackson.

The facts of the matter are not in dispute. Counsel filed letter Briefs with the Commissioner for his review, determination, and judgment.

Respondent was suspended without pay subsequent to a determination by the Board on January 8, 1973, which reads in part as follows:

> "On the 8th day of January, 1973, the Board of Education of the Township of Jackson, reviewed the charges made against Ernest Tordo wherein it is alleged that the said teacher was found guilty by a jury verdict on the charge of accepting a bribe in violation of *N.J.S.A.* 2A:93-6, in the Ocean County Court in December of 1972.*** (Complainant's Certificate of Determination)

Respondent was found guilty of the bribe charge by a jury. His sentence by the Honorable William E. O'Connor, Judge of the Ocean County Court, Toms River, is summarized as follows:

1. Respondent "*** was sentenced to a period of one year in the Ocean County Jail, six months of the sentence being suspended.***"

2. Respondent "*** was placed on probation for two years.***"

3. On Judge O'Connor's recommendation, respondent was placed on a work-release program and is released daily to work in a local clothing store. He returns to the jail each night.

4. Respondent "*** must serve a period of time during the next six months in the Ocean County Jail.***" (Respondent's Brief, unp)

Respondent admits that his guilt and sentence is conduct unbecoming a

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teacher, but argues that he is paying his debt to society through his sentence and punishment by the Court. He asserts that dismissal from his position as a teacher is too harsh a penalty to be imposed by the Commissioner.

Respondent argues also, that one of civilization's aims in such matters is rehabilitation; therefore,

> "*** to say that one who is convicted of a criminal offense cannot be a teacher is in effect saying that rehabilitation is impossible and meaningless." (Respondent's Brief, unp)

Respondent prays that

> "*** a suspension from his position for a period of one year without pay would more than adequately meet the requirements of a penalty for his past conduct; and that permitting his return to the profession upon completion of that year would satisfy the ends of justice and humanity." (Respondent's Brief, unp)

The Board acknowledges respondent's assignment to a work-release program with a local clothing store, but argues that the same rationale should not be used to restore respondent to his position as a teacher. The Board avers that

> "*** his position of a teacher is one of Public Trust, one that is a privilege and not a right. The illegal actions of Mr. Tordo were ones that were committed in his performance as a Public Official in the same Township he teaches in. The school system is not a large one but relatively small and the attending notoriety would be well spread throughout the district.***" (Complainant's Brief, at p. 2)

The Commissioner finds that respondent's conviction was made because of the commission of a crime of accepting a bribe (not related to his employment, but occurring while he was employed as a teacher) which, in the Commissioner's judgment, involves moral turpitude.

Black's Law Dictionary 1160 (rev. 4th ed. 1968) defines "moral turpitude" as follows:

> "An act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man."
>
> and,
>
> "Conduct contrary to justice, honesty, modesty, or good morals."

Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and

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influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully violates the law, as in this matter, and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.

In making a determination in the instant matter, the Commissioner must consider not only the effect of his decision on the respondent, but on the pupils, their parents, other teaching staff members, and the community at large.

The Commissioner finds also that the construction of *N.J.S.A.* 2A:135-9 is applicable in the instant matter. That statute reads as follows:

> "Any person holding an office or position, elective or appointive, under the government of this state or of any agency or political subdivision thereof, who is convicted upon, or pleads guilt, non vult or nolo contendere to, an indictment, accusation or complaint charging him with the commission of a misdemeanor or high misdemeanor touching the administration of his office or position, or which involves moral turpitude, shall forfeit his office or position and cease to hold it from the date of his conviction or entry of plea.
>
> "If the conviction of such officer be reversed, he shall be restored to his office or position with all the rights and emoluments thereof from the date of the forfeiture."

The conviction and sentencing of a teacher to jail for criminal offenses is sufficient reason for a finding of unbecoming conduct and the teacher's subsequent dismissal from his position. *In the Matter of the Tenure Hearing of Raymond Exum, School District of the City of East Orange, Essex County,* 1971 *S.L.D.* 259 In *Exum,* the crimes committed clearly involved moral turpitude, although there was no need to discuss them as such at that time.

The public interest demands the public trust of those teachers entrusted to care for and mold the character and attitudes of the pupils of this State.

Respondent's crime and its resultant notoriety certainly touched on his position as a public school teacher, and the Commissioner holds that he must forfeit his right to tenure in his position.

The Commissioner determines that respondent has not continued to serve and exhibit "good behavior" as described in *N.J.S.A.* 18A:28-5, which reads in part as follows:

> "The services of all teaching staff members including all teachers *** shall be under tenure during good behavior *** and they shall not be dismissed *** except for *** conduct unbecoming such a teaching staff member or other just cause***."

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Additionally, the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10, reads in pertinent part as follows:

> "No person shall be dismissed or reduced in compensation,
> (a) if he is or shall be under tenure of office, position or employment during good behavior *** in the public school system of the state *** except for *** unbecoming conduct, or other just cause***."

The Commissioner determines, therefore, that respondent's guilt, conviction, and sentence are sufficient proof that his behavior represents conduct unbecoming a teacher. The Commissioner further determines that Ernest Tordo must forfeit his right to tenure in the School District of the Township of Jackson, Ocean County, as of the date of his suspension.

COMMISSIONER OF EDUCATION

January 16, 1974

"R.K.,"

Petitioner,

v.

Board of Education of the Township of Lakewood, Ocean County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Barry D. Goldman, Esq.

For the Respondent, Rothstein, Mandell & Strohn (Edward M. Rothstein, Esq., of Counsel)

Petitioner, a tenth grade, sixteen-year-old pupil enrolled in respondent's high school, was expelled from school by resolution of the Board of Education of the Township of Lakewood, hereinafter "Board," adopted December 11, 1972. He requests that he be reinstated in school under the provisions of *N.J.S.A.* 18A: 46-13 *et seq.*

A hearing was conducted on October 18, 1973 at the office of the Ocean County Superintendent of Schools, Toms River, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

On December 12, 1972, the Superintendent of Schools of the Lakewood School System sent a letter to R.K.'s parents which reads as follows:

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"*** This letter is to inform you that your son *** [R.K.], has been expelled pursuant to a resolution passed by the Lakewood Board of Education on December 11, 1972.

"The resolution does include the following paragraph:

" 'That the said student shall have the right to make subsequent application to the Board of Education for attendance at special classes or educational facilities upon sufficient medical and psychological proof that attendance at such special classes or education facilities will be for the best interest for said student and the school system.' ***" (Exhibit A)

Thereafter, a Commissioner's decision was rendered on June 19, 1973, which upheld the expulsion action of the Board; however, the Commissioner directed the Board to act further in the interest of R.K., and consistent with his decision in *John Scher v. Board of Education of West Orange,* 1968 *S.L.D.* 92.

In *Scher,* the Commissioner commented as follows:

" ***The Commissioner notes, also, that it is not only within the authority but it is also the duty of a local board of education to administer the procedures for the diagnosis and classification of pupils who give evidence of emotional disturbance or social maladjustment. *N.J.S.* 18A:46-6, 8, and 11 Pupils may be refused admission to, or be excluded temporarily from school for a reasonable time pending such examination and classification. *N.J.S.* 18A:46-16 In this case, respondent has taken the position that petitioner's continued presence in the school would constitute a hazard to the physical well-being of himself, his fellow students and the school personnel. The Board asserts also that its psychiatrist, who had examined petitioner previously when he was in sixth grade, had advised that petitioner not be readmitted until a reexamination is made. Under such circumstance the Commissioner holds that respondent's requirement of a mental health evaluation is a proper exercise of its statutory authority. ***

And,

" *** Termination of a pupil's right to attend the public schools of a district is a drastic and desperate remedy which should be employed only when no other course is possible. It involves a momentous decision which members of a board of education, most of whom have had little specific training in education, psychology, or medicine are called upon to make. The board's decision should be grounded, therefore, on competent advice. Such advice can be obtained from its staff of educators, from its school physician and school nurse, from its psychologist, psychiatrist, and school social worker, from its counsel, and from other appropriate sources. The recommendations of such experts are an essential ingredient in any determination which has as significant and far-reaching effects on the welfare of a pupil as expulsion from school. It is obvious that a board of

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education cannot wash its hands of a problem by recourse to expulsion. While such an act may resolve an immediate problem for the school, it may likewise create a host of others involving not only the pupil but the community and society at large. The Commissioner suggests, therefore, that boards of education who are forced to take expulsion action cannot shrug off responsibility but should make every effort to see that the child comes under the aegis of another agency able to deal with the problem. The Commissioner urges boards of education, therefore, to recognize expulsion as a negative and defeatist kind of last-ditch expedient resorted to only after and based upon competent professional evaluation and recommendation. In the case under review, the Commissioner calls attention to the fact that although the Board ordered an evaluation of petitioner by its mental health team, it made its determination with respect to his status before such an examination and the recommendations emanating therefrom could be accomplished. The Commissioner suggests that the decision should have been left open until after it had received the results of the examinations and the recommendations made by the examiners. *** " (at pp. 96-97)

The Commissioner commented also in his June 19, 1973, decision, that the expulsion of R.K. was similar to the *Scher* matter, and that R.K. had been expelled by the Board without having had a prior evaluation by its Child Study Team and an examination by its school psychiatrist. The Commissioner determined further, that the procedures followed by the Board to expel R.K. were consistent with law; however, the Board was directed to have R.K. evaluated by its Child Study Team including an examination by its school psychiatrist. The Commissioner directed finally that the Board be guided by these recommendations in taking further action regarding R.K., in accordance with its own resolution of December 11, 1972, Exhibit A, *ante*, and the guidelines of the Commissioner in *Scher, supra.*

R.K. was evaluated by the Board's Child Study Team as directed. The Board considered R.K.'s reinstatement in school; however, his application for readmission was denied.

At the hearing, the report of the Child Study Team (J-1) was submitted and it reads in part as follows:

"*** 1. Based on the findings of individual members of the Child Study Team, *** [R.K.'s] performance and record following expulsion are such that the Board of Education seriously consider his return as a full time student.

"2. If it is determined by the Board of Education that he should return to school, we strongly advise that he be enrolled in a Vocational Education Program comparable to that in which he was previously enrolled.

"3. If he does not return, he should be provided the opportunity for an alternate program such as evening school coupled with employment, high school equivalency program and/or consider Job Training Program."

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Additionally, the school psychiatrist's report recommended that R.K. be returned to school.

The school psychologist and the Superintendent, also, testified that R.K. should be readmitted to school or in the alternative given a modified educational program tailored to meet his needs.

R.K.'s mother testified that he was still under a psychiatrist's care, that he was taking medication, and that he is improved. She testified also that his visits to his physician had diminished over the past year from several times a week, to once per week, to once every three weeks, and now only whenever he feels he needs to consult his physician.

Despite the recommendations from its Child Study Team, a school psychiatrist, a school psychologist and the Superintendent of Schools, the Board voted unanimously not to readmit R.K., according to the testimony of one of its members. Two Board members testified that the Board had considered all of the recommendations as reported, *ante*, but it was their determination that it would not be in the best interest of the school system, its teachers, and approximately 1,500 pupils to readmit R.K.

The hearing examiner notes that there is nothing in the record before the Board, subsequent to the Commissioner's decision of June 19, 1973, which would support a determination by the Board that there is no suitable education program that should be offered to R.K.

The hearing examiner recommends, therefore, that the Commissioner direct the Board to offer R.K. an education program suitable to his needs and consistent with the guidelines in *Scher, supra,* and the report of its own Child Study Team and its administrators. This program should be drafted by its educators.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the adjudication of June 19, 1973, the record in the instant matter, the report of the hearing examiner, and the recommendations contained therein. It is further noted that no exceptions to the hearing examiner's report were filed.

The Commissioner finds that the Board, while complying in form with the directive of June 19, 1973, *ante*, has refused to be guided by the recommendations of its Child Study Team, school psychiatrist, school psychologist, and administrators. In acting counter to their affirmative recommendations to return R.K. to a suitable educational program, the Board has acted contrary to principles clearly enunciated in *Scher, supra,* wherein it was stated:

"*** The board's decision should be grounded, therefore, on competent

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advice. Such advice can be obtained from its staff of educators, from its school physician and school nurse, from its psychologist, psychiatrist *** and from other appropriate sources. The recommendations of such experts are an essential ingredient in any determination which has as significant and far-reaching effects on the welfare of a pupil as expulsion from school.***" (at p. 96)

Accordingly, the Commissioner determines that the Board, in failing to heed the clear recommendation of its professional staff that R.K. be returned to school, unreasonably denied him the opportunity to continue his education in the public schools of the Township of Lakewood. It is ordered, therefore, that R.K. be readmitted to school forthwith in such program of studies consistent with his abilities and needs, based upon the recommendations of the Child Study Team, as shall be determined by the Board's school administrators.

COMMISSIONER OF EDUCATION

January 17, 1974

Board of Education of the Borough of Lawnside,

Petitioner,

v.

Mayor and Council of the Borough of Lawnside, Camden County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Theodore Z. Davis, Esq.

For the Respondent, Joseph Tomaselli, Esq.

Petitioner, hereinafter "Board," appeals from an action of the Mayor and Council of the Borough of Lawnside, hereinafter "Council," certifying to the Camden County Board of Taxation a lesser amount of appropriations for current expense and capital outlay purposes for the 1973-74 school year than the amount proposed by the Board in its budget which was defeated by the voters.

A hearing in this matter was held on September 17, 1973 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

At the annual school election held on February 13, 1973, the voters rejected the Board's proposal to raise by local taxes $606,101 for current expenses and $33,000 for capital outlay for the 1973-74 school year. The

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budget was then sent to Council for its determination of the amount to be raised to provide a thorough and efficient school system.

After a review of the budget and consultation with the Board, Council made its determination and certified the sum of $550,001 for current expenses, with no appropriation for capital outlay, to the Camden County Board of Taxation.

The Board named the Camden County Board of Taxation as a party respondent so that the Board of Taxation would reserve its determination regarding tax rates pending the Commissioner's decision in this matter. The record shows that the tax rate has already been struck pursuant to the applicable laws; therefore, the hearing examiner finds no necessity to consider further the County Board of Taxation as a party respondent. The record shows also, that the Board of Taxation has neither replied to the Petition of Appeal nor was it represented at the hearing.

The hearing examiner notes also, that the Borough of Lawnside is under the control and supervision of the Division of Local Government of the Municipal Finance Commission, hereinafter "MFC." MFC was notified of this budget controversy by letter from the Division of Controversies and Disputes dated July 11, 1973, and was invited to attend the hearing. MFC was contacted again by telephone on September 17, 1973; however, MFC was not represented at the hearing, nor has it submitted any documentation regarding this matter.

The Board avers that Council's reductions are arbitrary and capricious and will irreparably damage the quality of education offered in its schools. Council, however, suggested line items of the budget in which it believes economies could be effected, and the hearing examiner finds that the Council's proposed reductions have not been arbitrary and capricious, but have been made pursuant to the guidelines set down by the New Jersey Supreme Court in *Board of Education of East Brunswick v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966). These proposed reductions, $56,100 in current expenses and $33,000 in capital outlay, are shown as follows:

CURRENT EXPENSES

Account No.	Item	Budgeted By Board	Proposed By Council	Reduction
J110E	Legal Expenses	$ 1,500	$ 1,000	$ 500
J120A	Sal. Auditor	3,000	2,200	800
J130A	Bd. Expense	3,500	2,000	1,500
J130B	Bd. Sec. Expense	1,000	600	400
J130N	Misc. Expense	2,000	1,200	800
*J211A&B	Sal. Admin. Prin.	33,950	19,950	13,000
	and Asst.	–0–	1,000	*–0–
J213B	Sal. Spec. Tchrs.	40,000	20,000	20,000
J215B	Sal. Secy. Clerk	8,000	4,000	4,000
J410A	Sal. Physician	3,000	2,700	300
J410B	Sal. Nurse	7,300	3,000	4,300

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J610	Sals. Custodians	36,500	33,000	3,500
J650A	Water-Sewer	4,000	3,000	1,000
J640B	Electricity	13,000	10,000	3,000
J650D	Janitor Supls.	4,000	3,000	1,000
J720	Contr. Servs.	7,000	6,000	1,000
J730	Maint.-Repairs	6,000	5,000	1,000
	TOTALS	$173,750	$117,650	$56,100

*The Board's Proposal includes salaries for two principals – J211A – whereas Council's recommendation is a salary for one principal plus $1,000 for a teacher assistant – J211B – in a second school building.

CAPITAL OUTLAY

The Board's written testimony supports its need for the restoration of the $33,000 it budgeted. Council did not offer any line item reductions in this account, nor did it give any reasons for the reduction in capital outlay.

The hearing examiner recommends, therefore, that the entire amount of $33,000 be restored to the Board's capital outlay account.

J110E Legal Expense

The Board testified that it contracted counsel at $100 per month for twelve monthly meetings and agreed to pay additional moneys to counsel for time spent and services performed beyond the contractual agreement.

Council's reason for reducing this line item by $500 is that a $625 balance remained in January 1973.

There was no showing by Council that this $625 would not be expended by June 1973, nor was it suggested that the Board would not need its budgeted amount of $1,500 for the 1973-74 school. The hearing examiner recommends, therefore, that the $500 reduction be restored.

J120A Salary Auditor

The Board contends that the increase in this line item is needed because of new and added reports that previous auditors have not had to prepare, and the Board anticipates additional, but unspecified, costs.

Council contends that the $2,200 it proposed in this account represents a $200 (10%) increase over the amount budgeted last year, and even that exceeds the recommended wage-price guidelines.

The hearing examiner finds that the Board's anticipation of additional expenses is insufficient to support its proposal, whereas Council's suggested economy is reasonable and provides for a $200 increase in this line item. He recommends, therefore, that the Commissioner sustain the $800 reduction.

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J130A Board Expense
J130B Board Secretary Expense

The Board argues that increased expenses in dues to several organizations, plus increased costs in attending seminars and meetings throughout the State, are the reasons for the increase proposed in the J130A line item. The Board also argues that the Board Secretary's work load will increase because of the new school facility and that there will be increased costs for postage and for the Secretary's attendance at seminars and meetings. (J130B)

Council states that it wishes to hold the line on these items.

The hearing examiner finds that Council's reasons for these suggested economies cannot be supported and recommends that the Commissioner restore the $1,500 and $400 reductions in these line items.

J130N Miscellaneous Expense

Council avers that the balance shown by the Board in this line item supports its determination that the budgeted amount is not required. The Board offered no written testimony nor evidence to support this appropriation.

The hearing examiner recommends that Council's reduction be sustained.

J211A&B Administrative Principal

The Board decided that it is both necessary and educationally sound to have a full-time administrator in each of its schools. The Board's written testimony supports that determination, and the Board budgeted $39,950 for salaries for two school administrators.

Council asserts that $19,950 is sufficient salary for one principal who should supervise both buildings and that it provides $1,000 for the salary of a teacher to be an Administrative Assistant in the building not occupied by the Principal.

The hearing examiner finds that the Board has the statutory authority under *N.J.S.A.* 18A:11-1 to determine its administrative needs. The Board's proposal is based on educational considerations, and there is no showing by Council that the Board's proposal is unnecessary or unreasonable. The hearing examiner recommends, therefore, that the $13,000* reduction be restored. *(See table, *ante.*)

J213B Salaries Special Teachers

The Board budgeted for four additional special teachers, such as home economics, industrial arts, special education, a librarian and a physical education teacher. Two such teachers have already been employed at salaries of $7,300 each, the minimum salary in the district. This need was caused in part by the opening of the new school facility.

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Council's opinion is that only two special teachers are needed; therefore, it reduced this line item from $40,000 to $20,000.

The hearing examiner finds that an allowance must be made for the four teachers budgeted by the Board. Counsel offered no reasons for the reduction other than its opinion that the Board could get along with lesser staff, while the Board justifies its need because of the opening of a new schoolhouse. The hearing examiner recommends that an average salary of $10,000 per teacher for two more teachers, in addition to the two already hired by the Board at salaries of $7,300 be allowed in the budget. Therefore, $34,600 should be allowed in this account, and the $40,000 originally budgeted should be reduced by $5,400.

J215B Salary Secretary Clerk

The Board budgeted $4,000 for an additional secretary for the proposed principal of the new school, and the hearing examiner has recommended that Council's suggested deletion of the principal's salary be restored. (J211A,B, *ante*)

Council's proposed reduction in this line item is based on its recommendation that the new principal is not necessary.

The hearing examiner recommends that the $4,000 reduction be restored.

J410A Salary Physician

The Board budgeted $3,000 for its physician which is $500 more than the amount budgeted the previous year. It comtemplates additional expenses and services over those already contracted.

Council reduced this budgeted amount by $300, thereby allowing for a $200 increase, and the hearing examiner recommends that its reduction be sustained.

J410B Salary Nurse

The Board determines that a full-time nurse is now required because of the opening of a new schoolhouse, and budgeted $7,300 for the position.

Council gave no reason for its recommended economy other than it "does not feel that a full time nurse is required." (Council's Statement)

The hearing examiner recommends that the $4,300 reduction be restored.

J610 Salaries Custodians

The Board budgeted $36,500 for custodians' salaries and in its written testimony stated that $35,350 of that amount is already committed to their salaries without the inclusion of pay for personal illness and other unexpected needs of the Board.

Council reduced this line item by $3,500, reasoning that the Board should

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charge for the use of school buildings when janitorial services are required, thereby making up the difference in this suggested economy.

The hearing examiner supports Council's reasoning; however, he recommends that the budget be reduced in this line item by the amount exceeding those moneys already committed, *ante,* or $1,150.

J650A Water–Sewer
J640B Electricity

In both of these line items the Board has relief on its past expenses and the architect's recommendation, since a new and previously unused school building must be operated.

Council argues that the building will not be occupied until September 1973, that the Board's budget covers anticipated expenses prior to that time, and that the Board's suggested budgeted amount is only an estimate.

The hearing examiner finds that the budgeted amount is indeed an estimate; however, it is an estimate based on experience and the architect's recommendation. He recommends, therefore, that the amounts of $1,000 and $3,000 be restored to these line items.

J650D Janitor Supplies

The Board budgeted $4,000 in this line item which is an increase of $1,000 over the amount budgeted the previous year. The expenditure for the 1972-73 school year was $3,237.31 and additional expenditures are anticipated because of the new building facility.

Council offered no reason for this suggested economy, and the hearing examiner finds that the suggested increase is reasonable in considering the needs of an additional schoolhouse. He recommends that the $1,000 reduction be restored.

J720 Contracted Services
J730 Repairs

The Board argues that it anticipates additional contracted services in these line items, particularly for maintenance of the new gymnasium floor and other special areas of the new schoolhouse.

Council argues that the new school building should require less maintenance and repairs than the old building, and it avers, therefore, that its reduction is reasonable and that its proposed amounts in these line items are adequate.

The hearing examiner finds that the amount proposed by Council allows a considerable increase in these line items over the amounts actually expended last year. He recommends that the aggregate reduction of $2,000 be sustained.

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In summary, it is recommended that the combined line items discussed, *ante*, be determined as follows:

CURRENT EXPENSES

Account No.	Item	Amount of Reduction	Amount Restored	Amount not Restored
J110E	Legal Expense	$ 500	$ 500	$ –0–
J120A	Sal. Auditor	800	–0–	800
J130A	Board Expense	1,500	1,500	–0–
J130B	Bd. Sec. Expense	400	400	–0–
J130N	Misc. Expense	800	–0–	800
J211A&B	Sal. Admin. Prin. and Asst.	13,000	13,000	–0–
J213B	Sal. Spec. Tchrs.	20,000	14,600	5,400
J215B	Sal. Secy. Clerk	4,000	4,000	–0–
J410A	Sal. Physician	300	–0–	300
J410B	Sal. Nurse	4,300	4,300	–0–
J610	Sals. Custodians	3,500	2,350	1,150
J650A	Water-Sewer	1,000	1,000	–0–
J640B	Electricity	3,000	3,000	–0–
J650D	Janitor Supls.	1,000	1,000	–0–
J720	Contr. Servs.	1,000	–0–	1,000
J730	Maint.-Repairs	1,000	–0–	1,000
TOTAL – CURRENT EXPENSE		$56,100	$45,650	$10,450
TOTAL – CAPITAL OUTLAY		$33,000	$33,000	$ –0–
GRAND TOTAL		$89,100	$78,650	$10,450

The hearing examiner recommends, also, that this report be forwarded to the Division of Local Government Services, Department of Community Affairs, Trenton.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, the report of the hearing examiner, and the findings and recommendations contained therein. It is noted that no exceptions were filed thereto within the period of time provided for such filing. The Commissioner concurs with the recommendations and total determination as found in the report of the hearing examiner and finds that the amount of $45,650 must be added to the amount previously certified by Council to be raised for current expenses, and that the amount of $33,000 must be certified by Council to be raised for capital outlay of the School District of Lawnside in order to provide a thorough and efficient system of public schools in the district for 1973-74. He therefore directs the

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Council of the Borough of Lawnside to add to the previous certification to the Camden County Board of Taxation of $550,001 for the current expenses of the school district the amount of $45,650, so that the total amount of the local tax levy for current expenses for 1973-74 shall be $595,651. Additionally, the Commissioner directs the Council of the Borough of Lawnside to certify to the Camden County Board of Taxation for the capital outlay of the school district the amount of $33,000 for 1973-74. It is further directed that a copy of this decision be sent to the Division of Local Government Services, Department of Community Affairs, Trenton.

COMMISSIONER OF EDUCATION

January 18, 1974

Dorothy Duffy, Janice Picarell, Ruth Oxee, James McCabe, George Latimer, and Brick Township Education Association,

Petitioners,

v.

Board of Education of the Township of Brick, Ocean County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Joseph N. Dempsey, Esq.

For the Respondent, Anton and Ward (Donald H. Ward, Esq., of Counsel)

Petitioners Duffy, Picarell, Oxee, and McCabe, teaching staff members employed by the Board, who are also officers of the Brick Township Education Association, hereinafter "Association," together with the Association, allege that the Board of Education of the Township of Brick, hereinafter "Board," through its school administrators, acted improperly by inserting allegedly adverse materials in the form of administrative communications into petitioners' personnel record files during the school year 1972-73.

The Board admits the insertion of such materials but denies any impropriety or illegal action on its part.

Petitioners pray for relief in the form of an Order from the Commissioner directing the Board to remove such materials from the personnel files of all its teachers and to desist thereafter from the insertion therein of such allegedly offensive notations.

The matter is submitted for Summary Judgment by the Commissioner.

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The relevant facts are not in dispute and are stipulated in the form of exhibits, thus obviating the need for a plenary hearing. The Commissioner has examined the record in the instant matter, including the Briefs filed by both parties, and the transcript of oral argument held October 16, 1973 at the State Department of Education, Trenton, before a representative of the Commissioner.

In the first instance, it is necessary to describe the nature of those administrative communications, the insertion of which into teachers' personnel files provides the sole basis of contention in the instant matter. The eighteen exhibits (Exhibits J-1-18) attached to the Amended Petition of Appeal may be summarized, in terms of the allegations contained therein, as follows:

A. Exhibits 1, 13, 15: unauthorized distribution by petitioners of Association materials through school mailboxes.

B. Exhibits 2, 4, 5, 6, 7, 12: signing in late, signing out early or violation of other sign-in, sign-out regulations by petitioners.

C. Exhibit 10: transacting Association business on school property without authorization of the building principal.

D. Exhibit 3: failure to attend a PTA meeting.

E. Exhibits 14, 16: failure to complete lesson plans on time.

F. Exhibit 8: unauthorized removal by petitioner from school mailboxes of flyers approved for distribution by the building principal.

G. Exhibit 11: letter from attorney for the Board charging that petitioner directed insubordinate remarks to a school administrator.

H. Exhibit 9: letter explaining the Board's view of its grievance procedure as requiring initial discussion of a matter by the grievant with his building principal.

In the instant matter, the Commissioner is neither asked nor does he render judgment on the merits of the contents of these eighteen communications. (Exhibits J-1-18) The Commissioner is limiting his determination to a single issue, as agreed upon by counsel, namely: Is the unilateral insertion of such communications into the personnel record files of these teaching staff members, by school administrators without benefit of a hearing, an *ultra vires* act?

Petitioners allege that the eighteen administrative communications (Exhibits J-1-18), addressing complaints to individual petitioners, contained offensive and punitive material and were improperly inserted into the personnel files of petitioners without benefit of a hearing. In this regard, petitioners contend that the Commissioner's decision in *Sayreville Education Association, Inc., v. Board of Education of the Borough of Sayreville,* 1971 *S.L.D.* 197 is

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controlling and compels the Board to provide a hearing prior to such insertion, or, absent such a hearing, to refrain from incorporating such material into teaching staff members' personnel files. Petitioners quote from the Commissioner's decision in *Sayreville* as follows:

> "*** It seems clear to the Commissioner that the action taken by respondent is punitive in its effect, since it imparts the stigma of an illegal action of the record of all but a few of its teaching staff members. This stigma is presumably attached permanently to the record and thus has a continuing effect, and such effect may not be mitigated in future years by exemplary conduct or devoted service. The effective punishment remains for each teacher a part of the 'records' which have been described in one court as 'the mind and memory of a corporate body.' *Brown v. Webster City,* 115 *Iowa* 511, 88 *N.W.* 1070 (1902).***" (at p. 201)

In the instant matter, petitioners contend that:

> "*** [T]he material placed in the teachers' files or proposed for such placement purports to memorialize improper actions on the part of the subject teachers. Hence, a stigma can be presumed to attach permanently to each teacher's record with a continuing effect.***" (Brief in Support of Motion for Summary Judgment, at p. 2)

Finally, petitioners state that such allegedly punitive action is not provided for by statute and is therefore illegal.

The Board, on the other hand, asserts that the *Sayreville* decision, *supra,* is not applicable to the instant matter in that the Sayreville Board of Education had passed a resolution requiring, *inter alia,* that:

> "*** 1. A Memorandum to the effect that the certificated person employed by this school district took part in an illegal strike against this Board of Education shall be placed in the personnel file of each certificated person whose absence on March 10, 11, 12 and/or 13, 1970, was not excused and a copy of said Memorandum shall be delivered to said person.
>
> "2. A statement that said person's file contains the aforesaid Memorandum shall be contained in any reply made to an inquiry by a prospective employer concerning said person's record of employment with this school district.***" (*Sayreville, supra,* at p. 198)

The Board asserts that it has no intention of adopting such a resolution as that described in *Sayreville, supra,* in regard to the communications included in Exhibits J-1-18. The Board further maintains that petitioners were not denied due process but were in each instance offered an opportunity to be heard on an informal basis by the school administrative officer, or on level I of the grievance procedure. The Board further asserts that the filing of such letters as those protested by petitioners is clerical and administrative, rather than disciplinary or

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punitive in nature. Finally, the Board states that "*** The placement of the letters in the files of the Petitioners is neither to invoke penalty nor punishment***." (Answer to Amended Petition, at p. 3)

In the Commissioner's judgment, the matter, *sub judice,* is clearly distinguishable in several points from *Sayreville, supra.* In *Sayreville,* it was determined that a stigma was permanently attached by the memorializing of an illegal act, the act of engaging in an illegal strike. In the instant matter, however, each of the offenses is so minor in nature that the Commissioner cannot find that petitioners will be stigmatized by the mere fact that copies of these communications have been placed in their files. Additionally, it is clear that no illegal act was memorialized herein by the filing of the communications. (Exhibits 1-18, *ante*) In *Sayreville,* the Commissioner opined that the action of the Board was improper in that it had a continuing effect that could not be mitigated by future years of exemplary conduct and service. Conversely, the Commissioner finds, herein, that the record of such acts may indeed be effectively mitigated by the simple expedient of conforming to such reasonable expectations of the Board regarding promptness and adherence to established regulations as are encumbent upon efficient employees. The Commissioner opines that the record of such acts as herein described would pale into insignificance before such exemplary service. The instant matter is further distinguished from *Sayreville* in that there is no clear showing herein that the Board has acted with punitive intent or in a manner to impugn the character of petitioners as was found by the Commissioner to be offensive and unreasonable in *Sayreville.* Finally, in contrast to *Sayreville,* there is, herein, no evidence of a resolution or other act by the Board directing its agents to advise prospective employers of its teachers of the communications or of the records herein controverted.

In recognition of the enumerated clearly distinguishing dissimilarities, the Commissioner finds and determines that *Sayreville, supra,* is not controlling with respect to the matter, *sub judice.*

The Commissioner finds petitioners' demands for hearings before the school principals prior to the insertion of such relatively innocuous notations into personnel files, as opposed to private discussion thereof, to be without merit. If petitioners disagree with the substance of these communications, they possess the option of filing formal grievances under the Board's grievance procedure policy which was negotiated with the Association. The purpose of a grievance policy is to provide procedures by which employees "*** may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them***." *N.J.S.A.* 34:13A-5.3

The record shows no intent on the part of the school administrators to act in a malicious or covert manner, but rather shows an open, forthright presentation of their concerns, in written form, with offers of private discussions at the option of petitioners. The Commissioner finds that this administrative procedure is entirely proper. The Commissioner does not believe that administrators should be burdened with endless, unnecessary procedural fetters as herein suggested by petitioners.

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The Commissioner finds that petitioners are in error in their claim that the Board has no legal authorization to keep personnel records in the manner herein controverted. The Commissioner holds that the Board has not only the right, but a mandated duty, to keep accurate records regarding professional personnel. The mandatory powers and duties of boards of education are clearly established by *N.J.S.A.* 18A:11-1, wherein it is stated:

> "The board shall *** make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and the government and management of the public schools and *** *regulation of conduct and discharge of its employees.****" (*Emphasis supplied.*)

See also *N.J.S.A.* 18A:28-5 and 18A:29-14. It is inconceivable that the Board could carry out these statutory mandates efficiently without the making and filing of records regarding teaching staff members and other personnel by its administrative staff. The words of the Court in the case of *Kopera v. West Orange Board of Education,* 60 *N.J. Super.* 288, 298 (1960) are particularly pertinent as follows:

> "*** local boards have the right to reward the capable and the efficient, provided they do it fairly, without bias, prejudice, favoritism or discrimination, *and they have the right to adopt any reasonable means toward that end.****" (*Emphasis supplied.*)

In summary, the Commissioner finds the Board's practice with regard to personnel record insertions is not unique, without precedent, or contrary to statutory authority, and is reasonable. Absent the finding of any offensive condition in the instant matter, such as was present in *Sayreville, supra,* the Commissioner determines that the Board's practice regarding personnel record insertions is legal and proper. If petitioners do not agree with the administrative determinations set forth in these eighteen communications (Exhibits J-1-18), they may avail themselves of the existing grievance procedures for relief. Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

January 18, 1974

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Board of Education of the Borough of Collingswood,

Petitioner,

v.

Board of Commissioners of the Borough of Collingswood, Camden County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Brown, Connery, Kulp, Wille, Purnell and Greene (George Purnell, Esq., of Counsel)

For the Respondent, James Perrin, Esq.

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Commissioners," taken pursuant to *N.J.S.A.* 18A:22-37, certifying to the Camden County Board of Taxation a lesser amount of appropriations for school purposes for the 1973-74 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing conducted on August 15, 1973 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. Supplemental affidavits were filed thereafter by the Board, and Briefs of counsel were subsequently submitted.

At the annual school election held on February 13, 1973, the Board submitted to the electorate a proposal to raise $2,660,413 by local taxation for current expenses of the school district for the 1973-74 school year. That proposal was rejected by the voters, and the Board subsequently submitted its budget to the Commissioners for their determination of the amount necessary for the operation of a thorough and efficient school system in the Borough of Collingswood, pursuant to the mandatory obligation imposed on the Commissioners by *N.J.S.A.* 18A:22-37.

After consultation with the Board and a review of the proposed budget, the Commissioners made their determination and certified to the Camden County Board of Taxation an amount of $2,403,644 for current expense. That amount represents a reduction of $256,769 from the amount originally presented to the voters by the Board. Although the Board challenged the entire amount of the reduction in its Petition of Appeal, at the time of hearing and, subsequently in its Brief (at pp. 1, 18), the Board determined to appeal $217,396 of the total reduction, by specific line items, as made by the Commissioners.

The Board contends that the Commissioners' action in reducing its budget will most seriously affect the educational programs already in progress and will prevent the Board from providing a thorough and efficient school system in the Borough of Collingswood. The Commissioners, to the contrary, deny the Board's

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contention in this regard and assert that the amount they certified allows the Board to continue its program and to provide a thorough and efficient school system for the Collingswood community.

Although there appears to be argument from the Board that the Commissioners determined reductions from political motivation, the hearing examiner finds no credible evidence to support such a claim, if in fact, it is seriously made.

As part of its determination, the Commissioners suggested specific items of the school budget in which they believe economies could be made without harm to the educational program. However, the following exposition will address only those line items totaling $217,396 which the Board appeals.

J211 Salaries Principals Reduction $17,000

The Board proposed an amount of $170,106 for this line item, while the Commissioners recommend $153,106, a reduction of $17,000. The Board avers that the moneys proposed for reduction are essential to maintain a second position of assistant principal at the high school. The Commissioners' rationale for economy in this account is that the incumbent assistant principal whose salary for 1972-73 was $19,222 was retiring. Through discussions with the Board, the Commissioners learned that this person also taught two mathematics classes. Through some unspecified calculation, the Commissioners determined that the cost to replace the incumbent's teaching services would be approximately $2,000. Because the Commissioners believe that the high school would be able to function with one assistant principal and, of course, the high school principal, they accordingly recommended that the Board not replace the retiring incumbent, allow funds to replace his teaching service, and reduce the moneys in this account by $17,000. The Commissioners assert that comparable surrounding school districts have fewer administrators than Collingswood, and that no sound reason has been advanced by the Board why it should employ more administrative assistants than neighboring districts.

The Collingswood High School has an approximate enrollment of 1,100 pupils in grades ten through twelve, contains 48 classrooms, and has a teaching staff of 56. The Board asserts that the second position of assistant principal had been first created seven years ago. The Board contends that the Commissioners could have deleted that position from the budget prior to the incumbent's gaining tenure, but chose not to. Perceiving that statement by the Board, claiming estoppel as a defense against such deletion now, the Commissioners assert that the question of need for continuing this position has, in fact, arisen in prior years when the two parties consulted subsequent to budget disputes. The Commissioners aver that it has been their position for some time now that, when one of the assistant principals resigned or retired and the Commissioners were aware of the pending retirement of the incumbent, the position should then be abolished.

In any event, the Board avers that this position is absolutely essential to continue its "open-door policy" which allows high school pupils to consult with

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administrators on a personal basis which, the Board contends, has reduced the potential for student disorder and increased the general rapport among all groups of the high school community.

Additionally, the Board specifically cites eight major areas of responsibility assigned to the second assistant principal, in addition to other responsibilities also assigned to him on a joint basis with the other assistant principal.

Contrary to the view held by the Commissioners, the hearing examiner finds that the Board has a need for a second assistant principal at the high school. The size of the physical plant itself, the pupil enrollment, and staff number surely require that much administrative time be spent tending to numerous important responsibilities. The administrative "open-door policy" is to be encouraged and should not be eliminated in view of its success, and should not be considered a frill.

Accordingly, it is recommended that the $17,000 reduction proposed by the Commissioners in this line item be restored.

J214b Salaries – Guidance Personnel Reduction $9,500

The Board proposed a total amount of $57,250 for this line item, while the Commissioners recommend a total of $47,750, a reduction of $9,500. The Board asserts that the moneys recommended for reduction are to support an additional guidance counselor at the junior high school, which currently has only one guidance counselor assigned. The junior high school, containing grades seven through nine, has a pupil enrollment of approximately 850, with 28 classrooms, and a teaching staff of 34. The Board contends that its guidance program, which seeks to assist all pupils to mature in self-understanding, self-responsibility, decision-making ability, and the development of proper attitudes and values, forms an integral part of its educational program. Its present counselor-pupil ratio of 1:850 is excessive and prohibits proper counseling at the junior high level. Furthermore, testimony of the Board reflects that because of recent budget defeats by the voters it was reluctant to include another position for guidance in an effort to minimize expenditures. But, because of pupil-oriented problems, such as drug abuse and aggressiveness, it determined to seek approval for such a position this year, thereby reducing the counselor-pupil ratio to 1:425. Even at that ratio, the Board asserts, the case load per counselor would still be much higher than the ratio of 1:250 recommended by the four educational groups it cites as authorities.

The Commissioners, however, believe that one guidance counselor at the junior high school is sufficient. Furthermore, the Commissioners state that the Board's admission that it refrained from requesting such a position in prior years indicates that the Board was not convinced of this need. And, even if the Board was convinced that an additional guidance position was necessary, by not providing for one, it violated its own responsibility and obligation. Thus, the Commissioners conclude that the Board, in fact, deems the addition of a guidance position as not being necessary.

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The hearing examiner believes that the Board has, in fact proven its need for the addition of a second position of guidance counselor at the junior high school. Accordingly, it is recommended that the $9,500 proposed for reduction by the Commissioners be restored.

J216 Other Salaries for Instruction Reduction $18,896

The Board proposed an amount of $31,136, while the Commissioners recommended an amount of $12,240, a reduction of $18,896. The Board avers that the total amount it proposed is necessary to continue its program of teacher aides which was begun during 1964-65. Since that time, according to the Board, eight teacher aides have been utilized by the Board to perform at least sixteen teacher-related clerical duties. Five of these eight aides are part-time, assigned to each of the five elementary schools in the district, one is assigned full-time at the high school, and the remaining two are assigned to special education classes. The Board points out that the amount budgeted for this line item for 1972-73 was $25,583.

The Board asserts that unless the amount reduced by the Commissioners is restored, it will be required to release all but the special education teacher aides which would be a serious loss of established and experienced people.

The Commissioners aver, however, that the only criterion for the use of teacher aides, excluding those working with special education pupils, is class size. That being so, the Commissioners conclude that at least one purpose for the use of aides is class management. And, because the Board has not offered any evidence that there is an existing problem with class management, the Commissioners deduce that no justification has been shown for restoration of these funds.

The hearing examiner cannot agree. Even if class size is *a* factor, surely the other 16 responsibilities assigned by the Board to teacher aides, whom the Commissioners had the opportunity to review and question, provide proof regarding the loss the Board would suffer should this reduction be sustained.

Accordingly, the hearing examiner recommends restoration of $18,896 to this line item.

J420c Miscellaneous Expenses – Health Services Reduction $2,000

The Board proposed an amount of $3,625 for this account, while the Commissioners recommend a total of $1,625, a reduction of $2,000.

The Board Secretary testified that the increase in this line item over the 1972-73 budgeted figure of $825 is due to the fact that, until 1972-73, pupil psychological evaluations were erroneously being charged to line item J250c Miscellaneous Expense for Instruction. Upon learning the proper line item to which pupil psychological evaluations should be charged, moneys were transferred during 1972-73 to line item J420c from line item J250c, so that the actual expenditures for the J420c account were $5,355.12.

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Of the total $3,625 requested for 1973-74, the Board asserts that $2,800 is for evaluations while $825 is for medical supplies.

The Commissioners aver that in arriving at their original determination to reduce this requested sum by $2,000, they did not have the information the Board now presents in regard to pupil psychological services being charged to the wrong line item. While not disputing the merit or need for psychological evaluations, the Commissioners do take issue with the lateness of the explanation they received from the Board. Based on the record before him, the hearing examiner believes that the Commissioners were not completely informed of the Board's explanation of this line item until September 17, 1973, when a supplemental affidavit was filed by the Board Secretary which asserts, *inter alia,* that line item J420c is the only line item in the total school budget which contains provisions for medical evaluations. The Commissioners, having been satisfied, formally withdrew their objection to restoration of the reduction in this line item.

Accordingly, by agreement of the parties, it is recommended that $2,000 be restored to this line item.

J610 Salaries for Operation of Plant *Reduction $12,500*
J710b Salaries for Repair of Buildings *Reduction $7,500*

For these line items, the Board proposed a total appropriation of $275,821, while the Commissioners recommend $255,821, a reduction of $20,000. The Commissioners determined the Board failed to establish its need to employ a new custodian and a secretary for the supervisor which most of the $20,000 represents.

The Board, in establishing its need for the moneys eliminated in this line item, relies on the testimony of the Supervisor of Buildings and Grounds. He avers that the $20,000 is essential to provide him with the services of a secretary, thereby freeing him from the daily clerical work which now absorbs much of his time and which could be better utilized in the various school buildings. The supervisor estimates this cost at $4,500. Additionally, he testified that, because of the substantial extra work emanating from the improvements authorized by a recently passed referendum, approximately $3,000 would be necessary for overtime pay for the maintenance staff. The Board, however, has limited its appeal of this reduction to the extent of $17,000 (Board's Brief, at p. 7), finding that the employment of another janitor for the remainder of the school year is not necessary.

The difference between the cost for a secretary ($4,500) and anticipated overtime work for janitors ($3,000), and $17,000 is necessary, the Board asserts, to honor its commitment for a 5.5% wage increase for its existing staff included in these two line items.

The hearing examiner does not find a secretary for the Supervisor of Buildings and Grounds to be essential to the operation of the school at this time. In all probability, the anticipated overtime will be required, as will the moneys

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necessary for the Board to honor its wage agreement. Accordingly, of the $20,000 in contention, the hearing examiner recommends the restoration of $12,500 to this line item, and that the remaining $7,500 be sustained.

J720b Contracted Services – Repair of Buildings Reduction $50,000

The Board proposed an amount of $76,965 for this line item, while the Commissioners recommend an amount of $26,965, a reduction of $50,000.

The Board received voter approval on a 1.6 million dollar improvement authorization bond referendum on March 14, 1972. That referendum presented two proposals which were:

1. Costs for improvements in the amount of $938,000 for the following schools:
   A. Garfield Elementary
   B. Mark Newbie Elementary
   C. Sharp Elementary
   D. Tatem Elementary
   E. Zane – North Elementary

2. Costs for improvements in the amount of $672,000 for the Junior High School, which include a new gymnasium, multi-use room, and other additional facilities.

As part of their underlying determination for reduction, the Commissioners aver that the proposed expenditures in this account have been provided for in the 1972 referendum. Citing the absence of information on the total work to be performed through the improvement authorization, the Commissioners contend that the repairs requested under this line item were to be supported by the referendum. They arrived at the reduction, therefore, by eliminating all repairs to the elementary schools totaling $35,510, with the remaining $14,490 apparently to be eliminated at the discretion of the Board. Furthermore, the Commissioners aver that for 1972-73, the Board expended $17,963 from an appropriation of $41,472 in this line item. If the repairs now deemed necessary by the Board were, in fact, necessary, why was not the entire appropriation used last year, the Commissioners query. Finally, the Commissioners point out that even with the reduction of $50,000, the Board still has $26,925 in this line item, an increase of $7,000 over last year's expenditures.

The Board relies on the testimony presented in the affidavit of the Supervisor in which he asserts that the Board itself originally reduced this item by $22,000 from the total amount needed for all repairs to existing buildings. It is noted that, attached to this affidavit was a breakdown by general headings as to how the original amount of $98,965, prior to the Board's reduction, would be expended in each school.

In regard to the expenditures covered by the referendum, the Supervisor asserts that neither the senior nor junior high school is included in the

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improvement authorization for improvements. Furthermore, the Supervisor contends that there is no duplication of work between this line item and the projects included in the improvement authorization, and that in his judgment all moneys reduced by the Commissioners herein are essential to achieve minimum maintenance for the school buildings which range in age from fifteen to fifty years.

In a subsequent affidavit filed by the Superintendent, he asserts that, during the fall of 1972, bids were received for the projects covered by the referendum which far exceeded the amount authorized. Another proposal was submitted to the voters on February 13, 1973 to extend the original authorization of the March 14, 1972 referendum by $680,000. That proposal was defeated by the voters. The defeat of that proposal has caused the Board, therefore, to modify its plans in regard to the improvement of the elementary schools. Further, the Superintendent attests, information from the architect indicates that neither the improvements nor the new gymnasium will be completed during the 1973-74 school year.

In regard to the detailed list of repairs included in this line item, the hearing examiner notices that for the senior high school, $33,445 is earmarked for such projects as fire system, clock and bell repair, sound system repair, hearing system, roof and door repair, remodeling of assistant principal's office, stadium reconditioning, and other areas of repair. There follows a listing of similar kinds of repairs to the junior high school, and the five elementary schools in the district, with a final heading of "general repairs" throughout the district set at $12,000.

As pointed out by the Commissioners, boards of education carry the burden of proof in budget appeals before the Commissioner of Education. That burden goes to the sole issue of the necessity of the requested restoration to maintain a thorough and efficient educational program. The hearing examiner can find no demonstrable need for the restoration of the sum suggested for reduction by the Commissioners. While all the items mentioned by the Supervisor are certainly desirable, there is no evidence that all items are essential for the operation of the public schools in Collingswood during the 1973-74 school year.

Based on prior expenditures by the Board in this line item, the amount of $26,925, which remains after the Commissioners' reduction of $50,000, will still leave sufficient funds for the 1973-74 school year. Accordingly, it is recommended that the Commissioners' reduction be sustained.

Unappropriated Current Expense Balance

The Board's 1972-73 audit report filed in the Department of Education, reflects an unappropriated free balance in the current expense account of $159,608.53 as of June 30, 1973. Of that amount, the Commissioners appropriated $100,000 as revenue to be applied to the 1973-74 current expense portion of the Board's budget. It avers that, based on the advice of its auditor who is also the auditor for the Board, $100,000 could be applied to the 1973-74 school budget without affecting the educational program. The Board, however,

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points out that such advice from the auditor is not contained in a verified statement, affidavit, or sworn testimony.

Using as criteria the purposes for maintaining an unappropriated free balance, the Commissioners contend that the Board has outlined no plans for these moneys except to maintain the balance as a cushion against unanticipated obligations. The Commissioners assert that such funds should not remain idle; rather, the amount of $100,000 must be used to reduce the local tax levy.

Citing *East Brunswick Board of Education v. East Brunswick Township Council,* 48 *N.J.* 94 (1966), the Board asserts that the Commissioners offered no detailed statement of reasons as to their reduction herein. The Board seeks support in that regard by citing *Board of Education of the Borough of Sayreville v. Borough Council of the Borough of Sayreville,* 1972 *S.L.D.* 514, in which the Commissioner ordered that the reduction to the Board's unappropriated free balance be restored because Council failed to state its reasons for that reduction.

Finally, the Board argues that its unappropriated free balance of $159,608.53 is not unreasonable in light of its total current expense budget in excess of 3 million dollars.

The hearing examiner has reviewed the submitted data of surrounding school districts and their respective unappropriated free balances. However, such data is not germane to this matter, because unappropriated balances are uniquely affected and influenced by variables inherent in each school district.

The hearing examiner finds that the Board has not proven the need for the restoration of $100,000 to the unappropriated free balance for the 1973-74 school year. Accordingly, it is recommended that $59,608 of the Commissioners' reduction herein be sustained, which will leave a balance of $100,000 for unanticipated obligations.

In summary, a recapitulation of the hearing examiner's recommendations are as follows:

Account Number	Item	Proposed Reduction	Amount Restored	Amount not Restored
J211	Sal.-Principals	$ 17,000	$ 17,000	$ –0–
J214b	Sal. Guidance Pers.	9,500	9,500	–0–
J216	Other Sal. Instruction	18,896	18,896	–0–
J420c	Misc. Exp.-Health Serv.	2,000	2,000	–0–
J610	Sal.-Operation of Plant	12,500	12,500	–0–
J710b	Sal.-Repair of Bldgs.	7,500	–0–	7,500
J720b	Contr. Serv.-Repair of Bldgs.	50,000	–0–	50,000
	TOTAL	$117,396	$ 59,896	$ 57,500
	UNAPPROPRIATED FREE BALANCE	$100,000	$ 40,392	$ 59,608
	GRAND TOTAL	$217,396	$100,288	$117,108

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This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the findings and recommendations in the report of the hearing examiner and notes that no exceptions were filed thereto within the time period allotted for such filing of exceptions. The Commissioner concurs with the total determination in this report and finds that the amount of $59,896 must be added to the amount previously certified by the Commissioners to be raised for the current expenses of the school district of Collingswood in order to provide sufficient funds to maintain a thorough and efficient system of public schools in the district for 1973-74. He therefore directs the Board of Commissioners of the Borough of Collingswood to add the amount of $59,896 to the $2,403,644 previous certification to the Camden County Board of Taxation for the current expenses of the school district, so that the total amount of the local tax levy for current expenses for 1973-74 shall be $2,463,540. Additionally, the Commissioner directs that the Board of Education of the Borough of Collingswood appropriate from its unappropriated free balance in its current expense account the amount of $59,608 to be used for current expenses of the school district during the school year 1973-74.

COMMISSIONER OF EDUCATION

January 18, 1974

Jeanette Brown,

Petitioner,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Ruhlman and Butrym (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Brown, Connery, Kulp, Wille, Purnell & Greene (George Purnell, Esq., of Counsel)

Petitioner, a teacher of art with a tenure status, employed by the Board of Education of the Township of Cinnaminson, hereinafter "Board," alleges that she was wrongfully denied a salary increment for the 1973-74 school year. The Board admits the refusal to grant such salary increment but denies that its action was improper or unlawful.

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A hearing in the matter was conducted on October 10, 1973 at the County Extension Service Building, Mount Holly, by a hearing examiner appointed by the Commissioner. Briefs of counsel were filed subsequent to the hearing. The report of the hearing examiner follows:

The salary policy of the Board with respect to the withholding of increments is stated in its board policy manual as follows:

> "*** 1. No increment shall be given without a record of satisfactory service and the recommendation of the Superintendent of Schools.
>
> "2. The Board may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any employee in any year by a recorded roll call majority vote of the full membership of the Board. It shall be the duty of the Board within ten days to give written notice of such action, together with the reasons therefor to the employee concerned.***" (R-3)

Similarly, Article X, Section C of the negotiated agreement for 1972-73 between the Cinnaminson Teachers' Association and the Board states:

> "C. *Withholding of Increments*
> 1. Title 18A:29-14 of New Jersey Statutes Annotated will control the withholding of any increment." (R-2, at p. 12)

The board policy, *ante*, is substantially identical to the cited statute authorizing the withholding of increments for "inefficiency or other good cause."

The pertinent events which occasioned the instant Petition are recited as follows:

At some time prior to March 14, 1973, petitioner was summoned to a meeting held in the office of her school principal at the close of the school day on March 14, 1973. Present at this meeting were petitioner, the Superintendent of Schools, the principal, and two representatives of the Cinnaminson Teachers' Association. During the meeting the Superintendent read to those present, in its entirety, a communication which he had received from the principal, dated March 9, 1973, which stated *inter alia*:

> "*** I recommend that an increment be withheld from [petitioner], Art teacher at Rush Elementary School.***" (R-1)

This communication (R-1) concluded with a listing by the principal of the reasons for his stated recommendation that her increment be withheld. (In this regard, the hearing examiner finds no need to set forth these reasons, since the merits of such complaints are not in contention, nor were they the subject of proof in the matter, *sub judice*, at the hearing of October 10, 1973.)

The aforementioned meeting of March 14, 1973, was terminated by

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common assent after more than one and one-half hours of discussion of the issues raised by the principal's letter, *ante.*

Subsequent to the meeting of March 14, 1973, the Board of Education of Cinnaminson Township, acting upon the recommendation of the Superintendent, voted unanimously on March 19, 1973 to withhold petitioner's salary increment for the school year 1973-74. Thereafter, in a letter (P-1) dated March 21, 1973, signed by the Board Secretary and addressed to petitioner, the Board provided notice of its action to petitioner, stating as its reasons, precisely, and word for word, those advanced by the principal in R-1.

The hearing examiner finds that the foregoing facts are uncontested by petitioner or the Board. However, it is also found that divergent testimony with regard to other important facts germane to the instant matter must now be described.

While not denying that she heard read by the Superintendent on March 14, 1973, the recommendation of the principal that an increment be withheld, petitioner avers that such recommendation was that of the principal and not the recommendation of the Superintendent. In this regard, she testified at the hearing that she was first, and at no other time, informed by the Superintendent in the office of the principal on March 21, 1973 at approximately 9:00 a.m., of his decision, as differentiated from the decision of the school principal, to recommend to the Board that her increment be withheld. (Tr. 14, 74) Pertinent thereto, she testified that this notification was given her by the Superintendent at that time in the form of the Board's letter of notification. (P-1) Therefore, petitioner alleges that she was denied due process by the Board in view of statements by the Commissioner in his decision of *Fitzpatrick v. Board of Education of the Borough of Montvale, Bergen County,* 1969 *S.L.D.* 4 wherein he said:

> "*** Even though a board of education has the power to withhold a salary increment, such authority cannot be wielded in a manner which ignores all the basic elements of fair play. *** the most elemental requirements of due process demand at least that the employee to be so deprived be put on notice that such a recommendation is to be put to his employer on the basis of the unsatisfactory evaluation and that he be given a reasonable opportunity to speak in his own behalf. *** any employee has a basic right to know if and when his superiors are less than satisfied with his performance and the basis for such judgment.***" (at p. 7)

The Board, on the other hand, presented two witnesses who testified that notification of intent to recommend withholding of increments was given by the Superintendent to petitioner on March 15, 1973 at approximately 9:00 a.m. in the office of the principal. With regard thereto, the Superintendent testified:

> "*** I told [petitioner] that I had considered the charges very carefully and in weighing them felt that – I felt that they were substantiated, they were extremely serious and, as a result, I must recommend to the Board that an increment be withheld.***" (Tr. 40-41)

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"*** I told her after considering the substance of the charges and her responses that I felt she was – that they were serious enough and substantiated sufficiently that my recourse was to recommend to the Board that an increment be withheld.***" (Tr. 48)

With regard to the alleged meeting on March 15, 1973, *ante,* petitioner's principal testified:

"*** Dr. Blank came over to my office as a follow-up of the meeting that we had had the previous day [March 14, 1973] and notified Mrs. Brown that he was going to recommend to the Board of Education that an increment be withheld. It was the next day. This was approximately – approximately nine o'clock in the morning. I can't pick out the exact time, but the following day [March 15, 1973] it was Dr. Blank, I and Mrs. Brown.***" (Tr. 21)

In summation, the hearing examiner observes that petitioner, while admitting she discussed the principal's recommendation concerning her 1973-74 salary increment, contends that she was not put on proper notice by the Superintendent or the Board prior to the Board's action on March 19, 1973 to withhold her 1973-74 increment. She maintains that, absent such proper notice in advance of the Board action, she was denied opportunity to respond to charges made by agents of the Board. Such denial, petitioner contends, is illegal and she prays the Commissioner to order that the Board restore the increment.

However, the Board asserts that due process was afforded and relies upon testimony of the Superintendent, corroborated by testimony of the principal, that notification of intent to recommend withholding of the increment was given petitioner on March 15, 1973 by the Superintendent. The Board further maintains that petitioner was properly and fully informed of the reasons for such recommendations at that meeting and at the March 14, 1973, meeting, *ante.* In this regard the Board contends that sufficient time and opportunity to respond to the charges made against her were afforded at the meeting of March 14 and 15, 1973, or, in any event, that they would have been afforded to petitioner prior to March 19, 1973, had she requested another meeting. Finally, the Board contends that *N.J.S.A.* 18A:29-14 is controlling (Tr. 80) in that the negotiated agreement between the Board and the Cinnaminson Education Association in effect on March 19, 1973, states on page 12:

"*** Title 18A:29-14 of New Jersey Statutes Annotated will control the withholding of any increment.***" (R-2)

Having considered the testimony presented at the hearing, *ante,* the hearing examiner finds in the matter, *sub judice,* that on March 14, 1973, petitioner was confronted with charges regarding performance of her duty, and was given opportunity to respond to those charges before her accusers and with representatives of her own choosing present. There is no indication of refusal by the Board or its agents to convene other meetings at petitioner's request to further discuss such charges. Additionally, the hearing examiner finds that no

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notice was given at the March 14, 1973 meeting by the Superintendent of his intent to recommend to the Board that petitioner's increment for 1973-74 be denied. However, it is crystal clear from the testimony presented that the principal's recommendation, with reasons therefor, was read in detail at the March 14, 1973 meeting, *ante,* and forthrightly stated:

> "*** I recommend that an increment be withheld from [petitioner], Art teacher, at Rush Elementary School.***"

The hearing examiner faced with totally conflicting testimony regarding the alleged meeting of March 15, 1973, *ante,* determines that the believable testimony is that such a meeting was held and that notification was rendered to petitioner, by the Superintendent, at the meeting of his intention to recommend to the Board that her increment be denied for the 1973-74 school year. In this regard, the hearing examiner, in the unfortunate absence of documentary evidence, relies upon the corroborating testimony of two witnesses, the principal and the Superintendent.

The hearing examiner further finds that the Board Action on March 19, 1973, in denying petitioner's increment for 1973-74, was substantiated by precisely the same reasons as set forth by the principal and discussed in the meeting of March 14, 1973, and that these reasons were succinctly communicated to petitioner via the Board's letter of March 21, 1973 (P-1), in precisely the same language as the principal had used in his letter of recommendation to withhold petitioner's increment. (R-1) Finally the hearing examiner finds that the Board's notice to petitioner of the denial of her 1973-74 increment was given in writing with the reasons therefor, within the ten-day statutory limitation of time set forth in *N.J.S.A.* 18A:29-14, the Board's policy.

At issue before the Commissioner is whether due process was afforded petitioner with respect to the denial of her salary increment prior to the time the Board acted to deny such increment on March 19, 1973.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner. The principal issue herein is whether or not the findings of the report are sufficient to substantiate a judgment that due process was afforded petitioner before the Board acted to withhold her salary increment for the school year 1973-74. The Commissioner determines that such findings are sufficient in this regard and that petitioner was "*** given a reasonable opportunity to speak in her own behalf." (*Fitzpatrick, supra*) He further determines that such opportunity was timely.

Accordingly, the Commissioner finds the Board's action controverted herein to be a proper exercise of its discretion according to the law as set forth in a long line of decisions by the Commissioner and the Courts (See *Charles*

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Coniglio v. Board of Education of the Township of Teaneck, Bergen County, 1973 *S.L.D.*)

The Petition is dismissed.

COMMISSIONER OF EDUCATION

January 18, 1974

In the Matter of the Tenure Hearing of William W. Carrington, School District of the Township of Piscataway, Middlesex County.

COMMISSIONER OF EDUCATION

ORDER

It appearing that the Board of Education of the Township of Piscataway, hereinafter "Board," having filed a charge against William W. Carrington of abandoning his position; and it appearing that such a charge would be sufficient if true in fact to warrant his dismissal; and it appearing that the Board properly certified said charge to the Commissioner of Education on February 23, 1973; and it appearing that service of said charge by the Assistant Commissioner of Education in charge of Controversies and Disputes was thrice attempted unsuccessfully by certified mail to respondent's last known addresses on March 2, 1973; and it appearing that a further service of said charge was made to John Barrett at respondent's last known address, 675 West 4th Street, Plainfield, New Jersey, on June 20, 1973; and it appearing that service of said charge was attempted also on William W. Carrington, Rt. 1, Box 24, Ringgold, Virginia, on June 20, 1973; and it appearing that counsel for respondent has advised the Division of Controversies and Disputes that respondent has moved to Virginia and that he has applied for withdrawal of his moneys from the Public Employees Retirement System, hereinafter PERS; and it appearing that the Division of Controversies and Disputes was notified on January 7, 1974, that respondent withdrew his total accumulated savings from PERS on September 20, 1973 (ASL-#235, 668 – PERS); and it appearing that respondent is no longer a member of PERS; now, therefore, IT IS ORDERED on this 21st day of January 1974, that William W. Carrington be hereby dismissed as a janitor under tenure in the School District of the Township of Piscataway, Middlesex County, effective on the date of his suspension by the Board.

COMMISSIONER OF EDUCATION

January 21, 1974

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Richard L. Preston and Elizabeth N. Preston, as Taxpayers of the Town of Westfield, and as the Guardians and Natural Parents of Cynthia Preston, a Minor Child; and William R. Hedden and Constance Hedden as Taxpayers of the Town of Westfield, and as the Guardians and Natural Parents of Jody Hedden, a Minor Child,

Petitioners,

v.

Board of Education of Westfield; Lillard E. Law, Superintendent of Schools, for Westfield; New Jersey State Board of Education and Carl L. Marburger, Commissioner of Education; Carolyn Jennings, Instructor of Sex Education in the Tamaques School, Westfield, and Louise Larsen, Instructor of Sex Education in the Wilson School, Westfield, Union County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION ON MOTION TO DISMISS

For the Petitioners, Meth & Wood (Theodore Sager Meth, Esq., of Counsel)

For the Respondents, Nichols, Thomson & Peek (William D. Peek, Esq., of Counsel)

Petitioners are the parents of pupils enrolled in the elementary grades of the Westfield Public Schools, Union County. In a fifteen-count Petition of Appeal, they charge the Westfield Board of Education, hereinafter "Board," with illegal acts and with acts that violate their constitutional rights in regard to a Family Living-Sex Education Curriculum, hereinafter "Program," instituted in grades kindergarten through six in the Westfield Public Schools. The Board, by way of Answer, denies the allegations set forth therein, and asserts that its actions regarding the Program were proper and legal.

On March 29, 1972, the Board filed a Motion to Dismiss, which was ultimately joined by all parties herein, on the grounds that the issues set forth have been resolved and, consequently, no controversy exists.

Oral argument on the Motion was heard June 18, 1973 at the State Department of Education, Trenton. The matter is referred to the Commissioner of Education on the record and the transcript of that argument.

The Commissioner observes that, although the matter has yet to proceed to hearing, the record before him is rather voluminous with various amendments, motions, exchanges of correspondence, and a copy of the original Program's curriculum and a copy of the curriculum which purports to reflect agreed-upon

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revisions thereto. It is that agreement among the parties, as to the curriculum revisions, which forms the substantial basis for the Motion to Dismiss.

Subsequent to the Board's filing of its Motion, by letter dated April 12, 1973, the Deputy Attorney General, assigned to represent the State respondents, joined in that Motion to Dismiss by moving for dismissal against the Commissioner and the State Board of Education. Petitioners, however, by letter dated April 18, 1973, initially opposed the Motion to Dismiss, absent an explicit approval by the Commissioner and the State Board of Education of the revised Program's curriculum with the attendant modifications as set forth therein.

While petitioners originally opposed the Motion, *sub judice,* it is noted that during oral argument thereupon, their counsel moved "*** on behalf of the Petitioners for the dismissal of the proceedings before the Commissioner, and in that regard, join with the State [the Commissioner of Education and the State Board of Education] and the Board of Education [Westfield Board of Education] in their application [for dismissal of the Petition]. ***" (Tr.2)

It is represented by petitioners, that the constitutional and legal issues raised by the litigants have been amicably resolved and that a three-point agreement has been reached. Thus, on its face, the Motion to Dismiss, now before the Commissioner, has been joined by the parties of interest in this matter.

The three-point agreement is as follows:

1. It is agreed between the Board and petitioners that a joint publicity release be prepared for the media which would preclude one side from issuing a self-serving statement regarding the terms and conditions of the settlement.

2. There will be continuing discussions regarding new audiovisual material to be used in the Program, so that such material may be previewed, not only by petitioners, but by all members of the community of Westfield.

3. There will be discussions initiated regarding the possible adoption of a limited excusal program.

At this juncture, the Commissioner points out that the settlement of litigation as herein proffered, ranks high in our public policy. *Jannarone v. W. T. Co. et al.,* 65 *N.J. Super.* 472; *Judson et al. v. Peoples Bank & Trust Co.,* 25 *N.J.* 17 (1957)

Under the terms of such agreement, the Commissioner opines that a mutual press release would be beneficial, in order to avoid the possibility of renewed discord which might follow a unilaterial verson of such agreement.

In regard to parental review of audiovisual materials being considered for use by the Board in the Program, the Commissioner encourages community

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involvement in the operation of the schools. However, in the final analysis, it still remains the obligation and responsibility of local boards of education to determine the program (*N.J.S.A.* 18A:33-1) and policies (*N.J.S.A.* 18A:11-1) they shall adopt for their schools. Consequently, the objective of this review program as articulated by counsel for petitioners, and counsel for the Board, is of concern to the Commissioner. It is to be effectuated in order "*** that they [members of the community] can exercise an intelligent and informed decision [based on their preview] as to whether or not to avail themselves of the excusal program which the Board of Education has set up in regard to this curriculum [Family Living – Sex Education] .***" (Tr. 4-5) From a review of the record and the transcript of the oral argument in this matter, it is clear to the Commissioner that the Board has, in the past, allowed parents who so desired, to have their youngsters "excused" from the Program by virtue of a policy known as a "general excusal policy." These excused pupils were then given an "*** educationally effective alternative program***." (Tr. 9) Counsel for the Board likened this general excusal program to other areas of the curriculum in which pupils are excused from their regular classroom studies for speech therapy or instrumental music. (Tr. 11)

The second point of the agreement must be considered jointly with the third point of agreement which is the "limited excusal program," not yet adopted by the Board. It would provide:

> "*** That if a parent determined that the family living program would be generally beneficial for the child, but felt that a particular session in the program probably would involve audiovisual material [that] was not in the best interest of his or her child, that the child could be excused from that one session and still take advantage of the other session[s] ***." (Tr. 13-14)

Asserting that much of the curriculum of the Program comprises audiovisual material, and that each unit stands on its own, counsel for petitioners believes that parents ought to have the option of determining which of the various segments their children should see. Counsel for the Board asserts that the proposed "limited excusal program" should also be extended to classroom discussions, so that a parent may, at his or her option, determine in which discussion his youngster should participate. (Tr. 15)

The Commissioner views the proposed "limited excusal program" being considered by the Board, in regard to this matter, as completely untenable and without legal justification or authority. In its essence, such a policy, were it to be adopted, would give to parents the authority which the Legislature has already vested in local boards of education. *N.J.S.A.* 18A:33-1 specifically provides, *inter alia:*

> "Each school district shall provide, for all children who reside in the district and are required to attend the public schools therein and those who reside therein or elsewhere and are entitled or permitted to attend the schools of the district pursuant to law, suitable educational facilities including proper school buildings and furniture and equipment,

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> convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and 20 years, either in schools within the district convenient of access to the pupils, or as provided by article 2 of chapter 38 of this title, but no course of study shall be adopted or altered except by the recorded roll call majority vote of the full membership of the board of education of the district."

The Commissioner, in *Clinton F. Smith et al. v. Board of Education of the Borough of Paramus et al.,* 1968 *S.L.D.* 62, affirmed State Board of Education, February 5, 1969, held:

> "*** Certain elements of the curriculum such as United States History, New Jersey history and geography, and physical education are mandated by statute. *N.J.S.A.* 18A:35-1 *et seq.,* 18A:6-2 and 3 But the public school curriculum is not restricted to the few areas of study which the Legislature has prescribed. *Boards of education* are free to determine whatever other learning experiences are suitable to the pupils to be served and will best achieve the aims and objectives of the schools.***" (*Emphasis supplied.*) (at pp. 64-65)

See also *George Ulassin v. Board of Education of the Township of Branchburg, Somerset County,* 1972 *S.L.D.* 219. Historically, boards of education are the agencies which have the authority to determine curricula for their pupils. Such power is derived from the Legislature. The powers of boards of education are specifically enumerated in the laws or implied therefrom. *N.J. Good Humor, Inc. v. Bradley Beach,* 124 *N.J.L.* 162 These powers can neither be increased nor diminished except by the Legislature. *Burke v. Henney,* 6 *N.J. Super.* 524 Implied powers extend only as far as is necessary to carry out the purposes of the school law. *N.J.S.A.* 18A, *et seq.; Albert D. Angell et al. v. Board of Education of the City of Newark, Essex County,* 1960 *S.L.D.* 141 Until and unless the Legislature changes or amends *N.J.S.A.* 18A:33-1, the Board has no authority to delegate its responsibility under that law.

The Commissioner finds little merit in counsel's analogy between the proposed "limited excusal program" and pupils who are assigned to speech therapy or instrumental music during the regular school day. The activation of the excusal program rests solely with the parent. The scheduling of special class instruction or various other activities, which by their nature are not for all pupils, is properly vested in the Board, carried out through its administrators.

Although it is agreed between the parties that the "limited excusal program" is still being discussed, the Commissioner takes the opportunity to state his belief that subsequent to the determination herein, the parties will no longer consider an excusal program to be a viable segment to the agreement.

Lastly, in regard to petitioners' request for the Commissioner and the State Board of Education to "approve" the revised curriculum for the Program, it is noted that such authority is found in the *New Jersey Administrative Code* 6:27-1.1 *et seq.* (Approval of High Schools) for secondary programs. However,

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in the instant matter, it was earlier reported that the Program herein is part of the elementary curricula (grades kindergarten through six). No authority can be found for either the Commissioner or the State Board of Education to "approve" offerings at the elementary level.

In this instance, the Board, as already noted, has the mandate of the Legislature to determine the curricula of its schools. The Commissioner of Education has supervision over all of the public schools of the State, and he is required to make certain that the terms and policies of the school laws are effectuated. *Laba v. Newark Board of Education,* 23 *N.J.* 364 (1957) He is also vested with quasi-judicial powers to hear and decide controversies and disputes which arise under the school laws. *N.J.S.A.* 18A:6-9 However, such powers are not without bounds, for:

> "*** The School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal.***" *Kenney v. Board of Education of Montclair,* 1938 *S.L.D.* 647 (1934), affirmed State Board of Education, 649, 653

Further:

> "*** it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions.***" *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E. & A.* 1947)

Therefore, on the representation made by counsel, that the legal and constitutional issues raised by petitioners in their allegations against the Board have been resolved, and upon the belief that the Board will satisfy its legal obligations as articulated herein, the Motion to Dismiss is hereby granted as to all named respondents without prejudice.

COMMISSIONER OF EDUCATION

January 23, 1974

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John Horvath, Theresa Horvath, and Judith De Ponceau,

Petitioners,

v.

Board of Education of the Township of Franklin, Somerset County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioners, Wharton, Stewart & Davis (Richard H. Thiele, Jr., Esq., of Counsel)

For the Respondent, Graham, Yurasko, Golden and Lintner (J. Lance Lintner, Esq., of Counsel)

This matter having been brought before the Commissioner of Education by Richard H. Thiele, Jr., Esq., attorney for petitioners on a Notice of Motion for Interlocutory Restraint, dated January 8, 1974, requesting the Commissioner to temporarily and/or permanently restrain the Board of Education of the Township of Franklin from appointing persons to serve in the schools as school resource officers, J. Lance Lintner, Esq., appearing for the school district of the Township of Franklin; and

It appearing that the position of school resource officer embraces, in part at least, a responsibility to act as a "law enforcement officer"; and

It appearing that persons to be appointed to such positions as herein created must, by job description, be "regular police officers" detailed by the Chief of Police to the Franklin Township Public Schools and that such officers are responsible to the Chief of Police for that portion of their duties which may be categorized specifically as duties of law enforcement; and

It appearing that the police officers (school resource officers) shall be armed in conformity with the expressed view of the Board that "The officer's weapon is part of his uniform." (from Resolution adopted by the Franklin Township Board of Education on September 13, 1973); and

It appearing that no prior approval by the County Superintendent of Schools and the Commissioner has been received for the positions herein controverted pursuant to rules of the State Board of Education contained in *N.J.A.C.* 6:3-1.4; and

It appearing that such approval would not be possible under the circumstances since the rules, *ante*, further provide that:

> "*** (h) School law enforcement officers shall not be assigned any other duties while carrying out responsibilities of law enforcement officers. They

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shall not be permitted to carry any firearms in the school building.***"; and

It appearing that the positions herein controverted are in direct contravention of this rule; therefore

IT IS ORDERED that the Board of Education of the Township of Franklin abolish such positions forthwith or, in the alternative, that the Board revise the job description pertinent thereto to conform with the rules of the State Board of Education, *ante,* and, pursuant to such rules, secure the requisite approvals.

ORDERED this 25th day of January, 1974.

COMMISSIONER OF EDUCATION

John and Theresa Horvath and Judith De Ponceau,

Petitioners-Appellees,

v.

Board of Education of the Township of Franklin, Somerset County,

Respondent-Appellant.

STATE BOARD OF EDUCATION

DECISION

For the Petitioners-Appellees, Wharton, Stewart & Davis (Richard H. Thiele, Jr., Esq., of Counsel)

For the Respondent-Appellant, Graham, Yurasko, Golden & Lintner (J. Lance Lintner, Esq., of Counsel)

For the Township of Franklin, Applicant for Intervention, Seiffert, Frisch & Gruber (Robert M. Frisch, Esq., of Counsel)

Decided by the Commissioner of Education, January 25, 1974

Petitioners instituted this proceeding before the Commissioner of Education of New Jersey seeking to restrain the Respondent Board of Education of Franklin Township from appointing so-called "school resource officers" and seeking a declaration that the Board's resolution of authorization therefor null and void. Thereafter, petitioners filed a Motion seeking an interim restraint. The Commissioner entered an Order on January 25, 1974, as follows:

"IT IS ORDERED that the Board of Education of the Township of

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> Franklin abolish such positions forthwith or, in the alternative, that the Board revise the job description pertinent thereto to conform with the rules of the State Board of Education, *ante,* and pursuant to such rules, secure the requisite approvals."

The order recited that the action of the Board had been in violation of *N.J.A.C.* 6:3-1.4. Respondent appealed that determination. During the pendency of this appeal the Township of Franklin moved for leave to intervene as a party respondent relying upon the arguments advanced by the Respondent Board in support of its appeal.

It is apparent from the record before us that the action of the local board was in violation of the spirit and intent of the cited Administrative Code provisions when viewed in the light of *N.J.S.A.* 18A:17-42, -43, -44, and -45, and in violation of the literal terms thereof. The lengthy resolution of the Board authorizing school resource officers, notwithstanding its prolixity, seems to express neither a security nor an educational purpose. Particularly troublesome are the provisions of the resolution giving such officers what appears to be almost unlimited access to information from students' school records for unspecified purposes. This, coupled with the respondents' ever-so-strong assertion that such officers *are not* employees of the Board of Education and the fact that the resolution does not hold them to the same strict standards of conduct, competence, sensitivity and professionalism that apply to other employees, raises serious question as to the true purpose of such officers. Perhaps, after full hearing before the Commissioner, some of these considerations may be more clearly brought into focus.

We affirm the Order of the Commissioner dated January 25, 1974 for the reasons expressed therein and those stated herein.

The Application for Leave to intervene by the Township of Franklin seems to rely solely for support on the fact that the school resource officers are employees of the Township. We find this unpersuasive as a basis for granting such leave, and accordingly deny that Application.

The matter is remanded to the Commissioner for disposition.

May 1, 1974

Contested positions abolished – case closed August 1, 1975.

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Board of Education of the Township of Wall,

Petitioner,

v.

Township Committee of the Township of Wall and the County Board of Taxation, Monmouth County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Mirne, Nowels, Tumen, Magee & Kirschner (William C. Nowels, Esq., of Counsel)

For the Respondents, Campbell, Mangini, Foley, Lee & Murphy (John Jay Mangini, Esq., of Counsel)

Petitioner, the Board of Education of the Township of Wall, hereinafter "Board," appeals from an action of the Township Committee of the Township of Wall, hereinafter "Committee," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Monmouth County Board of Taxation a lesser amount of appropriations for school purposes for the 1973-74 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing conducted on June 5, 1973 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election, held February 13, 1973, the Board submitted to the electorate proposals to raise $4,555,000 by local taxation for current expenses and $30,000 for capital outlay costs of the school district. These items were rejected by the voters, and, subsequent to the rejection, the Board submitted its budget to the Committee for its determination of the amounts necessary for the operation of a thorough and efficient school system in Wall Township in the 1973-74 school year, pursuant to the mandatory obligation imposed on the Committee by *N.J.S.A.* 18A:22-37.

After consultation with the Board, or representatives thereof, on at least two different occasions, the Committee made its determinations and certified to the Monmouth County Board of Taxation an amount of $4,398,100 for current expenses and $10,500 for capital outlay. Graphically, the pertinent amounts are as follows:

	Current Expense	Capital Outlay
Board's Proposal	$4,555,000	$30,000
Committee's Reduction	156,900	19,500
Amount Certified	$4,398,100	$10,500

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The Board contends that the Committee's action was arbitrary, unreasonable, and capricious and documents its need for the reductions recommended by the Committee with written testimony and a further oral exposition at the time of the hearing. The Committee maintains that it acted properly and after due deliberation, and that the items reduced by its action are only those which are not necessary for a thorough and efficient educational system. The Committee also documents its position with written and oral testimony. As part of its determination, the Committee suggested specific accounts of the budget in which it believed economies could be effected as follows:

CURRENT EXPENSE:

Account Number	Item	Budgeted by Board	Sugg. by Committee	Reduction
J110B	Sal.-Bd. Sec. Off	$ 59,000	$ 58,000	$ 1,000
J110L	Sal.-Pers. Off.	17,000	—0—	17,000
J120B	Legal Fees	5,000	4,000	1,000
J130B	Other Exp.-Bd. Sec.	3,500	3,000	500
J130F	Other Exp.-Supt. Off.	2,500	2,000	500
J212	Sal.-Supvr. of Instr.	81,300	71,300	10,000
J213-1	Sal.-Tchrs.	2,835,684	2,816,684	19,000
J213-3	Sal.-Supp. Instr.	34,600	33,600	1,000
J215A	Sal.-Sec. Prin. Off.	73,650	68,950	4,700
J215B	Sal.-Sec. Supvr. Off.	15,100	10,400	4,700
J216	Sal.-Aides	119,300	100,000	19,300
J230A	Sch. Lib. Books	21,699	18,699	3,000
J230B	Per. & Nwsprs.	2,900	1,900	1,000
J230C	A-V Mat.	25,744	20,044	5,700
J240	Teaching Supls.	124,695	104,695	20,000
J250B	Travel Exp.-Instr.	7,850	6,850	1,000
J250C	Misc. Exp.-Instr.	24,150	20,150	4,000
J610A	Sal.-Cust. Serv.	217,500	212,500	5,000
J720A	Contr. Serv.-Gr. Upkp.	20,380	9,880	10,500
J720B	Contr. Serv.-Rep. of Bldgs.	63,760	54,760	9,000
J730A	Repl. Instr. Equip.	25,000	16,000	9,000
J730B	Rep. Noninstr. Equip.	3,100	2,000	1,100
J730C	Purch. New Equip.	60,000	55,000	5,000
J40B	Other Exp.-Repair of Bldg.	27,500	25,000	2,500
J1100	Comm. Serv.	$ 1,400	$ —0—	$ 1,400
	Subtotal-Current Expense			$156,900
CAPITAL OUTLAY:				
L1220C	Site Impr.	6,000	2,500	3,500
L1230C	Bldg. Remod.	23,700	7,700	16,000
	Subtotal-Capital Outlay	$29,700	$10,200	$19,500

Subsequent to the rejection by the voters of the budget proposed by the Board, at least two meetings occurred between representatives of the two bodies, during which views were exchanged. (Tr. 57, 60, 76) Furthermore, the

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Committee supplied its "underlying determinations and supporting reasons" for its action as required in *Board of Education of East Brunswick Township v. Township Council of East Brunswick*, 48 *N.J.* 94, 105 (1966). It is noted that based on an unaudited report by the Board Secretary, which was made part of the record in this matter on November 16, 1973, current expense unappropriated free balance, as of June 30, 1973, was $224,441 – a balance which remained after the Board had already appropriated $100,000 to this budget.

The hearing examiner presents his findings, conclusions, and recommendations on each of the line items in dispute, in conjunction with the oral and written testimony of the parties, as follows:

CURRENT EXPENSE:

J110B Salaries–Board Secretary's Office

Agreement between the parties was reached as to the $1,000 reduction suggested by the Committee on this item. Accordingly, the hearing examiner recommends this reduction be sustained.

J110L Salaries–Personnel Office

The Board proposes an amount of $17,000 in this line item which would support a new position entitled "Assistant to the Superintendent." (Tr. 11) The Superintendent testified that because the Board employs over 500 persons, 260 of which are professional employees, he needs assistance in carrying out the administrative responsibilities that are concomitant with a six-school district. He asserts that constant employee turnover requires attention which, among his other duties, he finds difficult to provide. In a job description made part of the Board's written testimony, the person selected for the position would have responsibility in the instructional program, staff leadership, instructional materials program, personnel recruitment and selection, and other areas determined by the Superintendent. The Committee avers, however, that such a position is not now needed by the Board because, just one and one-half years ago, an assistant to the business manager was employed. The Committee contends that that position was to relieve the Superintendent of some of his responsibilities. The Superintendent avers that the assistant to the business administrator, the latter also being the Board Secretary, was assigned responsibilities in the area of fiscal affairs for the Board, not the instructional program of the schools.

The hearing examiner finds that the Board has proven the necessity for a position having the responsibilities of assisting the Superintendent of Schools. The facts support the conclusion that one person cannot effectively carry out the responsibilities of administering a school district the size of Wall Township without adequate assistance. While the restoration of this $17,000 item is recommended to the Commissioner, it is also recommended to the Board that an appropriate title, recognized within the *Rules Concerning Teachers Certificates* as having those specific kinds of responsibilities, be assigned to that position.

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J120B Legal Fees

The Board budgeted $5,000 for this line item on the basis of prior experience. In 1971-72, the Board expended $6,536.25; in 1972-73, the total expenditure was $5,552, although only $1,250 was budgeted. The Committee asserts that in view of a more than 50% increase in the budgeted amount of this line item over the last year, a $1,000 reduction would not impair the school system's thoroughness and efficiency.

The hearing examiner finds, particularly in view of the over-expenditures in this line item the last two years, that a figure of $5,000 for the 1973-74 school year is, in fact, prudent and necessary. Accordingly, it is recommended that $1,000 be restored to this line item.

J130B Other Expenses–Board Secretary's Office

The Board proposed $3,500 for this line item. The Committee determined that this represented an unjustified increase over the 1972-73 school year and, therefore, recommends a $500 reduction. Data supplied by the Board in regard to this line item discloses that in 1971-72 a total of $3,471.87 was expended, while for 1972-73 a total of $2,582.43 was expended as of March 1, 1973. The Board offered no additional testimony in support of its $3,500 proposal for this line item; thus, the hearing examiner concludes that $3,500 is not essential. Accordingly, it is recommended that the $500 reduction be sustained.

J130F Other Expenses–Superintendent's Office

The Board budgeted $2,500 for this line item, and the Committee recommends a $500 reduction on the basis that the Board's proposal is an unreasonable increase over last year's appropriation. The expenditures for the years 1971-72 and 1972-73, respectively, were $2,849.20 and $2,627.62. Based on those prior expenditures, it is reasonable to conclude that $2,500 is necessary for this line item. Accordingly, it is recommended that $500 be restored.

J212 Salaries–Supervisors of Instruction

The Superintendent testified that approximately four years ago a program of individual instruction was begun in one of the elementary schools, and this program has since been adopted by several other schools in the district. The philosophy behind this concept is the recognition of the individuality of each pupil, including the assessing of strengths and weaknesses and setting of appropriate goals for each pupil. In order to be successful in this approach, the professional staff must reorient its attitudes and perceptions of its responsibilities toward pupils. The Board, therefore, proposed $10,000 for this line item to support a position of Assistant for Instruction, whose major responsibility would be to work with teaching staff members who are accustomed to a traditional approach to teaching, while they make the transition of individualizing the instructional programs for their pupils. The Committee, in recommending the elimination of this position, thereby effectuating a savings of $10,000, asserts that the Board already has sufficient instructional supervisors and that the work of the Assistant for Instruction could be carried out by two existing curriculum coordinators.

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In this regard, the Board represents on its *Staffing Roster,* a document included as part of its written testimony, that there were five instructional supervisors listed in line item J212 for the 1972-73 school year. However, in its separate line item budget, filed and made part of the record herein, the Board asserts that four positions were included in J212 with the one now in dispute being anticipated for the 1973-74 school year. This inconsistency is further compounded on the Board's summary sheet, pages 2-6 of this line item budget, where the penciled figure of six supervisors appears. From the record, therefore, it is unclear how many supervisors, excluding the one position now in dispute, are now employed by the Board.

In any event, the Superintendent contends that the two existing curriculum coordinators, one for K through grade six, and the others for grades seven through twelve, are so involved with their own work with teachers that to expect them to carry out the work of the Assistant for Instruction is simply not feasible. Furthermore, the Board avers, that as the total district moves into individualized instruction, there will be less need for remedial and supplemental instruction and more need for teamwork. The Board currently has two full-time equivalent positions of assistants for instruction. The one requested here would permit a full-time position at three of the elementary schools.

The hearing examiner finds, notwithstanding the inconsistency of the Board's figures regarding line item J212, that the need for this position has been established and, accordingly, recommends the restoration of $10,000 to this line item.

J213-1 Salaries–Teachers

The Committee suggests a $19,000 reduction in this line item which represents support for the following positions:

1/4	Media Specialist	$ 2,500
1/4	Media Specialist	2,500
2/5	Phys. Ed. Teacher (Elem.)	4,000
Elementary Art		10,000

The Committee asserts that because the Board now has two elementary art teachers for K through grade five which, in its judgment, is sufficient for community needs, a $10,000 reduction in this line item, thereby eliminating the new position of an art teacher, is justified. Additionally, the Committee maintains that the two media specialists (1/4) and the physical education teacher (2/5) could also be justifiably eliminated.

The Board argues that its requests herein are efforts to get close to standards recommended by the State Department of Education and the American Library Association as they relate to the media specialists. In regard to physical education, the Board grounds its proposal for an additional 2/5 position on its legislative mandate to provide a program of instruction in physical education, in addition to other authorities it also cites. In regard to the position of art teacher, the Board relies again on the view that the State Department of Education recommends one art teacher for every 500 pupils.

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It is noted that with few exceptions, local boards of education are free to establish their own curricula. One of those exceptions is found in *N.J.S.A.* 18A:35-5 which requires every board to provide physical education training. In those areas not mandated by the Legislature, *e.g.* media programs and art, the Department of Education does issue guidelines, which, through its available expertise, indicate optimum conditions. They are not, however, requirements which must be met by law.

The Board asserts that to carry out its physical training mandate, it should have 9.1 teachers at the elementary level. If it is allowed the 2/5 position now in dispute, it will have 7.8 teachers which will provide the staffing to conduct a physical education program without exceeding safety factors. During 1972-73, the total enrollment for grades K through 6 was 1,858, therefore 7.8 physical education teachers will provide for approximately 238 pupils per teacher.

The hearing examiner finds that the Board requires the additional 2/5 physical education teacher as requested and recommends a restoration of $4,000 to this line item for that purpose. The hearing examiner does not find that the evidence supports an essential need by the Board for the other positions herein, and accordingly recommends that $15,000 of the original $19,000 reduction recommended by the Committee be sustained.

J213-3 Salaries–Teachers-Supplemental Instruction

The Board budgeted $34,600 for this line item for teaching services for individual supplementary instruction. The Committee recommends a $1,000 reduction. There is no evidence in the record which supports the Board's reasons for its determination that the moneys reduced by the Committee are essential.

While the Board argues that a figure for this account is hard to estimate, prior experience dictated the proposed amount of $34,600. The 1972-73 budgeted figure was $30,314.

The hearing examiner does not find the weight of evidence to support the Board's contention for this line item. Accordingly, it is recommended that the Committee's reduction of $1,000 be sustained.

J215A Salaries–Secretaries-Principal's Office

The Board budgeted the amount of $73,650 for this line item, while the Committee recommended a reduction of $4,700. The Board avers that $4,700 is necessary to employ a central office clerical position to handle exclusively the clerical work of one library supervisor. This arrangement, the Board asserts, would free four library clerks now assigned to elementary school media centers to work more closely with pupils.

The Committee asserts that the Board has not built a new library, so a new position of "librarian" is not necessary. This argument, of course, is not consistent with the Board's request for a clerical person. The Superintendent testified that this position is essential for the efficient operation of the library.

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The hearing examiner finds that this position is necessary and accordingly recommends restoration of $4,700 to this line item.

J215B Salaries–Secretaries-Supervisors of Instruction

The Board budgeted $15,100 in this line item, while the Committee recommends $10,400, a reduction of $4,700. The Committee avers that its reason for this reduction is identical with its reasoning for the previous account J215A.

The Board asserts that the $4,700 represents another clerical position for its curriculum coordinators. Although two clerical persons are now assigned to the curriculum department, changes in courses of study and an upcoming Middle States evaluation require additional assistance.

The hearing examiner finds that the need for this clerical position is supported by the testimony and recommends the restoration of $4,700 to this line item.

The Board budgeted the amount of $119,300 in this line item for teacher aides, while the Committee recommends $100,000, a reduction of $19,300. The Board asserts in its written testimony that any reduction in this line item would seriously hamper the individualized instruction program being developed in the district. The requested funds, the Board avers, would allow it to expand its individualized instruction program according to its original master plan. Furthermore, the Board avers, this will be the final large increase in this line item for this purpose. The Superintendent testified that he could not specifically state how many additional aides would be employed with the $19,300 recommended for reduction by the Committee. He testified that all the aides employed through this line item are absolutely essential for continued success of the individualized approach to teaching. For 1972-73, the amount budgeted for aides in line item J216 was $92,300; for 1971-72, the amount budgeted was $63,400. The major portion of the increase proposed for 1973-74, $26,500, is for expansion of teacher-aide utilization. (Tr. 23)

The Committee contends that the entire individualized instruction program is expanding much too quickly and, while they agree on the need for individualized instruction, they believe a slower rate of growth is required.

The hearing examiner finds that, even with the Committee's reduction of $19,300, an increase of $7,700 over last year's budgeted amount would still allow for limited expansion of the individualized instruction program in the district. There is no evidence that the $19,300 recommended by the Committee for reduction is essential for the operation of the schools at this time. Accordingly, it is recommended that the Committee's reduction of $19,300 be sustained.

J230A School Library Books
J230B Periodicals and Newspapers
J230C Audiovisual Materials

These three line items will be treated simultaneously because the

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Committee determined in each instance that on-hand inventories could be utilized for the 1973-74 school year and recommends reductions in the following manner: J230A – $3,000; J230B – $1,000; J230C – $5,700. The Board, in proposing $21,699 for line item J230A, argues that the total amount is necessary to offset the increase in cost for library books, to adequately supply a library in one school, to make up for past shortages, and to update books to meet requirements of the Middle States evaluation soon to occur. Although the Board argues that its proposal is only $5,000 over last year's amount of $16,700, a $1.50 per pupil increase, the hearing examiner finds that with the proposed reduction the Board will still have $18,699, or $4.60 per pupil, for the total enrollment. It is therefore recommended that the Committee's reduction in line item J230A of $3,000 be sustained.

In regard to J230B, the Board proposes an amount of $2,900, an increase of $500 over last year's amount of $2,400. The Committee's recommended reduction of $1,000 is found by the hearing examiner to be unjustified in view of the nature of this line item. Periodicals and newspapers, an important resource in any school, are sometimes out-of-date within hours of publication. It is vital that pupils be informed regarding current events. With publication costs rising, the Board's request for $2,900 is reasonable to support this vital segment of the instructional program. Accordingly, the hearing examiner recommends restoration of $1,000 to line item J230B.

The Board budgeted the amount of $25,744 for line item J230C, an increase over the 1972-73 budgeted amount of $22,100. The reduction of $5,700 recommended by the Committee would reduce this year's allocation to less than the allocation of 1972-73. The Board contends that its budgeted appropriation is essential to the continuance of its audiovisual program because of increased costs in purchasing materials, increased enrollment and increased utilization of audiovisual aids. Also, participation in the Monmouth County Audiovisual Aid Commission Program has increased in cost from $1.00 to $1.25 per pupil.

The hearing examiner recommends the restoration of $5,700 to line item J230C on the finding that the Board has proven its need for these funds.

J240 Teaching Supplies

The Board budgeted an amount of $124,695, while the Committee recommends the amount of $104,695, a $20,000 reduction. The amount proposed by the Board is an increase over the $95,000 allocated for the 1972-73 year. The Committee asserts that even with its reduction, the Board will still have an amount close to $10,000 above last year's appropriation.

However, the Board contends that the increase in its proposal for 1973-74 is due in large part to the introduction and expansion of individualized instruction programs in several of its schools. The Board points to such programs as I.P.I. Math, I.P.I. Reading, Mini-Courses, Hilda Taba Social Studies program and various mini-programs as requiring increases in teaching supplies. The Board also included in its written testimony statements from several of its school administrators in an effort to justify its total proposal.

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The hearing examiner finds that, in ideal circumstances, the total amount requested by the Board could be justified. However, there is no credible evidence to indicate that the individualized instruction program will be seriously impaired unless the total amount is granted. The hearing examiner recommends that the $20,000 proposed reduction be sustained.

J250B Travel Expense

The Board budgeted the amount of $7,850, while the Committee recommends the amount of $6,850, a reduction of $1,000. The reason advanced by the Committee for its reduction is that, in its judgment, reductions in certain appropriations were necessary in view of the community's needs and its ability to pay.

During 1972-73, the Board budgeted $6,000 in this line item and avers that the increased request for 1973-74 is due to increases in costs for travel, including lodging and food, and the increase in the number of participants in unspecified activities. The Board also asserts that some expenses for professional days allowed to teachers are taken from this line item.

Although the hearing examiner finds little weight in the Committee's vague reasoning in its determination regarding this line item, the Board has been equally vague in its reasons why the increase over last year's appropriation is necessary. Accordingly, having found that the Board, which bears the burden of proof in these matters, did not substantiate its claim, the hearing examiner recommends that the Committee's reduction of $1,000 be sustained.

J250C Miscellaneous Expense for Instruction

The Board proposed an amount of $24,150 for this item, while the Committee proposes $20,150, a reduction of $4,000. The Committee maintains that by virtue of the Board's proposed increase in this line item over the 1972-73 appropriation of $16,800, a reduction of $4,000 is warranted which still leaves an increase of $3,350 for 1973-74. The Board avers that the total increase is necessary for general expenses related to the Middle States evaluation, additional programming costs for its computer, and continuation of an in-service training program entitled "Behavior Modification." There is no showing as to the specific expenses anticipated for the Middle States evaluation, how much additional computer programming would cost, or a cost estimate for the continuation of the in-service program. Although it is recognized that estimates for each school are included in the Board's proposal, such estimates do not establish that the disputed moneys are essential to the operation of the public schools. In this instance, the Board has not proven the need for the moneys suggested by the Committee for reduction. Accordingly, the hearing examiner recommends that the $4,000 reduction herein be sustained.

At this juncture, it is necessary to provide a brief explanation of the subsequent disputed line items. It has been stated that at least two meetings occurred between representatives of the Board and the Committee, subsequent to the defeat of this budget by the voters. Although the testimony is unclear as to what really was accomplished at those meetings, the Board Secretary who was

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present at both meetings (Tr. 57-58, 60-61), testified that there was tentative agreement between the parties that certain reductions in the budget could be made which would total approximately $100,000. (Tr. 63, 68) This amount was, in effect, a compromise of the original overall reduction of $176,000 proposed by the Committee. (Tr. 62) Counsel for the Board pointed out that the Board of Education did not accept the recommended reduction of $100,000 which its representatives discussed with the Committee. (Tr. 56) The Committee believes that the remaining ten line items in dispute were part of those items originally included in the alleged $100,000 compromise. (Tr. 69) In its written testimony, the Committee provides the following underlying reason for its determination in regard to each of the reductions in the remaining line items:

> "*** Respondent (the Committee) in the exercise of its reasonable judgment determined that reductions in certain other budgetary appropriations were both necessary and appropriate in view of community needs and financial abilities but nevertheless sufficient moneys would still be afforded to provide a thorough and efficient system of schools. Respondent felt that the following amounts could properly be eliminated from the respective budgetary accounts.***" (Committee's Statement of Reasons, at p. 4)

Thus, with the Committee offering the foregoing general reason for each of the reductions in the following line items, a recitation of the specific line items will now continue.

J610A Salaries–Custodial Services

The Board proposed $217,500, and the Committee recommends a $5,000 reduction for the reason stated above. The Superintendent testified that the $5,000 would be used to employ one additional custodian which would then allow for a daytime head custodian and three night custodians at an unnamed school. The hearing examiner notices that the first step of the custodian's salary guide, effective July 1, 1972, is $5,338. In addition, the written testimony of the Board represents that the $5,000 recommended for reduction was to be used to employ eighteen-year-old pupils as the need arises to assist in the custodial program.

Because there is no clear plan for the use of the $5,000 recommended for reduction by the Committee, the hearing examiner recommends that the Committee's reduction of $5,000 be sustained.

J720A Contracted Services–Upkeep of Grounds

The Board proposed $20,380 for this line item, while the Committee recommends $9,880, a reduction of $10,500 for the reasons stated above. The Board avers that the moneys proposed for reduction are necessary for the following purposes:

1. $1,500 to blacktop an outside play area at the Allenwood School to be

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used as an outside basketball court for the physical education program (Tr. 34).

2. $3,000 to patch the high school parking area, photographs of which were marked P-3; $23,000 was proposed in both the 1971-72 and 1972-73 budgets to re-pave the parking lot and both times the request was turned down.

3. $6,000 to improve and refinish the high school track which, the Superintendent asserts, is now deteriorated to the degree that, unless it is refinished, the interscholastic program will be threatened (Tr. 35).

Based on the evidence, the hearing examiner concludes that the Board has proven the necessity for the amount it requests for item #3 above. However, the evidence is not persuasive for the necessity of expenditures on the parking lot and outside basketball court. Accordingly, it is recommended that $6,000 of the reduction be restored, and $4,500 be sustained.

J720B Contracted Services–Repair of Buildings

The Board recommended an appropriation of $63,760 for this line item, while the Committee recommends an amount of $54,760, a reduction of $9,000. The Board contends that the $9,000 recommended for reduction is necessary to replace windows at the Central School for $4,000, and at the West Belmar School for $5,000. Also, this is the last year of a three-year window replacement program at both schools. To delay this replacement now will simply postpone the necessary expenditure to another year.

The evidence in the record before the hearing examiner does not establish that the windows in either named school must be replaced this year in order for the schools to operate. Since the expenditure may be postponed for another year, as the testimony of the Board asserts, it is not essential this year. Accordingly, the hearing examiner recommends that the reduction of $9,000 be sustained.

J730A Replacement of Instructional Equipment

The Committee recommends a reduction of $9,000 in this line item, while the Board avers that $3,800 of the amount is necessary for a second-year payment on IBM typewriters for its business education department. The Board states that, by its own action, it reduced the original amount of $37,900 it was going to submit to the voters to the $25,000 it did budget for this line item. Any further reduction, the Board argues, would seriously reduce the number of items contained in an eight-page listing of equipment it believes to be necessary.

The hearing examiner can find no basis in the record to conclude that every item requested by the Board is absolutely essential for the efficient operation of the public schools. Accordingly, it is recommended that the reduction of $9,000 be sustained.

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J730B Replacement of Noninstructional Equipment

The Board recommends an amount of $3,100 for this line item, while the Committee recommends a reduction of $1,100. The Board asserts that the small number of items requested are justified; therefore, these funds ought to be restored.

The Board's testimony fails to prove the necessity for these moneys. Accordingly, it is recommended that the Committee's reduction of $1,100 be sustained.

J730C Equipment for Instruction

The Board recommended the amount of $60,000 for this line item, while the Committee recommends $55,000, a reduction of $5,000. The Board alleges that such a reduction would reduce the total amount available to less than was expended in this line item during 1972-73.

There is no evidence in the record which proves the Board's need for the additional $5,000 recommended for reduction by the Committee. Even with the $5,000 reduction, the Board will have a $55,000 appropriation for this line item.

Accordingly, it is recommended that the reduction of $5,000 be sustained.

J740B Maintenance of Plant

The Board proposed a total of $27,500 for this line item, while the Committee recommends a reduction of $2,500. On its detailed statement regarding the use to which its total proposal herein would be put, the Board includes a $5,000 contingency fund which appears to be unnecessary in view of its unappropriated free balance.

Accordingly, and notwithstanding that the remainder of $25,000 will be less than that budgeted for the 1972-73 school year, the hearing examiner recommends that the proposed $2,500 reduction herein be sustained.

J1100 Community Services

The Board budgeted the amount of $1,400 for this line item, which, according to the Committee's statement of reasons, was earmarked for the adult education director and secretary. The Committee recommends the elimination of these funds.

The Board avers that if this reduction is sustained, its financial support of adult education will be withdrawn, thus forcing the program to become self-supporting.

The hearing examiner finds no other evidence in the record before him to support the Board's contention. If, the Board desires to continue its financial support of this program, surely $1,400 may be appropriated for that purpose from its unappropriated free balance.

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Accordingly, the hearing examiner recommends the $1,400 reduction proposed herein be sustained.

CAPITAL OUTLAY:

L1220C Site Improvement

The Board budgeted the amount of $6,000 for this line item, while the Committee recommends a reduction of $3,500. The Board asserts that if the reduction herein is sustained, the provision for a handball court at the high school will be eliminated for the third year in a row.

Furthermore, the Board adds that pupil interest is high, and the proposed handball court will be a desirable asset to the physical education program.

While the hearing examiner agrees that a handball court may be a desirable asset, the criterion which must be applied in budget disputes before the Commissioner is not desirability but necessity.

Accordingly, it is recommended that the reduction of $3,500 herein be sustained.

L1230C Remodeling

The Board budgeted the amount of $23,700 for this line item, while the Committee recommends $7,700, a reduction of $16,000. The Board states that it proposed this amount in order to carry out renovations to the storage area located at the West Belmar School, built originally in 1898. Furthermore, the Board asserts that during 1972-73 it had appropriated $10,000 for this project; however, the bids received were in excess of that amount. In support of its position regarding the storage area at the West Belmar School, the Board submitted a series of photographs of that area. (P-4) Additionally, a letter from the Board's insurer, dated November 1972, was submitted in support of the Board's contention regarding the storage area.

The hearing examiner finds that the Board has established the need for this project. Accordingly, it is recommended that $16,000 be restored to this line item.

This concludes the review of individual line items and the hearing examiner's respective recommendations.

The Board also asserts that it inadvertently failed to include $28,799 in the original proposed budget presented to the voters, and suggests that this be considered by the Commissioner. It is recommended that if such moneys are, in fact, necessary, the Board provide them from its unappropriated current expense balance.

A recapitulation of the hearing examiner's recommendations regarding each of the disputed line items is as follows:

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CURRENT EXPENSE:

Account Number	Item	Recommended Reduction	Restored	Not Restored
J110B	Sal.-Bd. Sec. Off.	$ 1,000	$ –0–	$ 1,000
J110C	Sal.-Pers. Off	17,000	17,000	–0–
J120B	Legal Fees	1,000	1,000	–0–
J130B	Other Exp.-Bd. Sec.	500	–0–	500
J130F	Other Exp.-Supt. Off.	500	500	–0–
J212	Sal.-Supvr. of Instr.	10,000	10,000	–0–
J213-1	Sal.-Teachers	19,000	4,000	15,000
J213-3	Sal.-Supp. Instr.	1,000	–0–	1,000
J215A	Sal.-Sec. Prin. Off.	4,700	4,700	–0–
J215B	Sal.-Sec. Supvr. Off.	4,700	4,700	–0–
J216	Sal.-Other	19,300	–0–	19,300
J230A	Sch. Lib. Books	3,000	–0–	3,000
J230B	Per. & Nwsprs.	1,000	1,000	–0–
J230C	A-V Mat.	5,700	5,700	–0–
J240	Teaching Supls.	20,000	–0–	20,000
J250B	Travel Exp.-Instr.	1,000	–0–	1,000
J250C	Misc. Exp.-Instr.	4,000	–0–	4,000
J610A	Sal.-Cust. Serv.	5,000	–0–	5,000
J720A	Contr. Serv.-Upkp. Grds.	10,500	6,000	4,500
J720B	Contr. Serv.-Rep. of Bldgs.	9,000	–0–	9,000
J730A	Repl. Instr. Equip.	9,000	–0–	9,000
J730B	Repl. Noninstr. Equip.	1,100	–0–	1,100
J730C	Purch. New Equip.	5,000	–0–	5,000
J740B	Other Exp.-Repair of Bldg.	2,500	–0–	2,500
J1100	Comm. Serv.	1,400	–0–	1,400
Total–Current Expense		$156,900	$54,600	$102,300
CAPITAL OUTLAY:				
L1220C	Site Improvement	$ 3,500	$ –0–	$ 3,500
L1230B	Building Remodeling	16,000	16,000	–0–
Total–Capital Outlay		19,500	16,000	3,500
Grand Total		$176,400	$70,600	$105,800

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, the report of the hearing examiner, and the exceptions thereto filed by counsel.

The Commissioner agrees with the findings and determination of needs of the Board in each point as set forth by the hearing examiner. However, the Commissioner will additionally set forth an analysis of the unappropriated free balance of the Board as shown in the final audit of the Board's current expense account dated June 30, 1973.

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The audit report discloses an unappropriated free balance of $401,598.48 in the current expense account of which $150,000 has been appropriated by the Board to its 1973-74 budget. This leaves a remainder of $251,598.48 for use by the Board, a sum much greater than the Board's June 5, 1973 estimate, or of the balance shown by its unaudited report received November 16, 1973.

The Commissioner directs that the restoration of $54,600 to the current expense account, as recommended by the hearing examiner, be effected and that the Board fund such restoration by the transfer of $54,600 from the unappropriated free balance in its current expense account to its 1973-74 budget. The remaining $196,998.48 free balance should be adequate as a contingency for the Board's needs in 1973-74.

Additionally, the Commissioner further concurs with the report of the hearing examiner with respect to the Board's capital outlay needs and finds that the amount of $16,000 must be added to the amount previously certified by the Committee to be raised for the capital outlay purposes of the School District of Wall, in order to provide sufficient funds to maintain a thorough and efficient system of public schools in the district for the school year 1973-74. He, therefore, directs the Township Committee of the Township of Wall to add $16,000 to the previous certification of $10,500 to the Monmouth County Board of Taxation for the capital outlay account of the school district, so that the total amount of certification for the local tax levy for capital outlay shall be $26,500 for the school year 1973-74.

COMMISSIONER OF EDUCATION

January 25, 1974

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Board of Education of the Township of Wayne,

Petitioner,

v.

Municipal Council of the Township of Wayne, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

For the Petitioner, Goodman & Rothenberg (Sylvan Rothenberg, Esq., of Counsel)

For the Respondent, G. Thomas Breur, Esq.

Petitioner, the Board of Education of the Township of Wayne, hereinafter "Board," appeals from the action of respondent, the Mayor and Council of the Township of Wayne, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37, certifying to the Passaic County Board of Taxation an amount of appropriation for current expense and capital outlay purposes for the 1973-74 school year $600,000 less than the amount proposed by the Board in its budget which was rejected by the voters.

The Board alleges that the amount certified by Council is insufficient to provide a thorough and efficient system of free public schools in the Wayne School District and prays for relief in the form of full restoration by the Commissioner of Education of the reduced amount of $600,000 for the 1973-74 school year.

Council replies that all necessary considerations and criteria set forth in law were properly followed by it in order to reach a determination of the amount of moneys required by the Board to provide a thorough and efficient system of public schools within the District for the 1973-74 school year.

Testimony and documentary evidence were educed at a hearing before a hearing examiner appointed by the Commissioner of Education at the State Department of Education, Trenton, on August 31, 1973. The report of the hearing examiner is as follows:

At the annual school election held February 13, 1973, the voters of the school district rejected the Board's proposals to raise $12,734,505 for current expenses and $129,200 for capital outlay. Immediately thereafter the Board delivered to Council an itemization of the defeated budget, in order to secure Council's determination of the amount of local tax money required to maintain a thorough and efficient school system.

At a regular meeting held March 21, 1973, Council adopted a resolution certifying to the Passaic County Board of Taxation the amount of $12,134,505 for current expenses for the 1973-74 school year for a total reduction of $600,000. Subsequently, at a regular meeting held April 4, 1973, Council

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adopted an amending resolution certifying that the $600,000 reduction should be deleted from the current expense and capital outlay accounts. (Exhibit P-1)

The pertinent amounts in dispute are shown as follows:

	Current Expense	Capital Outlay
Board's proposed budget	$12,734,505	$129,200
Council's certification	12,234,505	29,200
Reduction	$ 500,000	$100,000

In its Answer to the Board's Petition of Appeal, Council enumerated suggested items of the school budget in which it believes economies could be effected without harm to the educational program, as follows:

Account	Item	Board's Budget	Council's Proposal	Amount Reduced
J110B	Sal. Board Sec.	$ 1,000	$ –0–	$ 1,000
J110D	Sal. School Elec.	2,000	1,000	1,000
J110F	Sal. Supt. Off.	115,600	97,500	18,100
J110I	Sal. Bus. Admin. Off.	98,500	90,500	8,000
J120B	Legal Fees	19,000	11,000	8,000
J120C	Arch. Fees	1,000	–0–	1,000
J120D1	Surveys & Tests	12,000	7,000	5,000
J130F1	Supt. Off. Trav.	2,500	1,000	1,500
J130F3	Supt. Off. Exp.	7,000	4,500	2,500
J130H	Sch. Census	1,000	–0–	1,000
J130I2	Bus. Admin. Off. Supp.	7,000	5,500	1,500
J130I3	Bus. Admin. Off. Post.	12,600	10,900	1,700
J130M	Printg. & Publ.	3,000	2,000	1,000
J130N1	Books & Subs.	1,300	300	1,000
	Subtotal 100 Administration $52,300			
J212	Sal. Supvr. Instr.	329,400	283,225	46,175
J213.1A	Sal. Teachers	6,942,600	6,828,175	114,425
J213.1B	Sal. Spec. Serv.	655,400	606,400	49,000
J213.1C	Sal. Spec. Educ.	332,800	322,800	10,000
J213.3	Sal. Supp. Instr.	107,800	100,800	7,000
J213.4	Sal. Driv. Educ.	21,300	17,800	3,500
J214B	Sal. Guid. Pers.	362,500	358,500	4,000
J214C	Sal. Child St. Team	141,400	125,400	16,000
J214D	Sal. Curr. Dev.	14,000	10,000	4,000
J215C1	Sal. Instr. Staff Sec.	80,300	74,300	6,000
J230C1	A-V Mats.	32,000	20,500	11,500
J250A	Misc. Off. Supp.	16,900	15,900	1,000
J250B1	Instr. Trav.	14,200	12,100	2,100
J250C1	Grad. Exp.	8,000	4,000	4,000
J250C4	Consult. Serv.	7,300	3,800	3,500
	Subtotal 200 Instruction $282,200			

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J510A	Sal. Supv.	220,000	206,500	13,500
J510C	Safe. Bus.	21,000	–0–	21,000
J520C	Other Busing	25,000	10,000	15,000
	Subtotal 500	Transportation $49,500		
J610A	Sal. Cust.	789,200	746,200	43,000
	Subtotal 600	Operation $43,000		
J710	Sal. Maint.	208,800	201,800	7,000
J720C	Equip. Repair	35,000	30,000	5,000
J730	Equip. Repl.	56,300	41,300	15,000
J740	Bldg. Mats.	52,500	45,000	7,500
	Subtotal 700	Maintenance $34,500		
J830A	Instr. Rental	11,900	–0–	11,900
J830B	Noninstr. Rent.	600	–0–	600
J870	Tuition	211,000	190,000	21,000
	Subtotal 800	Fixed Charges $33,500		
	Total Current Expense $495,000			
L1240C	Instr. Equip.	106,600	56,500	50,000
L1240E,F,G,	Plant & Trans. Equip.	18,400	13,400	5,000
	Total Capital Outlay $55,000			
S1320B	Retire. Notes	50,000	–0–	50,000
	Total Debt Service $50,000			
	Grand Total, Reductions			$600,000

On the basis of the documentary evidence and oral testimony educed at the hearing, the findings and recommendations of the hearing examiner with respect to each of the items in dispute are set forth as follows:

J110B Salary Board Secretary *Reduction $1,000*

Council's suggested reduction of this total appropriation of the Board Secretary's salary is based upon the argument that the school business administrator-secretary is adequately compensated by the salary appropriation budgeted under the title of school business administrator, and, therefore, there is no need for this $1,000 appropriation.

The Board's records disclose that the same amount of $1,000 was budgeted and expended for the 1972-73 school year for the Board Secretary's salary. When the two positions of school business administrator and board secretary are combined, as is done with some frequency throughout this State, it is common to find that a smaller percentage of the combined salary for this individual is allocated to the board secretary salary line item with the larger percentage allocated to the school business administrator salary line item. Actually, the percentages allocated vary from school district to school district, and may be altered by a local board from time to time depending upon

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circumstances. The mere fact that only $1,000 of this individual's salary is allocated to the board secretary salary line item does not constitute sufficient reason for a reduction. This $1,000 salary item has been contracted and the school business administrator-board secretary is entitled to receive it without a reduction. It is recommended that this $1,000 reduction be restored.

J110D Salary School Election *Reduction $1,000*

Council proposed a reduction of $1,000 in this line item on the grounds that only one school election will be held during the 1973-74 school year and therefore only $1,000 is required. The Board estimates that a school election costs $1,000, but the audit report for 1972-73 (Exhibit P-4) discloses that the last annual school election cost $1,120. It is recommended that $880 of the total reduction be sustained and $120 be restored.

J110F Salaries–Superintendent's Office *Reduction $18,100*

Council proposed elimination of three pool secretaries claiming that the Superintendent presently has two secretaries and the assistant superintendent has a secretary. According to the Board's documentary evidence (Exhibit P-3), these three secretaries perform clerical and secretarial duties for the Superintendent, assistant superintendent, directors of secondary education, elementary education, special services, personnel and the learning disabilities center. Also, the Board states that these three secretaries serve as substitutes for all of the secretaries assigned to the offices mentioned above.

If the overwhelming majority of time of these three secretaries is spent working for the directors of secondary and elementary education, special services, and the learning disabilities or child study center, then their salaries should correctly be charged to the 200 Instruction series of line items, and not to 100 Administration. Charging instruction costs to administration decreases the former and inflates the latter, thus distorting proper cost allocations.

From the record, it appears more likely that these three secretaries serve primarily the Superintendent, assistant superintendent and business office. Although the Board's documents do not disclose the actual number of clerical and secretarial personnel in the various line items, it is fair to say that there are secretaries assigned to each administrator and office.

In view of the defeat by the voters of the 1973-74 school budget it is recommended that $12,000 of the proposed reduction be sustained and $6,100 be restored. This will provide for one pool secretary to serve as a substitute and to provide extra assistance to other offices at peak work periods.

J110I Salaries–Business Administrator's Office *Reduction $8,000*

In its Answer to the Petition of Appeal, Council recommends that one clerk be eliminated from this line item and that a data processing supervisor not be added. The Board's documentation provides no convincing argument why this amount of $8,000 should be restored. Therefore, it is recommended that the $8,000 reduction remain undisturbed.

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J120B Legal Fees *Reduction $8,000*

Council suggested a reduction of $8,000 from the total appropriation of $19,000 in this line item, in view of the fact that the 1972-73 budget allocation was $11,000. The audit report for 1972-73 (Exhibit P-4) discloses that all J120 line items grouped together accounted for expenditures of $21,332.39, but provides no break down for J120B. The Board's budget documentation (Exhibit P-3) indicates that for 1972-73, $713.90 was expended for a fact-finder, $560.50 for an arbitrator, $4,278.00 for a negotiator, and $6,687.49 for legal fees to the Board's attorney. The Board asserts that the $8,000 must be restored because the Board is committed to utilizing a negotiator for all 1973-74 salary negotiations.

Based upon the foregoing facts, it is recommended that $2,000 be restored to this line item and $6,000 of the reduction be permitted to stand.

J120C Architect's Fees *Reduction $1,000*

Council suggested reduction of the entire allocation of this line item for 1973-74. No allocation was budgeted in this line item for 1972-73, and the amounts budgeted for the prior years of 1971-72 and 1970-71 were not expended. The Board avers that this $1,000 allocation is necessary for the preparation of schematic plans and cost estimates for a proposed improvement authorization which would include a building project and work on two existing school sites. No specific details are provided regarding the exact nature of the building project or the site development. Since preliminary planning costs may be refunded to this budget line item from a voter approved improvement authorization, it is recommended that this reduction remain undisturbed.

J120D1 Surveys and Tests *Reduction $5,000*

Council reduced $5,000 of the total $12,000 allocation in this budget line item with the recommendation that the Board's proposed inventory and appraisal of equipment be completed with existing personnel. The Board argues that it will incur costs for land surveys and test borings as preliminary planning for additions to eight elementary schools, and will also require $10,000 for an appraisal and inventory of equipment for insurance purposes

In view of the rejection of the 1973-74 school budget by the voters, it is recommended that the reduction of $5,000 in this budget line item be sustained. If any of the remaining $7,000 in this line item is expended for an equipment inventory and appraisal for insurance purposes, such an expenditure should properly be charged to an appropriate line item in the 800 Fixed Charges account as an insurance related cost. The costs for land surveys and test borings which would be charged to this line item preliminary to a school building referendum may be reimbursed from school construction funds derived from bond anticipation notes or bond sales approved by the voters of the school district.

J130F1 Superintendent's Office–Travel *Reduction $1,500*

Council proposed a reduction of $1,500 from the total amount of $2,500

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budgeted, by virtue of the fact that $2,500 was budgeted for each of the three prior years, with unexpended balances of $1,224.18, $1,328.71, and $1,704.10 respectively. The Board replies that balances have remained in each of the three prior years simply because travel was either voluntarily curtailed or the Superintendent and assistant superintendent paid for travel without charging their expenses to the school district.

Since travel expenses charged to this line item for the past three years have averaged approximately $1,100 per year, it is recommended that $200 of the reduction be restored and $1,300 be sustained.

J130F3 Superintendent's Office–Expenses *Reduction $2,500*

Council's suggested reduction of $2,500 of the $7,000 budgeted in this line item is based upon the fact that $7,000 was budgeted for each of the two prior years with unexpended balances of $2,548.00 and $1,812.90. The Board alleges that price increases of twenty-five percent for paper products during 1973-74 account for the increased need for $7,000 in this line item.

In view of past experiences and present conditions it is recommended that $700 be restored to this line item and $1,800 remain undisturbed.

J130H School Census *Reduction $1,000*

Council has eliminated the entire allocation of $1,000 in this line item on the basis of the fact that no expenditures were made for this purpose from the $1,000 budgeted in 1972-73 and no allocation was budgeted for 1971-72. The Board maintains the allocation is necessary for a partial census but provides no specific facts to substantiate the need.

It is recommended that the reduction remain undisturbed.

J130I2 Business Administrator's Office–Supplies *Reduction $1,500*

Council's reduction of $1,500 from the total $7,000 budgeted in this line item is based upon the assumption that unexpended balances from 1970-71 and 1971-72 remain as surplus funds in the amount of $2,500. Actual 1972-73 expenditures totaled $7,611.90, an overexpenditure of $611.90. (Exhibit P-4)

Unexpended balances of various school budget line items at the close of the fiscal year on June 30 do not remain in specific line items. The total of all budgeted but unexpended funds, less any overexpenditures and less the amount of unexpended funds budgeted as revenue for the succeeding fiscal year, are referred to as an unappropriated free balance, and this amount is clearly identified in the Board's fiscal reports and audit report for each fiscal year. An unappropriated free balance may appear for both the current expense and capital outlay portions of the total budget, but no line items retain unexpended balances as of July 1, the beginning of the fiscal and school year.

For the reasons stated above, it is recommended that the $1,500 reduction be restored in full.

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J130I3 Business Administrator's Office–Postage *Reduction $1,700*

Council's proposed reduction of $1,700 of the $12,600 budgeted is based upon a recommendation that report cards not be mailed to parents, but be delivered home by the pupils. The Board's documentary evidence does not prove the necessity for the restoration of the $1,700. Therefore, the reduction should remain undisturbed.

J130M Printing and Publications *Reduction $1,000*

Council's suggested reduction of $1,000 of the total $3,000 budgeted in this line item is based upon the incorrect assumption that large balances from prior years remain in this line item. Actually, the $3,000 appropriation for 1972-73 was overexpended by $117.29. (Exhibit P-4) It is recommended that the $1,000 be restored.

J130N1 Books and Subscriptions *Reduction $1,000*

Council's reduction of $1,000 from the $1,300 budgeted is based upon the fact that $1,300 has been budgeted for each of four consecutive years, and the largest annual expenditure was $605.82 for 1972-73. (Exhibit P-1)

Based upon actual experience it is recommended that $350 be restored and $650 be sustained.

By way of summary for the 100 Administration line items, it is recommended that $12,970 be restored and $39,330 be sustained of the total reductions of $52,300.

J212 Salaries–Supervisors of Instruction *Reduction $46,175*

Council suggests that the proposed reduction of $46,175 include the elimination of one director of guidance, one federal program coordinator, and one administrative intern. The Board asserts that each of its two high schools has a guidance director who is responsible for counseling approximately three hundred pupils, as well as supervising five additional counselors and directing the guidance functions in his school. The federal program coordinator, says the Board, is responsible for obtaining almost $300,000 in federal and State funds for the school district, and must keep abreast of all funding sources and regulations regarding allocation and distribution of these funds. The Board states that the administrative intern position was deleted from its budget. According to the Board's documentation (Exhibit P-1), an administrative intern was included on the salary list for supervisors at a salary of $16,159 for 1972-73. Although the 1972-73 supervisors' salaries totaled $329,290 as listed, actual expenditures totaled $316,931.40. It is recommended that $30,000 be restored to this line item to maintain the necessary positions of one guidance director and one federal program coordinator, and that $16,175 of the reduction remain undisturbed.

J213.1A Salaries–Teachers *Reduction $114,425*

Council proposes that a new teacher intern program costing $40,000 be

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eliminated from this line item, in addition to a reduction of eleven classroom teachers. The Board's testimony states that this intern program was eliminated for 1973-74 at a meeting held during June 1973. Also, the Board discloses that it eliminated seventeen elementary teaching positions which had been budgeted in order to reduce class size. According to the Board, the school district now has the same number of teachers during 1973-74 as it had employed during 1972-73. (Tr. 41) In view of the facts stated above it is recommended that the reduction of $114,425 be sustained.

J213.1B Salaries–Special Services *Reduction $49,000*

The reduction of $49,000 suggested by Council includes the elimination of five additional teaching staff positions in special areas. The Board's evidence is somewhat confusing, since the Board asserts the necessity to employ an additional speech therapist to serve the two senior high schools, plus a learning disabilities teacher. The Board's budget document (Exhibit P-1) states that the salaries of four existing learning disabilities teachers have been transferred from this line item to J214C for 1973-74. Since the teaching positions budgeted in this line item include reading, speech, art, physical education, instrumental music, vocal music and outdoor education, an appeal for a learning disabilities teacher under this line item is incorrect.

It is recommended that the reduction of $49,000 for new and additional teaching staff members for speech, mathematics, physical education and art be sustained.

J213.1C Salaries–Special Education *Reduction $10,000*

Council recommends the elimination of a new, additional teacher of special education in this line item. The Board avers that an additional teacher for neurologically impaired is required for 1973-74 as the result of growing enrollments in this area. As an alternative, the Board states that three teacher aides could be employed for these classes to permit thirty percent enrollment increases with the same number of teachers.

Based upon these facts, it is recommended that the $10,000 reduction be restored.

J213.3 Salaries–Supplemental Instruction *Reduction $7,000*

The reduction of $7,000 in this line item was proposed by Council on the grounds that total enrollment within the school district has declined. The Board argues that the original appropriation of $95,000 for 1972-73 had to be increased to $135,000, and was exceeded by $6,165.74 with a total expenditure of $141,165.74. For 1973-74, the Board seeks an appropriation of $107,800.

In view of the clear need for the total budgeted allocation of $107,800 for supplemental instruction, it is recommended that the $7,000 reduction be restored.

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J213.4 Salaries–Driver Education *Reduction $3,500*

Council's proposal to reduce this line item by $3,500 is based upon the claim that the Board has not proven the necessity for a thirty percent increase over the $15,458.75 expended during 1972-73. The Board's documentation states that 983 pupils will be eligible for driver education during 1973-74, and the cost for behind-the-wheel instruction for 654 pupils will be $21,300. The Board's testimony, however, discloses that summer driving instruction was eliminated and the program was not offered beginning in September 1973. If the program were now reinstated, in spite of the present gasoline shortage, the remaining allocation should be sufficient for 1973-74. Therefore, it is recommended that the reduction remain undisturbed.

J214B Salaries–Guidance Personnel *Reduction $4,000*

Council's reduction is based upon the conclusion that the increase over 1972-73 is excessive. The Board asserts that increases required by the salary guide disclose the necessity for the total allocation of $362,500 in this line item. No new positions have been included for guidance personnel in the 1973-74 budget.

It is recommended that the $4,000 reduction by Council be restored.

J214C Salaries–Child Study Team *Reduction $16,000*

Council's reduction represents the elimination of one additional psychologist for 1973-74. The Board argues that the proposed new psychologist was deleted before the school budget was presented to the voters. An analysis of the salary records contained in the Board's documentary evidence (Exhibit P-1) discloses that no allocation is provided for an additional psychologist for 1973-74. Therefore, the amount of $16,000 reduced by Council should be restored.

J214D Salaries–Curriculum Development *Reduction $4,000*

Council suggests that this line item be reduced to conform to prior years. The Board asserts that this money is necessary in order to maintain the level of curriculum development work performed during prior years. Actual expenditures for 1972-73 totaled $8,292.99. The Board's testimony discloses that curriculum development in the areas of mathematics, social science, and science was not performed during the summer months as had been originally planned. (Tr. 46)

In accordance with these facts, it is recommended that the reduction remain intact.

J215C1 Salaries–Instructional Staff Secretaries *Reduction $6,000*

Council proposes this reduction in order to keep the increase above 1972-73 approximately $6,000 instead of $12,000. The Board's documentary evidence (Exhibit P-1) discloses that salaries for clerical personnel under this line item for 1973-74 will total $74,225, including increasing a part-time secretary to a full-time position.

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It is recommended that the reduction of $6,000 remain undisturbed.

J230C1 Audiovisual Materials *Reduction $11,500*

Council's reduction is based upon the Board's request for an increase from $20,150.83 expended during 1972-73 to $32,000 for 1973-74. Council points out that an additional $10,000 is allocated in J230C2 for participation in the County library program. The Board asserts that previous allocations have been too small to maintain the level of supply of these materials necessary for an efficient educational program.

It is recommended that $5,000 be restored to this line item and $6,500 be sustained.

J250A Miscellaneous Office Supplies *Reduction $1,000*

Council bases its suggested reduction on the fact that of $15,900 allocated for 1972-73 only $13,129.31 was expended leaving a balance of $2,770.69. The Board claims that the increase arises out of utilization of more individualized instruction.

Council's reduction should be permitted to stand.

J250B1 Instructional Travel *Reduction $2,100*

Council's reduction is predicated upon the fact that this line item has had unexpended balances for 1970-71, 1971-72, and 1972-73 of $3,298.37, $2,296.46 and $1,133.64, respectively. The Board avers that increased travel for special education teachers and an increase in mileage allowance from $.10 to $.12 requires that the reduction be restored. The mileage allowance increase equals $20 for each 1,000 miles, and mileage reimbursements during 1972-73 totaled $109,663.

Therefore, the sum of $1,000 should be restored to this line item, and the balance of $1,100 should be not restored.

J250C1 Graduation Expenses *Reduction $4,000*

Council's suggestion that pupils be required to pay their individual costs for cap and gown rental for graduation exercises is improper. Local boards of education which desire to maintain formal graduation exercises with academic gowns must pay this expense for each pupil. The alternative of holding such an exercise without formal academic robes is available, but in this instance the Board does not choose to establish such a policy.

Therefore, the reduction of $4,000 should be restored.

J250C4 Consulting Services *Reduction $3,500*

The reduction suggested by Council is based upon the fact that unexpended balances have remained in this line item for each of the three previous years. The Board views this allocation as vital for instructional improvement.

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In view of the expression of the will of the voters that school costs be stabilized, it is recommended that this reduction remain undisturbed.

J510A Salary–Supervisor *Reduction $13,500*

Council proposes that the position of transportation supervisor not be filled. The Board's documentation indicates that, at the time of the hearing, the position was not filled and its duties were being performed by other employees.

In view of the need for economy indicated by the rejection of the budget, it is recommended that the reduction stand.

J510C Safety Busing *Reduction $21,000*

Council suggests elimination of bus transportation which is not required by statute. The Board argues that strong concern on the part of parents necessitates transportation in hazardous areas. However, the concern expressed by the voters in the budget defeat indicates greater economy is a paramount consideration. Therefore, it is recommended that the amount reduced not be restored.

J520C Other Busing *Reduction $15,000*

Council suggests a reduction in bus transportation other than regular routes. The Board avers that this line item includes transportation to outdoor education sites and camps for elementary pupils, and athletic trips, ecology programs and journeys for special education pupils on the secondary level. Expenditures for this line item totaled $13,897.30 for 1972-73.

Therefore, it is recommended that $5,000 of the reduction be restored and $10,000 be sustained.

J610A Salaries–Custodians *Reduction $43,000*

Council suggests eliminating overtime, and four new positions for three custodians and one matron. The Board argues that the new positions are necessary because of increased square footage of areas added to the schools, and also because of use of school facilities by many organizations after school hours. Actual expenditures for 1972-73 were $708,973.97. For 1973-74 the Board budgeted $789,200.

Since economies are required as the result of the rejection of the budget by the voters, it is recommended that the reduction be undisturbed. This will still provide for an increase of $37,226, which should be sufficient for 1973-74 wage increases.

J710 Salaries–Maintenance *Reduction $7,000*

Council proposes that the increase from actual 1972-73 expenditures of $184,965.79 to the Board's budgeted amount of $208,800, which is $47,668, should be reduced by $7,000. The Board does not offer proof of the necessity for this amount to be restored. Therefore, the $7,000 reduction should remain undisturbed.

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J720C Equipment Repair *Reduction $5,000*

Council's determination in regard to this line item is that an increase from the 1972-73 budgeted amount of $22,200 to the Board's 1973-74 amount of $35,000 is unwarranted. The Board claims that actual 1972-73 expenditures were $31,378, and that the increase is necessary in order to properly maintain existing equipment. However, the Board's 1972-73 audit report (Exhibit P-4) does not list actual appropriations and expenditures for each individual line item. Instead, the audit report groups together all J720 line items, J720A, J720B, and J720C into one total. This is a confusing and time-consuming practice which should be discontinued, particularly in view of the fact that the Board's budget book provides a separate ledger page for each individual line item. There is no necessity for recombining these line items in the annual audit report. This practice consumes time and makes impossible the identification of actual expenditures for each specific line item throughout the budget.

The reduction should remain undisturbed.

J730 Equipment Replacement *Reduction $15,000*

Council proposes this reduction on the grounds that the increase from $41,300 budgeted for 1972-73 to the 1973-74 amount of $56,300 (which is $15,000) is excessive. According to the audit report (Exhibit P-4) for 1972-73, actual expenditures totaled $39,533.63.

In view of the expression of the voters in defeating the proposed budget, it is recommended that the reduction stand.

J740 Building Materials *Reduction $7,500*

Council suggests a $7,500 reduction from the allocation of $52,500, which is unchanged from 1972-73. Actual expenditures for 1972-73 were $47,031.38. The Board states that material purchases are carefully controlled, but are necessary for the proper maintenance of schoolhouses and school grounds.

In view of rising costs for these materials, it is recommended that $3,000 be restored to this line item and $4,500 remain as a reduction.

J830A Instruction–Rental *Reduction $11,900*

Council claims that the Board will have thirty-eight empty classrooms for 1973-74, and no rental space should be required. The Board claims that a feasibility study for relocating the center for multiply handicapped classes discloses that disadvantages to the educational program outweigh the rental cost for existing facilities.

In view of the fact that the rented facilities are necessary for the multiply handicapped classes, it is recommended that the amount of $11,900 be restored.

J830B Noninstruction–Rental *Reduction $600*

Council states that the $50 per month rental for a garage to house obsolete

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equipment is unnecessary, because the Board has adequate space for storage. The Board claims that equipment is stored only until it can be sold, and that storage space within the district is minimal.

It is recommended that the $600 be restored.

J870 Tuition *Reduction $21,000*

Council asserts that the 1973-74 allocation of $211,000 is excessive in view of actual 1972-73 expenditures totaling $163,653.12. Although the Board claims that the total allocation is necessary, the cost breakdowns as presented (Exhibit P-1) do not substantiate this need.

It is therefore recommended that the reduction remain standing.

L1240C Instruction–Equipment *Reduction $50,000*

Council states that a total allocation of $106,600 for equipment is unreasonable in view of actual expenditures of $55,492.38 for 1972-73. The Board avers that these equipment items are necessary to properly conduct the existing program.

In view of the budget rejection by the voters of the district, the economy resulting from maintaining this line item appropriation at $56,500 for 1973-74 is warranted. Therefore, the reduction should stand.

L1240E,F,G Plant & Transportation Equipment *Reduction $5,000*

For 1972-73, the Board expended a total of $5,948.30 in these three budget line items. For 1973-74, the Board budgeted a total of $18,400 for these three line items. Council asserts that this is excessive. The Board considers the total appropriation to be minimal for its needs.

An allocation of $13,400 for 1973-74 should be adequate for the Board under conditions of economy, therefore the $5,000 reduction should not be disturbed.

S1320B Retirement Notes *Reduction $50,000*

Council claims that the expenditure of $50,000 to reduce the total $300,000 bond anticipation note was not necessary. The Board argues that the $50,000 payment will save interest costs in future years when the balance of the total note is bonded.

The fact is that the total $300,000 note could have been renewed for 1973-74, and for 1974-75. Before the conclusion of the third year of the note, one installment must be paid. However, the amount of $50,000 was certified by the Board to the County Board of Taxation, and therefore may not be reduced by Council. The $50,000 installment had been paid at the time of hearing.

It is therefore recommended that $50,000 for this purpose be restored.

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The summary of recommendations regarding each of the line items and amounts in dispute are set forth in the following chart:

Account	Item	Proposed Reduction	Amount Restored	Amount Not Restored
J110B	Sal. Board. Sec.	$ 1,000	$ 1,000	$ –0–
J110D	Sal. Board Elec.	1,000	120	880
J110F	Sal. Supt. Off.	18,100	6,100	12,000
J110I	Sal. Bus. Admin. Off.	8,000	–0–	8,000
J120B	Legal Fees	8,000	2,000	6,000
J120C	Arch. Fees	1,000	–0–	1,000
J120D1	Surveys & Tests	5,000	–0–	5,000
J130F1	Supt. Off. Trav.	1,500	200	1,300
J130F3	Supt. Off. Exp.	2,500	700	1,800
J130H	Sch. Census	1,000	–0–	1,000
J130I2	Bus. Admin. Off. Supp.	1,500	1,500	–0–
J130I3	Bus. Admin. Off. Post.	1,700	–0–	1,700
J130M	Prntg. & Publ.	1,000	1,000	–0–
J130N1	Books & Subs.	1,000	350	650
	Subtotal	$ 52,300	$12,970	$ 39,330
J212	Sal. Supvr. Instr.	$ 46,175	$30,000	$ 16,175
J213.1A	Sal. Teachers	114,425	–0–	$114,425
J213.1B	Sal. Spec. Serv.	49,000	–0–	49,000
J213.1C	Sal. Spec. Educ.	10,000	10,000	–0–
J213.3	Sal. Supp. Instr.	7,000	7,000	–0–
J213.4	Sal. Driv. Educ.	3,500	–0–	3,500
J214B	Sal. Guid. Pers.	4,000	4,000	–0–
J214C	Sal. Child St. Team	16,000	16,000	–0–
J214D	Sal. Curr. Dev.	4,000	–0–	4,000
J215C1	Sal. Instr. Staff-Sec.	6,000	–0–	6,000
J230C1	A-V Mats.	11,500	5,000	6,500
J250A	Misc. Off. Supp.	1,000	–0–	1,000
J250B1	Instr. Trav.	2,100	1,000	1,100
J250C1	Grad. Exp.	4,000	4,000	–0–
J250C4	Consult. Serv.	3,500	–0–	3,500
	Subtotal	$282,200	$77,000	$205,200
J510A	Sal. Supv.	$ 13,500	$ –0–	$ 13,500
J510C	Safe. Bus.	21,000	–0–	21,000
J520C	Other Busing	15,000	5,000	10,000
	Subtotal	$ 49,500	$ 5,000	$ 44,500
J610A	Sal. Cust.	$ 43,000	$ –0–	$ 43,000
	Subtotal	$ 43,000	$ –0–	$ 43,000
J710	Sal. Maint.	$ 7,000	$ –0–	$ 7,000
J720C	Equip. Repair	5,000	–0–	5,000
J730	Equip. Repl.	15,000	–0–	15,000
J740	Bldg. Mats.	7,500	3,000	4,500
	Subtotal	$ 34,500	$ 3,000	$ 31,500

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J830A	Instr. Rental	$ 11,900	$ 11,900	$ –0–
J830B	Noninstr. Rent.	600	600	–0–
J870	Tuition	21,000	–0–	21,000
	Subtotal	$ 33,500	$ 12,500	$ 21,000
L1240C	Instr. Equip.	$ 50,000	$ –0–	$ 50,000
L1240E,F,G	Plant & Trans. Equip.	5,000	–0–	5,000
	Subtotal	$ 55,000	$ –0–	$ 55,000
S1320B	Retire. Notes	$ 50,000	$ 50,000	$ –0–
	Subtotal	$ 50,000	$ 50,000	$ –0–
	Grand Total	$600,000	$160,470	$439,530

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, the findings and recommendations of the hearing examiner, and the exceptions thereto filed by the Board.

The Board claims that Council caused inordinate delays in these proceedings which resulted in the Board's inability to implement certain education programs for the opening of the public schools in September 1973. The Board also asserts that Council's reduction of $600,000 from the school budget required the adoption of a revised budget entailing restrictions in its offerings. The record before the Commissioner discloses that two conferences, on June 12, 1973, and July 2, 1973, were conducted by the Passaic County Superintendent of Schools in an attempt to settle this dispute. Thereafter, a hearing scheduled for August 3, 1973, was adjourned at the request of Council for more preparation time. Efforts to schedule the hearing for August 14, 1973, were unsuccessful, and the hearing was subsequently held on August 31, 1973. The record was completed with a final submission of documentary evidence on October 12, 1973. At the hearing, Council acknowledged and regretted any delay in this matter and asserted that the volume of work entailed in this budget dispute partially was the cause. (Tr. 7-11) In its Memorandum (Exhibit R-1) Council asserts that on several occasions at least one member of the Board made informal representations that the Board would not appeal a school budget reduction limited to $500,000. Council claims it agreed, but the Board dissolved that understanding, and Council subsequently resolved that a reasonable reduction would be $600,000. Later, according to Council, another representation was made by a Board member that this reduction would not be appealed if $500,000 were reduced from the current expense account and $100,000 from capital outlay. Therefore, Council claims, it amended its resolution to comply with its understanding of the Board's position. Needless to say, the total $600,000 reduction was finally appealed by the Board.

In the judgment of the Commissioner, the record fails to support a finding that deliberate or unreasonable and prejudicial delay was intended or in

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fact caused by Council in this matter. Budget disputes, such as the instant matter, are complex and difficult matters. It behooves both parties in these disputes to commit the necessary time and attention required to prepare their respective evidence, which is usually voluminous, so that such cases can be heard and decided with reasonable dispatch.

The Board claims that Council substantiated only $516,119 or $83,881 less than the total reduction of $600,000. This is not so. An examination of Council's Answer to the Petition of Appeal clearly discloses an enumeration of the items suggested for reduction by Council which totals $600,000. Council's Memorandum (Exhibit R-1) is an elaboration of its reasons for the suggested item reductions already set forth in its Answer. Where Council's Memorandum did not elaborate on its reasons, such as for line item J110I, it relied upon the reasons set forth in its Answer.

The Commissioner has examined the exceptions recited by the Board in regard to each separate budgetary line item recommendation. The Commissioner is constrained to remind this Board and all other local boards of education in this State that in a budget appeal, following a defeat of a school budget by the electorate and a subsequent budget reduction by the governing body, the only criterion for restoration of any part of the reduced moneys is adequate proof of the necessity for such moneys in order to maintain a thorough and efficient system of public schools "*** in view of the nature of the local community, its educational needs and financial abilities ***." *Board of Education of East Brunswick Township v. Township Council of East Brunswick,* 48 *N.J.* 94, 105 (1966) Proof merely of the desirability for funds to implement new or expanded educational programs and offerings does not suffice unless the desirable is also necessary to maintain "*** the educational mandate in our Constitution and the State's statutory and administrative requirements.*** " *East Brunswick, supra,* at p. 105

In the instant matter, the Board views the recommendation for restoration of $160,470 as inadequate, claiming that its school system is looked upon by many others as the model for newly instituted programs. Also, the Board points out that a failure to restore the moneys reduced by Council in its instructional equipment account, a reduction of $50,000 from the proposed total of $106,600 will prevent it from implementing new programs. The Commissioner agrees that this school district provides exceptional educational opportunities for its pupils. It must be clearly stated that the Commissioner does not decry these fortuitous circumstances. The citizens of this community are to be commended for these educational provisions which hopefully may continue undiminished. The Commissioner endorses the standard of education being offered by the Board and supports its aspirations to maintain it and to introduce further innovative projects.

In this instance, there can be no question that a thorough and efficient school system can be maintained within the appropriations set by Council together with the amount recommended for restoration herein. It is quite probable that some elements of the school program as presently constituted may

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have to be curtailed to some degree, and some planned new innovations may have to be eliminated. However, after reviewing the status of the Board's budget in light of the recommendations herein, the Commissioner cannot find that the funds available will be so inadequate or that the educational program will be so adversely affected that a thorough and efficient school system cannot be maintained.

The Board characterizes the vote by the electorate on the 1973-74 school budget as being less than an overwhelming mandate for economy. The Board's rationale is that with 25,000 eligible voters as of February 1973, the current expense portion of the school budget was defeated by 3900 "NO" votes to 2629 "YES" votes, and the capital outlay budget was defeated by 3304 votes to 2704. The Board points out that only twenty-five percent of the eligible voters participated, and that the defeat was by a margin of two percent of those eligible to vote.

The Commissioner is aware of this lack of full participation by voters in local school elections, and deems the condition unfortunate. But the will of the people expressed at the polls cannot be overlooked or lightly set aside. The fact that the community rejected the Board's proposed school budget is a factor which must be considered along with the educational welfare of the children to be served.

For the reasons stated herein, the Commissioner finds and determines that the additional amounts of $110,470 for current expenses and $50,000 for capital outlay, must be restored in order that the Board of Education may provide a thorough and efficient system of public schools. The Commissioner, therefore, directs the Mayor and Council of the Township of Wayne to certify to the Passaic County Board of Taxation the additional total amount of $160,470 to be raised by local taxation for school purposes for the 1973-74 school year.

COMMISSIONER OF EDUCATION

January 28, 1974

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In the Matter of the Tenure Hearing of Joseph McDougall, School District of the Borough of Northvale, Bergen County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

For the Respondent, Charles J. Sakany, Esq.

Respondent, a janitorial employee of the Board of Education of the Borough of Northvale, hereinafter "Board," has been charged with neglect of duty and misbehavior by the Board, and has been suspended pending a determination of the specific charges which were certified to the Commissioner of Education on December 15, 1972.

Respondent denies the charges and prays that the Commissioner reinstate him in his tenured position.

A hearing was held on June 11, 1973 at the office of the Bergen County Superintendent of Schools, Wood-Ridge, before a hearing examiner appointed by the Commissioner. Thereafter, Briefs were filed by the parties on June 19 and August 27, 1973. The report of the hearing examiner follows:

The Board suspended respondent with full pay until the expiration of his accumulated sick leave which terminated on April 3, 1973. (Tr. 148, 150) Five specific charges were filed by the Board and they will be discussed *seriatim.*

CHARGE ONE

The Board consented to dismiss *Charge One* (Transcript 87); therefore, the hearing examiner recommends that the Commissioner dismiss the charge.

CHARGE TWO

"That on or about the 24th day of January, 1972, the said Joseph McDougall did wrongfully fail to appear to perform duties assigned to him and on or about February 5, 1972, after having agreed to appear for the cleaning up of an art room, which was his responsibility did in violation of said agreement fail to appear and failed to carry out and perform the duties properly assigned to him."

The record shows that the Supervisor of Buildings and Grounds asked respondent to clean up an art room on February 5, 1972 after a fire which caused the Board to order the repair, repainting, cleaning and re-waxing of the room, cabinets, floors and sinks. The Supervisor testified that respondent reported and worked on the 24th day of January. (Tr. 29-30) The Supervisor also testified that respondent did not clean the room as he promised on February 5, because he said he felt ill and tired, but that he would clean the

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room on the following day, a Sunday. Respondent returned the next day and cleaned the room, although the Supervisor testified that it was not cleaned "all the way," and that it was completed by another janitor the next night. (Tr. 27-32, 38-39)

The hearing examiner finds that respondent did report to clean the room, although he did not do so on February 5, 1972, as promised, nor did his work meet with the Supervisor's satisfaction.

CHARGE THREE

"At some time during the early part of 1972, said Joseph McDougall wrongfully accosted a pupil, verbally reprimanded him in a gruff manner and wrongfully charged said pupil with having used foul language. In addition to having acted in the aforesaid manner, said Joseph McDougall also approached the mother of said pupil and repeated the unfounded accusation concerning her child to her."

The testimony of the Secretary-Business Manager substantially supports the charge. He testified, also, that he was present on at least three or four occasions when respondent was cautioned by the Superintendent or the school principal that he should avoid reprimanding pupils. (Tr. 61-62)

On February 10, 1972, the Superintendent of Schools sent the following probation notice to respondent:

"TO: Mr. Joseph McDougal (sic)

"FROM: Dr. Edward Berkowitz

"SUBJECT: Notification of 90 Day Probation Period

"DATE: February 10, 1972

"This is to summarize the results of a meeting that was held in my office on Tuesday, February 8, with reference to charges presented against you concerning your performance of duty as a Custodian in the Nathan Hale School.

"You were reprimanded for not cleaning rooms assigned to you on or before January 24, on the evening of Mr. Filie's absence. You were also reported for failing to show up to clean the Art Room in the Nathan Hale School on Saturday morning, February 5, as arranged by you and Mr. Felix, our Maintenance head. The latter assignment was to clean the Art Room after the fire so that pupils could use the room for instruction.

"The third charge was that you accosted a youngster and verbally reprimanded him in a gruff manner and accused the youngster of having used foul language. You also approached his mother and repeated the accusation to her.

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"With regard to the first charge, we are noting your inefficiency in performing assigned tasks. It is evident that the rooms assigned to you were not cleaned. With regard to the second charge, there may be extenuating circumstances in that you were tired from your evening work. However, in the future, if you make an agreement to do an assigned job, we feel that you must meet your obligation, or give Mr. Felix the courtesy of notifying him that you will not be there to perform the service. We want you to be a contributing member of our custodial force who follows directions and shares the work.

"It is with regard to the third charge that I am placing you on probation for unbecoming conduct. I refer you to my letter of reprimand that is in your file dated June 1, 1971. At that time, the reprimand was written to remind you to control your temper, to keep your hands off children, and to use proper forms of address at all times. You were told not to directly challenge youngsters, that if you have a problem to inform your superior, Mr. Felix, or Mr. Mendillo, Principal of Nathan Hale. You were informally notified to call the police if there was a problem of a more immediate serious nature.

"You have admitted making accusations of a delicate and incriminating nature. Your direct contact with youngsters was rough and abusive.

"You have been directed to avoid contact with the public. Children in the past have made you a target of abuse. However, you were especially told to pay attention to cleaning the building and to make no contact except as noted above.

"In summary, because you failed to obey Mr. Felix's order and because you failed to follow a written order given on June 1, 1971, and you persist in your unbecoming conduct, you are hereby notified that you are being placed on probation 90 days following this date. Should you fail to meet the highest expectation for an employee doing similar work in the school district, your services will be terminated in accordance with the appropriate provisions of New Jersey statutes. You are directed to obey orders and to avoid any unbecoming conduct in your relationship with children and the community.

" [signature of Edward Berkowitz]

Edward Berkowitz
Superintendent of Schools

" [signature of Joseph McDougall]

Joseph McDougal (sic)

"(The signature does not necessarily mean agreement with this report. It does mean that it was discussed by the Superintendent and the person evaluated.)"

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Respondent admits talking to a pupil and his mother on February 5, 1972; however, he denies that his conversation was vulgar or improper, and he avers he spoke to them because of repeated problems of malicious damage being caused to the school. He testified as follows: "*** I might have yelled at him because he was, he had a foul tongue and I told him you got a foul tongue and his mother was standing there and I told her you better correct your boy.***" (sic) (Tr. 94)

The hearing examiner finds, therefore, that *Charge Three* is supported by the testimony and evidence and is substantially true as stated.

CHARGE FOUR

"That on or about the 26th day of April, 1972, in direct contravention of orders which had previously been issued to the said Joseph McDougall, he did wrongfully accost certain pupils at the main entrance of the Nathan Hale School in the Borough of Northvale and did on said date wrongfully place his hands on the person of one of the pupils and grabbed said pupil by the front of his shirt threatening to use physical force against said pupil. During the course of said incident, the said Joseph McDougall pulled the pupil back and forth with one hand and raised a clenched fist with the other."

Neither the pupil on whom respondent allegedly "plac[ed] his hand," nor his mother, testified, and respondent denies ever having placed his hands on any pupil. (Tr. 89-90) The principal testified that respondent denied, after questioning, that he had touched the boy. The Secretary-Business Manager testified that respondent admitted to him that he had touched the pupil in question, but that respondent earlier denied that he touched the pupil. (Tr. 63, 68)

Although the weight of the believable testimony appears to show that respondent did in fact touch the pupil, there has been no showing of malice nor intent to punish or harm the pupil. Nor did the Board offer any reason why the pupil himself could not testify as to the alleged incident contained in Charge Four. The hearing examiner makes no finding, therefore, that respondent touched the pupil as charged; however, the record clearly indicates that an incident of some kind between the pupil and respondent occurred after school on the aforementioned date, and that the pupil reported the incident to the principal, who in turn reported it to the Superintendent of Schools and the Secretary-Business Manager after first discussing the incident with respondent. (Tr. 9-12)

CHARGE FIVE

"On or about the first day of December, 1972, the said Joseph McDougall committed the following offenses:

"(a) While on property of the Northvale Board of Education, he was in an intoxicated condition.

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"(b) On said date in direct contravention of prior specific orders issued to him, he wrongfully attempted to reprimand a pupil.

"(c) On said date he wrongfully attempted to interfere with a teacher in the carrying out of her duties.

"(d) He made threatening gestures to pupils and to teachers in the performance of their duties.

"(e) He threatened to do bodily harm to a pupil.

"(f) He threatened a teacher with bodily harm.

"(g) He used vulgar language concerning the teachers.

"(h) He was guilty of insubordination and failed and refused to go to his home when ordered to do so by his superior.

"(i) He was insubordinate and violated standing orders by remaining in the vicinity of classrooms having previously been instructed not to do so."

The principal testified that respondent was intoxicated on December 1, 1972, and that "*** there was a strong odor of liquor in my office when he was there. *** And that he was not very stable ***. He was leaning against the outer wall of my office ***. His speech, we couldn't get anything that made any sense out of him.***" (Tr. 12-14)

On the same day, a teacher testified that respondent was intoxicated and similarly described his condition saying also that "*** His eyes were bloodshot, he was standing but weaving, his fists were clenched, he was in a state of disarray.***" She testified also that respondent stood at her door, fists clenched, and scrutinized each of her pupils as they left the room, single file, to go to their lockers and as they returned. Concerned for the pupils' safety, she testified that she sent them out the back door, and then hurried to the principal's office. She avers that respondent followed her and said he was looking for "*** a kid *** for what [the kid] did to his child.***" She demonstrated that respondent then placed his fist against her chin. She testified, further, that she told him "***he had no right to come into *** [her] classroom and he said I'll get you for this***." (Tr. 46-50) She testified also that she construed his gestures and actions as "threatening" and that "*** He was pugnacious, he was in a bad state.***" (Tr. 52)

As she related her story to the office secretary, the Principal, Supervisor of Buildings and Grounds and the Secretary-Business Manager entered the office. She told them of the incident related *ante.* All of the men testified that respondent had the odor of alcohol on his breath (Tr. 33-35), and the Secretary-Business Manager testified that respondent was not fit to work and he said he "***would dock him the day's pay and that he should go home***he was under the influence of alcohol.***" (Tr. 66)

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He testified that respondent did go home a little later, but not at the time he and the Principal directed him to leave. (Tr. 67)

Respondent denies being intoxicated, insubordinate or that he threatened any teacher or pupils. He specifically denies putting his fist in the teacher's face, but he admits that he "grabbed" a boy, the son of a friend of his, to warn the boy that he was "***running [in] too fast company and that was all that was said***." (Tr. 91)

Although his testimony is that he "grabbed" a boy, the hearing examiner is of the opinion that his speech was colloquial and not conflicting, in that his other testimony was that he "***never touched [nor] grabbed no (sic) child.***" (Tr. 92)

Respondent admits that he had been warned not to reprimand pupils under any circumstances; however, he testified that "*** [he] just wanted to talk to the boy and see if [he] *** could straighten him out because he was hanging with fast company.***" In this regard, he admits disobeying administrative instructions. (Tr. 105-106, 134)

The hearing examiner noted that respondent did not have normal, ordinary hand control, that it appeared that his hands were constantly partially clenched, and that he was unable to completely relax or open his hands fully. Respondent testified that he had rheumatoid arthritis. (Tr. 89) However, the testimony of the teacher was credible and convincing, that respondent did, in fact, place his fist against her chin and that his mannerisms toward her and her pupils were threatening.

The hearing examiner finds also that respondent was insubordinate in that he failed to follow administrative directives that he should not reprimand pupils nor counsel parents.

The hearing examiner finds, also, that respondent was intoxicated while in the school building on December 1, 1972. He admits having two beers. (Tr. 109)

In *Shroeder v. Board of Education of the Township of Lakewood,* 1960-61 *S.L.D.* 37, the Commissioner commented as follows:

> "*** The Board was guarded in its charges about appellant's drinking of alcoholic beverages. It did not accuse her directly of being intoxicated on duty. It did not go beyond the charge in the Bill of Particulars that she 'appeared' to have consumed alcohol before coming to school and accused her of actions often associated with intoxication without actually charging intoxication. It seems to the Commissioner in reading the record that the school authorities were hesitant to attempt to establish intoxication in the absence of expert testimony.
>
> "In *State v. Pichadou,* 34 *N.J. Super.* 177, the court reaffirmed the rule that the average person of ordinary intelligence, although lacking special

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skill, knowledge and experience, but who has had an opportunity for observation, may testify whether a certain person was intoxicated, that in prosecution for driving an automobile while under the influence of intoxicating liquor, the intoxicated condition of the defendant could be established in the absence of expert testimony. In the case 'incoherent,' 'blurring' and 'slurred' speech, pungent odor of alcohol and staggering were mentioned as evidence.

"In *State v. Brezina,* 45 *N.J. Super.* 596 at 604, it was said:

> " "Whether a man is sober or intoxicated is a matter of common observation not requiring any special knowledge or skill and is habitually and properly inquired into of witnesses who have occasions to see him and whose means of judging correctly must be submitted to the trier of facts. *Castner v. Sliker,* 33 *N.J.L.* 95. However, when this type of evidence is the only evidence submitted, it must be such as would not raise a reasonable doubt in a prosecution for driving an automobile while under the influence of intoxicating liquor. '

"It should be pointed out that appellant is not being tried for a crime. Her fitness to teach is being determined. Our courts have held that the evidence produced in a tenure proceeding does not have to be such as would support a conviction upon an indictment. *Reilly v. Jersey City,* 64 *N.J.L.* at page 510. In *Borough of Park Ridge v. Salimone,* 36 *N.J. Super.* at 498, it was said:

> " 'The *quantum* of proof necessary to convict is different. The proof might not be sufficient to demonstrate guilt of a crime to a jury beyond a reasonable doubt but it might indicate clearly and by the preponderance of the credible evidence of an employee's guilt of conduct unbecoming a police officer or subversive of good order and discipline of the force. *Beggans v. Civil Service Commission,* 10 *N.J. Misc.* 1142, (*Sup. Ct.* 1932), *Smith v. Carty,* 120 *N.J.L.* 335, 343, (*E. & A.* 1938).'*** "

The hearing examiner's report is summarized as follows:

Charge One should be dismissed by consent of the parties.

Charge Two should be dismissed. The Board showed only that it was not satisfied with respondent's work. The record shows that he did report to his work.

Charge Three – The record supports a finding that respondent did reprimand a pupil and speak to his mother despite being warned not to do so.

Charge Four – The hearing examiner finds that a verbal altercation took place between respondent and a pupil; however, there was insufficient proof that any physical touching occurred.

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Charge Five – Sub-Charges 5(e), (g), and (h) should be dismissed for lack of sufficient proof.

Charge Five – Sub-Charges 5(b), (c), (d), (f) and (i) are overlapping and will be considered together. The record shows that respondent did appear in the hallway outside a teacher's classroom and met a pupil to give him some advice. The hearing examiner also finds that respondent placed his clenched fist against the teacher's chin and that this gesture was threatening to the teacher. Her fear for her pupils was demonstrated in that she had them leave by a rear door and then hurriedly reported to the principal.

The testimony of the Principal, the Supervisor of Buildings and Grounds, the Secretary-Business Manager, and a teacher is more than sufficient to show that respondent was intoxicated on December 1, 1972.

Respondent moved for the dismissal of all charges on the grounds that the Board failed to notify him pursuant to *N.J.S.A.* 18A:6-12 which reads as follows:

> "The board shall not forward any charge of inefficiency to the commissioner, unless at least 90 days prior thereto and within the current or preceding school year, the board or the superintendent of schools of the district has given to the employee, against whom such charge is made, written notice of the alleged inefficiency, specifying the nature thereof with such particulars as to furnish the employee an opportunity to correct and overcome the same."

Respondent contends, also, that the Board had previously withheld his increment as a punishment for the school year 1972-73, and that the further filing of some of the same charges against him, with the Commissioner, places him in double jeopardy, and causes him to face a double penalty.

The Board contends that respondent's entire record should be examined by the Commissioner, including any charges which may have been used for withholding his increment, prior to a determination of this matter by the Commissioner.

The hearing examiner notes that respondent's increment was withheld during the 1972-73 school year, and that he did not appeal that action of the Board to the Commissioner. He recommends, therefore, that the entire record be considered for the purpose of determining a penalty, if any, for respondent.

The hearing examiner finds, also, that respondent's reliance on *N.J.S.A.* 18A:6-12 is misplaced. That statute is applicable only when a Board certifies charges of inefficiency, after first giving an employee a minimum of ninety days in which to improve on the areas in which he/she is inefficient. See *In the Tenure Hearing of Consuelo Garcia, School District of Midland Park,* 1970 *S.L.D.* 335. In the instant matter, the Board filed charges pursuant to the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10; therefore, the hearing examiner

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recommends that respondent's Motion to Dismiss for the aforementioned reasons be denied.

This concludes the report, findings and recommendations of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter and observes that neither party has filed a response to the hearing examiner's report.

The Commissioner concurs with the findings and recommendations of the hearing officer and, accordingly, dismisses Charge One and Charge Two. Also, under Charge Five, sub-charges 5(e), 5(g), and 5(h) are hereby dismissed for lack of proof. Charge Four is proven in part, but there is insufficient evidence to support a finding that respondent made physical contact with the pupil.

Charge Three is found to be true. The record shows clear evidence that respondent is guilty of improper behavior as charged, and further discloses that on three or four previous occasions respondent was reprimanded by either the Superintendent or the principal. In addition, respondent was reprimanded in writing on June 1, 1971 for similar conduct. (Exhibit P-1) The uncontradicted testimony of the principal is that he spoke to respondent five or six times, warning him to refrain from disciplinary actions against pupils. (Tr. 18)

Respondent moves for dismissal of the charges on the grounds that the Board failed to notify him in writing of his inefficiency and also failed to allow him ninety days to correct the same, pursuant to *N.J.S.A.* 18A:6-12. The Commissioner does not agree. The charges herein are centered upon misconduct and, therefore, are not within the scope of the statute requiring service of written notice of inefficiency to be corrected within a ninety-day period. *N.J.S.A.* 18A:6-12

From the record before him, the Commissioner finds and determines that respondent was intoxicated and insubordinate and that respondent threatened a teacher and pupils. The total of respondent's behavior constitutes a series of grave offenses.

A school janitor occupies a position of trust and responsibility necessitating high standards of dependability and morality. His functions far exceed opening and closing the schoolhouse and keeping it clean and tidy. The safety and welfare of the children may depend upon the proper discharge of his duties. He must always be in a fit condition to properly tend the heating plant and other potentially dangerous equipment.

The janitor in a public school plays an important role in the educational program in addition to maintaining the schoolhouse in a safe, clean, and efficient manner. He has a special kind of relationship to the children for whom he

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performs his services, and who look to him as an example of a helper and solver of many problems. He, like the teacher and other personnel who regularly come in contact with pupils, must be of exemplary conduct. If his conduct does not set a standard for children to emulate, then he fails to discharge an important aspect of his responsibilities.

The janitor also comes into regular contact with members of the school staff who are women, and he is expected to comport himself in a manner which will reflect dependability and inspire confidence. Reporting to duty under the influence of alcohol, using rough language, and acting in a menacing or threatening manner with respect to pupils or teachers are each grave offenses, which fall far short of acceptable standards of conduct for a janitor in a public school.

In previous instances, the Commissioner has imposed the penalty of dismissal for a janitor found guilty of being intoxicated and using rough language. *In the Matter of the Tenure Hearing of Joseph McDonald,* 1963 *S.L.D.* 213 Also, the Commissioner has dismissed janitorial employees for insubordination, disregarding orders, and failure to comply with instructions and perform assigned duties. *In the Matter of the Tenure Hearing of Adam Rogalinski,* 1967 *S.L.D.* 110; *In the Matter of the Tenure Hearing of Joseph Fortuna,* 1967 *S.L.D.* 150; *In the Matter of the Tenure Hearing of Theresa Cobb,* 1966 *S.L.D.* 197

In the instant matter, the Commissioner holds that the conduct of respondent, in a series of instances, has been so gross as to warrant the forfeiture of his tenure status and his employment with the Board of Education. Accordingly, the Commissioner orders respondent's dismissal as of the date of this decision.

The Commissioner observes that the Board's certification of the charges against respondent on December 15, 1972, included the determination to suspend him with pay pending the final decision of this matter by the Commissioner. However, in the transcript of the hearing in this matter, the Board states that it ceased payment of salary to respondent on April 3, 1973, because the Board had subsequently placed him on sick leave, and his accumulated sick leave was completely used up as of April 3, 1973. (Tr. 148-150)

The Commissioner is constrained to point out that he has dealt with variations of such Board actions in previous decisions. *In the Matter of the Tenure Hearing of Robert H. Beam, School District of the Borough of Sayreville, Middlesex County,* 1973 *S.L.D.* 157; *In the Matter of the Tenure Hearing of Dale Miller, School District of the Borough of Manville, Somerset County,* 1973 *S.L.D.* 409

It is clear that a local board of education may suspend a tenured employee with or without pay once charges are certified to the Commissioner. *N.J.S.A.* 18A:6-14 However, a board may not suspend a tenured employee with payment

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of a fraction or portion of his pay. Also, the suspension clearly must extend to the "*** final determination***" of the charges by the Commissioner. *Beam, supra; Miller, supra* In both *Beam* and *Miller*, the Commissioner held that local boards may not modify the precise requirements of *N.J.S.A.* 18A:6-14. The reasoning by which this determination was reached is amply set forth in both of the aforementioned decisions and, therefore, does not require repeating here.

In the instant matter, the Board's action first suspending respondent with pay in accordance with *N.J.S.A.* 18A:6-14 was properly within its discretion. However, the Board's subsequent action, placing respondent on sick leave until the expiration of that leave on April 3, 1973, was beyond the scope of the authority bestowed by *N.J.S.A.* 18A:6-14 and is wholly *ultra vires.* Therefore, the Board of Education of the Borough of Northvale is hereby ordered to pay to Joseph McDougall the full amount of his salary from April 3, 1973, when his salary was terminated, until the date of this determination, and the Board is also expected to expunge from its records the use by respondent of his sick leave days from December 15, 1972, the date of his suspension, until April 3, 1973.

In view of the fact that the Board formally suspended respondent with pay, there is no application of the 120 day provision contained in *N.J.S.A.* 18A:6-14 to this case.

COMMISSIONER OF EDUCATION

January 28, 1974

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Board of Education of the City of Elizabeth,

Petitioner,

v.

City Council of the City of Elizabeth, Union County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, O'Brien, Daaleman, Liotta & Muscatello (Raymond D. O'Brien, Esq., of Counsel)

For the Respondent, Frank P. Trocino, Esq.

Petitioner, the Board of Education of the City of Elizabeth, hereinafter "Board," and the City Council of the City of Elizabeth, hereinafter "Council," both have filed Motions for Summary Judgment in a dispute concerning the legality of a formal action of Council appropriating a sum of money raised by local taxation for public school purposes, and including a joint stipulation that approximately $500,000 will be budgeted by the Board for auxiliary services for pupils enrolled in nonpublic schools situated within the school district and coterminous with the City of Elizabeth.

The relevant material facts are not disputed, and both parties have waived oral argument and submitted Briefs or Memoranda of Law.

The concise issue is: May or may not the Board and Council agree to a stipulation of settlement of the 1972-73 school budget dispute in the amount of $606,460 with the included stipulation that $500,000 of the total amount shall be specifically allocated for auxiliary services for nonpublic school children.

A second issue, raising the question of the Commissioner's jurisdiction to decide this controversy, is argued affirmatively by the Board in its Brief and is not contested by Council. This kind of jurisdictional question concerning school budget disputes has been clearly decided by the New Jersey Supreme Court in *Board of Education of the Township of East Brunswick v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966) for type II school districts, and *Board of Education of the City of Elizabeth v. City Council of the City of Elizabeth, Union County,* 55 *N.J.* 501 (1970) for type I school districts.

The relevant facts in this matter are as follows: On January 26, 1972, the Board adopted its proposed school budget for 1972-73 in the amount of $20,015,625.33, of which $16,973,831.28 was to be raised by local taxation. This proposed budget included approximately $500,000 under J1100 Community Services, Special Projects, in six budgetary line items for auxiliary services for nonpublic schools. (Exhibit J-1) The proposed budget was submitted to the Board of School Estimate, and on March 28, 1972, the Board

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of Estimate, by a vote of three ayes and two nays, certified the amount of $16,973,831.28 as proposed by the Board to Council as the amount to be raised by local taxation for school purposes for 1972-73. The Council, meeting also on March 28, 1972, certified only $15,348,831.28 in local school taxes for 1972-73, this sum being $1,625,000 less than the amount proposed by the Board and certified by the Board of School Estimate.

The Board and Council agreed, after numerous conferences, to the full restoration of the $1,625,000 reduction in the following manner: (1) the sum of $363,860 was appropriated to the 1972-73 school budget by the Board from its unappropriated free balance in the current expense account; (2) the sum of $654,680 was restored for capital outlay by a bond ordinance #568 enacted by Council on July 25, 1972; and (3) the balance of $606,460 was certified to the Union County Board of Taxation by Council as an additional sum to be raised by local taxation, under the condition stipulated by both parties that $500,000 of this balance of $606,460 would be expended as budgeted for auxiliary services for nonpublic school children. The precise distribution of this $500,000 is set forth in Exhibits J-2, 3, 4 which will be discussed *post.*

The Board filed a Petition of Appeal, essentially for the purpose of determining the legality of its $500,000 budgetary appropriation for auxiliary services for nonpublic school children, which it had agreed with Council to provide. Council filed its Answer to the Petition of Appeal, and at a conference of counsel both parties agreed to file in effect Cross-Motions for Summary Judgment, a joint stipulation of facts, and to waive oral argument. This matter is now ripe for Summary Judgment.

The Board's budgetary proposal for providing auxiliary services to nonpublic schools consists of the following: line item J1100-213a includes eight art teachers, eight physical education teachers, eight music teachers, five remedial reading teachers and three bilingual teachers, for a total of $288,000; line item J1100-213c includes two speech therapists for a total of $20,000; line item J1100-214c includes two psychologists, two learning disabilities specialists and two psychiatric social workers for a total budgeted amount of $68,000; line item J1100-240 provides for teaching supplies for 8,000 pupils at five dollars per pupil in the total amount of $40,000. Provision is made for pension, social security, and health benefits insurance payments by the Board in line item J1100-820c for the aforementioned employees in the total amount of $75,200. Line item J1100-1240c provides instructional equipment, including four 16 mm projectors, four super 8 projectors, six filmstrip projectors, five opaque projectors, eight controlled readers, four language masters, and five overhead projectors, in the amount of $8,800. All of the above line items total $500,000. (Exhibit J-3)

The Board's plan specifies that all of the above-mentioned teaching staff members are properly certified Board employees who are assigned to provide services at fifteen nonpublic schools located within the school district.

In its Brief, the Board asserts that its auxiliary services plan provides services to nonpublic school children which are virtually identical to the services

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approved under the *New Jersey Nonpublic Elementary and Secondary Education Act* (*c.* 336, *L.* 1971), incorporated in our statutes as *N.J.S.A.* 18A:58-60 *et seq.* Under this Act, *N.J.S.A.* 18A:58-64, provided in pertinent part as follows:

> "In addition to the provisions of section 5 above [*N.J.S.A.* 18A:58-63], the commissioner shall provide, within the limits of the funds made available by the Legislature, such *supplies*, instructional materials, *equipment* and *auxiliary services* as are requested by the nonpublic school.***"
> (*Emphasis ours.*)

The Board avers that its auxiliary services plan is not in conflict with the legislative plan, but is merely an extension of the kind of assistance authorized by *N.J.S.A.* 18A:58-64.

No definitions of supplies, instructional materials, equipment, and auxiliary services are provided by *N.J.S.A.* 18A:58-63, 64. These definitions are found in the *New Jersey Administrative Code. N.J.A.C.* 6:8-1.3 defines supplies, instructional materials, equipment, and auxiliary services.

In *N.J.A.C.* 6:8-1.3, auxiliary services are defined as:

> "***nonadministrative services provided by personnel other than regular classroom teachers, school librarians, principals or other supervisory personnel to students whose special needs are not met in a standard or regular school program. Auxiliary services are limited to services, usually described as, or similar to, the following:
>
> "1. Remedial and corrective instruction and diagnostic services in reading and mathematics;
>
> "2. Corrective instruction in speech;
>
> "3. Adaptive or corrective instruction in physical education;
>
> "4. Guidance counseling and testing services;
>
> "5. Psychological testing and diagnostic services;
>
> "6. School nursing and health services.***"

The Board's plan adopts the above-stated definition of auxiliary services, with the exception of omitting reference to guidance counseling and testing services, and adds "cultural enrichment in the areas of art and music," which is nowhere mentioned in *N.J.A.C.* 6:8-1.3. (Exhibit J-2)

N.J.A.C. 6:8-1.2(f) limits auxiliary services and is quoted in pertinent part as follows:

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"Auxiliary services as defined herein shall be limited to those which are currently provided to the students of the public school district in which the nonpublic school is located***."

This limitation is also included in the Board's plan. (Exhibit J-2)

N.J.A.C. 6:8-1.2(f) also provides that:

"***Personnel providing such services must:

"1. Be employees of the local board of education at the time the services are provided;

"2. Be certified by the State Board of Examiners if such certification is required of similar personnel assigned to public schools;

"3. Be under the supervision of the local board of education."

The above provisions of *N.J.A.C.* 6:8-1.2(f) are also adopted as part of the Board's plan. In like manner, the Board has adopted portions of the definitions provided in *N.J.A.C.* 6:8-1.3 regarding supplies and equipment. (Exhibit J-2)

In an attempt to settle the instant matter prior to a determination by the Commissioner, the parties had previously agreed that the Board would allocate $363,860 to the 1972-73 school budget from its unappropriated free balance in the current expense account, Council would enact a bonding ordinance for school capital outlay projects in the amount of $654,680, and Council would adopt a resolution authorizing an emergency supplemental allocation in the amount of $500,000 to the Board for the nonpublic school auxiliary services plan. The Council did adopt such a resolution on June 13, 1972 for a supplemental emergency appropriation, and sought approval of this formal resolution from the Director of the Division of Local Government Services pursuant to *N.J.S.A.* 40A:4-48. The Commissioner of the Department of Community Affairs, which includes the Division of Local Government Services, sought the opinion of the Attorney General of this State regarding the legality under existing law of a supplemental emergency allocation by Council for the Board, for the stated purpose. The opinion of the Attorney General held that the proposed expenditure by Council was *ultra vires* its authority. The Director of the Division of Local Government Services, therefore, disapproved Council's resolution for the emergency appropriation. Thereafter, Council adopted the course of certifying an additional local school tax allocation to the Union County Board of Taxation in the amount of $606,460 as hereinbefore stated. The legal interpretation and conclusion reached by the Attorney General in his opinion dated August 18, 1972, regarding Council's resolution for emergency appropriation is applicable to this case in its present posture.

In the organic law of this State, the New Jersey Constitution, *Art.* VIII, *Sec.* IV, *Par.* 1, the people have mandated that:

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> "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years."

The Legislature has implemented this mandate by establishing the several local school districts, administered by local boards of education, whose members are either elected directly by the people or are appointed by elected officials. *N.J.S.A.* 18A:11-1; *N.J.S.A.* 18A:22-14 *et seq.* The several local boards of education are empowered by *N.J.S.A.* 18A:11-1(d) to:

> "Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district."

N.J.S.A. 18A:22-14, 15, dealing with school finances, limit the jurisdiction of local boards of education to expenditures for public schools. It is clear that the legislative plan for the administration, maintenance, and support of a system of free public schools, derived from the organic law, is limited to public schools. Nowhere in our education laws can be found any provision whatsoever for the appropriation and expenditure of local school taxes by local boards of education for the support of nonpublic schools, as proposed in the Board's plan in this specific case.

The Board argues that its plan is merely an extension of the services provided by the *New Jersey Nonpublic Elementary and Secondary Education Act* (*c.* 336, *L.* 1971), *N.J.S.A.* 18A:58-60 *et seq.* The legality of that Act was litigated in the combined case of *Public Funds for Public Schools of New Jersey et al.* v. *Carl L. Marburger, Commissioner of Education of the State of New Jersey et al.*, and *Board of Education of the City of Orange* v. *Carl L. Marburger, Commissioner of Education of the State of New Jersey,* 358 *F. Supp.* 29 (*D.N.J.* 1973). In that combined case a three-judge panel of the Federal District Court held that both *N.J.S.A.* 18A:58-63 (Section 5 of the Act) and *N.J.S.A.* 18A:58-64 (Section 6 of the Act) are unconstitutional.[1] Even if the Federal Court had not so held, the Board's reliance on the Act is misplaced, because the enactment of *N.J.S.A.* 18A:58-60 *et seq.* by the Legislature is clear evidence of legislative recognition that the subject of auxiliary and other services as provided therein, is not within the purview of local education boards without express authority conferred by the Legislature.

The Court's decision in *Public Funds for Public Schools, supra,* was based on an Act which was financed by legislative action. However, the reasons stated by the Court as to why the provisions of Section 6 of the Act (*N.J.S.A.* 18A:58-64, regarding auxiliary services, equipment, supplies, etc.) are unconstitutional are perfectly applicable to the Board's plan, which is almost identical to the Act, but is financed by local taxation. The Court's reasons for finding *N.J.S.A.* 18A:58-63 and *N.J.S.A.* 18A: 58-64 unconstitutional are now

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[1]Notice of Appeal has been filed in the Supreme Court of the United States, and is now awaiting disposition.

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well known to the local boards of education of this State and do not require repeating here.

The Board's last claim for validity of its plan is based upon the argument that its proposal to provide auxiliary services of the kind described, may be permitted under the concept of "dual enrollment" or "shared time," as described in Formal Opinion No. 4 of the Attorney General, November 29, 1965. The Commissioner has carefully examined the Board's auxiliary services plan for nonpublic school children and finds that the plan does not comport with the legal requirements of dual enrollment, although dual enrollment remains a perfectly viable form of educational plan in this State.

The Commissioner finds and determines for the reasons hereinbefore stated, that the Board of Education of the City of Elizabeth has no statutory authority to implement and finance by local district taxation, its plan for furnishing auxiliary services in the amount of $500,000 for pupils enrolled in the nonpublic schools situated within the school district of the City of Elizabeth. Accordingly, the Elizabeth Board of Education is hereby ordered to cease and desist forthwith from expending public school tax funds for such purposes as described herein in their plan for auxiliary services for nonpublic schools.

January 28, 1974

In the Matter of the Application of the Board of Education of the City of Union City, Hudson County.

COMMISSIONER OF EDUCATION

DECISION

At the general election held November 6, 1973, there appeared on the ballot in the City of Union City the following public question:

> "Shall the members of the Board of Education of the City of Union City, County of Hudson and State of New Jersey, be elected by the voters of the Union City School District at Annual School Elections?"

The announced tabulation of the voting on the above-stated question showed 5,723 "YES" votes and 2,747 "NO" votes, which resulted in a certification by the Board of County Canvassers of Hudson County that the vote was in the affirmative.

Thereafter, on December 20, 1973, the Union City Board of Education, hereinafter "Board," requested a Declaratory Judgment by the Commissioner of Education concerning the validity of the vote on the above-stated question to legally transform the Union City School District from a Type I to a Type II school district, pursuant to *N.J.S.A.* 18A:9-3 *et seq.* In this instance, a Declaratory Judgment is requested under *N.J.S.A.* 52:14B-8, which reads in part as follows:

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> "Subject to the provisions of section 4(b) and 4(e) of chapter 20, laws of 1944, as amended and supplemented (C. 52:17A-4b and 4e), an agency upon the request of any interested person may in its discretion make a declaratory ruling with respect to the applicability to any person, property or state of facts of any statute or rule enforced or administered by that agency. A declaratory ruling shall bind the agency and all parties to the proceedings on the state of facts alleged. Full opportunity for hearing shall be afforded to the interested parties. Such ruling shall be deemed a final decision or action subject to review in the Appellate Division of the Superior Court.***"

Accordingly, the Commissioner directed the Assistant Commissioner in charge of Controversies and Disputes to conduct an inquiry into the election, limited in scope to the public question. The inquiry was conducted by a representative of the Commissioner at the offices of the Hudson County Superintendent of Schools, Jersey City, on January 15, 1974.

In its Petition for Declaratory Judgment, the Board states its belief that a public question for changing a local school district from a Type I to a Type II district should properly include reference to the annual election of board members, and the annual submission of the school budget to the voters, as well as including the statutory authorization for such vote.

The Board does not seek to overturn the affirmative vote on the public question, and states that it will accept and be directed by the Declaratory Judgment of the Commissioner. Since certain doubts have been raised regarding whether the district is indeed transformed by the vote from a Type I to a Type II school district, the Board seeks a prompt decision that will permit the district to conduct its business effectively and hold a school election, if indeed, such an election is now properly authorized.

The Commissioner observes that *N.J.S.A.* 19:3-6 sets forth the requirements for a public question as follows:

> "Any public question voted upon at an election shall be presented in simple language that can be easily understood by the voter. The printed phrasing of said question on the ballots shall clearly set forth the true purpose of the matter being voted upon.***"

In this instance, the public question, *ante,* was indeed set forth in simple language. The issue is whether the wording of the question meets the test of the remainder of the statute, which requires that the voters understand the true purpose of the matter being voted upon.

The Commissioner finds ample proof in the undisputed testimony presented at the inquiry that at least three timely and well-advertised public forums were held at convenient locations for the express purpose of informing the public of important facts and issues arising from the public question, *ante.* The record shows that at these forums members of the Board of Education, the

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Mayor and Councilmen, civic organization leaders, and others presented information regarding the control of school elections, school budgets, curricula, and other important matters in school districts with appointed boards as compared to those with elected boards. The testimony further established that these forums were open to the entire citizenry and each included several hours of audience participation.

Additionally, the Commissioner finds that all persons who testified at the inquiry stated that the public question was clearly and easily understood by them and by those whom they knew. From the sum of the testimony, it is reasonable to conclude that all voters knew, or had ample opportunity to know, the full implications of the public question.

The Commissioner observes that the wording of the public question, *ante,* is not without precedent. Prior to the most recent (1968) revision of New Jersey School Laws (Title 18A, Education), *N.J.S.A.* 18:7-52.1 (now *N.J.S.A.* 18A:12-18) provided that:

> "In every incorporated town school district now governed by chapter seven of Title 18 of the Revised Statutes in which the board of education is appointed by the mayor, the question of whether or not such board of education shall be elected by the voters of the district at the regular school election may be submitted to the legal voters of the district at any special or regular school election to be held in the district, pursuant to a resolution adopted by the board of education, or at any general or municipal election, pursuant to a resolution adopted by the governing body of the town, directing that the question shall be so submitted. In any such district in which the board of education is elected by the legal voters, the question of whether or not such board of education shall be appointed by the mayor may be submitted to the legal voters in like manner.***"

The wording of the public question was described by *N.J.S.A.* 18:7-52.2 (omitted from Title 18A) as follows:

> "There shall be printed upon the official ballot to be used at such election the following: *** Shall the members of the board of education of . . . . . school district be . . . . . hereafter? Note: Insert in the second blank space in the above ballot the words 'elected' or 'appointed,' as the case may be. L. 1961, c. 100, p. 505 § 2."

In the revision of Title 18A, Education, the above-stated wording was omitted in *N.J.S.A.* 18A:12-18 as the result of the consolidation of *N.J.S.A.* 18:52.1 and 52.2.

The Commissioner observes that the public question submitted to the voters in the Union City School District did appear on the general election sample ballot (P-1) which was mailed to all registered voters prior to the general election. This public question also was printed in a large public notice to the voters of Hudson County, which was published in a daily newspaper, and which incidentally also contained notice of similar public questions for the school

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districts of the Township of North Bergen and the Township of Weehawken. (P-5)

A case which bears some elements similar to the instant matter is *James A. Richards v. Carol J. Barone, Town Clerk of the Township of Clinton et al.*, 114 *N.J. Super.* 243 (*Law Div.* 1971). In *Richards* action was brought to set aside a general election on the grounds that a public question was not published in accordance with statutes. The Court stated the issue as follows:

> "*** The key issue upon which the validity of the presentation of the question must stand or fall is whether the failure to advertise or publish notice of the public question so vitally influenced the election proceedings as to have repressed or contravened a full and free expression of the popular will of the voters of the Township of Clinton. *Sharrock v. Borough of Keansburg*, 15 *N.J. Super.* 11 (*App. Div.* 1951). ***" (at p. 247)

The Court held that, although there was an admitted failure to publish notice of the proposed public question at the general election as required by statute, in view of the mailing of sample ballots to any township residents showing the public question, and the vast amount of publicity concerning the issue embodied in the public question which was approved by nearly a two to one vote of those who voted on the question, it could not be said that the procedural omission had the effect of imposing so vital an influence that the election should be vitiated. The Court, therefore, held the election to be valid.

The similarity of *Richards, supra,* to the instant matter lies in the fact that the public question appeared on the sample ballot and had extensive publicity. A similar conclusion to *Richards* must be drawn in the instant matter, because here as in *Richards*, the record fails to disclose any evidence that the wording of the public question so vitally influenced the election as to have repressed or contravened a full and free expression of the popular will of the voters. The Commissioner so holds.

Accordingly, for the reasons stated above, the Commissioner finds and determines that the voters of the School District of Union City have elected that, subsequent to the February 1974 school election, the school district shall formally be designated as a Type II district pursuant to *N.J.S.A.* 18A:12-19 and *N.J.S.A.* 18A:9-3 *et seq.*

COMMISSIONER OF EDUCATION

January 29, 1974

You are viewing an archived copy from the New Jersey State Library.

"R.L.," a minor by his mother and natural guardian, "M.L.L.,"

Petitioner,

v.

Board of Education of the Penns Grove-Upper Penns Neck Regional School District and Maurice G. Kott, Acting Director of the Bureau of Children's Services of the State of New Jersey,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Camden Regional Legal Services, Inc. (Fred B. Last, Esq., of Counsel)

For the Respondents, Gerard J. Di Nicola, Esq.

Petitioner, a multiply handicapped pupil who resides in the School District of the Board of Education of Penns Grove-Upper Penns Neck, hereinafter "Board," alleges that the Board has improperly denied him the education to which he is entitled pursuant to statute and the New Jersey Constitution. The Board refutes that it has denied petitioner an educational opportunity and avers that it has complied with its obligations under the school laws of the State.

This matter has been submitted to the Commissioner for adjudication on exhibits and Briefs of counsel.

Petitioner, a multiply handicapped pupil, prays for an Order of the Commissioner of Education directing the Board to pay his tuition to The Woods School, a private residential school for handicapped pupils, pursuant to statute and constitutional mandate which requires local boards of education to provide appropriate free public education to all eligible residents.

The record shows that petitioner has been classified as a multiply handicapped pupil, *N.J.A.C.* 6-28-2.2(a), and has had several different educational opportunities, including home instruction, since the 1967-68 school year. Petitioner also admits that twelve inquiries were made over a six-year period in an attempt to find him a suitable educational program; however, he alleges that during that time he received practically no education, and that the Board's lack of diligence in seeking a proper placement for him demonstrates its bad faith. (Petitioner's Brief, at p. 17) He prays that the Commissioner order, as part of the relief he requests, that the Board continue his education after his twentieth birthday, for as long a period of time as required

> "*** TO PLACE HIM IN THE SAME POSITION HE WOULD HAVE ATTAINED HAD RESPONDENT MET ITS OBLIGATIONS SINCE JUNE 1967.***" (Petitioner's Brief, at p. 27)

The record shows specifically that, considering all the educational

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experiences offered to petitioner to date, the one which would be most satisfactory in meeting his special needs is The Woods School.

The Board does not deny that this may be a most suitable educational facility and program for petitioner, and it agrees

> "*** to send the petitioner to whatever school the State designates provided:
>
> "A. The State Department of Education finds the school for the Petitioner.
>
> "B. The State Department of Education authorizes the necessary expenditure of funds (to be shared by the State and local school district as provided by law).
>
> "C. The school so designated is willing to accept petitioner as a student.***" (Respondent's letter Memorandum of August 21, 1973, at p. 4)

Originally, the Bureau of Children's Services, hereinafter "B.C.S.," was named as a party respondent in the instant matter. At that time petitioner sought an order from the Commissioner compelling the Board and B.C.S. to provide all the funds for the placement of the petitioner at the private residential Woods School, Langhorne, Pennsylvania. Subject to petitioner's acceptance by The Woods School, the Board allocated $3,800, the cost of tuition at The Woods School, and B.C.S. later approved payment of $4,800 per year to defray the expense of room and board at this residential facility. However, the total annual cost for a residential pupil at The Woods School is $12,000; therefore, an additional $3,400 is required.

B.C.S. filed a Motion to Dismiss stating that the Commissioner lacked jurisdiction over that State agency. Further, B.C.S. stated that it was offering the maximum amount of funds allowable to petitioner under its administrative regulation, promulgated in compliance with applicable statutes. Petitioner thereafter consented to dismissing the Petition against Respondent Kott of B.C.S.

The Commissioner determines, therefore, that Respondent Kott is not a party to the instant matter.

Petitioner does not attack the Board's determination that $3,800 is the maximum amount of tuition which may be paid by the Board pursuant to *N.J.S.A.* 18A:46-21, rather he seeks additional moneys to pay the balance of his room and board and other necessary maintenance costs at The Woods School.

The salient issue to be determined herein, is whether or not the Board is required to pay the tuition plus room and board and other maintenance costs at the residential school. Petitioner believes that The Woods School is the only

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school identified so far, which can meet his special needs as a multiply handicapped pupil.

The authority of a board to pay tuition for handicapped pupils is found in *N.J.S.A.* 18A:46-21, which reads as follows:

> "Any board of education, jointure commission, state operated facility or private school which receives pupils from a sending district under this chapter shall determine a tuition rate to be paid by the sending board of education, but in no case shall the tuition rate in a nonpublic school exceed the maximum day class cost of education per pupil of children in similar special education classes in New Jersey public schools as determined according to a formula prescribed by the commissioner with the approval of the state board."

The record shows that the Board is willing to meet its obligation pursuant to this statute.

However, nowhere do the statutes give local boards of education the authority to expend public moneys for the payment of room and board and other maintenance fees for handicapped pupils, except where those pupils are accepted in State owned and operated institutions, such as the Marie H. Katzenbach School for the Deaf.

The Commissioner finds no violation of the statutes by the Board, nor is there a showing of any violation of State or federal constitutions with respect to providing an appropriate free public education for petitioner. The Board stands willing and able to pay petitioner's tuition to any suitable school facility meeting the parameters delimited in *N.J.S.A.* 18A:46-21, and is thereby meeting its legal obligations to petitioner.

The Commissioner sympathizes with petitioner and recognizes the very special needs of handicapped pupils, and more specifically, multiply handicapped pupils. The Commissioner directs the Board to continue its efforts to find a suitable school for the petitioner which will be fully funded by the moneys for which he is eligible by statute and the financial assistance offered by B.C.S. Until a suitable school is found, the Board is further directed to offer home instruction to petitioner.

Except for the directives contained herein, and absent a finding of any statutory, constitutional, or other violation of petitioner's rights by the Board, the Petition of Appeal is otherwise dismissed.

COMMISSIONER OF EDUCATION

January 31, 1974

Pending before State Board of Education

You are viewing an archived copy from the New Jersey State Library.

Thomas Highton et al.,

Petitioners,

v.

Board of Education of the City of Union, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Saul R. Alexander, Esq.

For the Respondent, Greenwood, Weiss & Shain (Stephen G. Weiss, Esq., of Counsel)

Petitioners, teaching staff members employed by the Board of Education of the City of Union, Hudson County, hereinafter "Board," allege that the Board improperly and illegally withheld salaries which were due them for a two-day period in the 1970-71 school year. The Board denies the contention.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner of Education at the office of the Hudson County Superintendent of Schools, Jersey City, on the days of December 5, 1972, and January 4 and March 8, 1973. Memoranda were subsequently submitted by respective counsel. The report of the hearing examiner is as follows:

During the spring of 1970, the Board officially adopted its calendar for the operation of its school system during the 1970-71 school year. This calendar contained a total of 184 days of scheduled attendance by pupils.

However, on February 1, 1971, the teachers of the district began a "job action" to withhold services which lasted for a period of five days through February 5, 1971. This job action, characterized by the Board as a "strike," was occasioned by a dispute over salary matters concerned with contract negotiations pertinent to the school year 1971-72.

The Board maintains that during this five-day period the schools of the district were "open" to pupils, although it seems clear that no pupils were in attendance in any school building of the district. In this regard, a bulletin (P-5) from the principal of the high school, dated June 17, 1971, states, *inter alia,* that:

> "*** *All* students were officially marked absent the 5 days of the Job Action.***" (*Emphasis supplied.*)

This statement receives corroboration from a review of three attendance registers submitted in evidence, which indicate, without exception, that every child in active enrollment in the Union City Public Schools was "absent" on each of the

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days February 1-5, 1971. (P-6, 7, 8) There is no evidence to the contrary.

Thus, as of the close of school on February 5, 1971, the teachers of the district had worked five fewer days than was provided by the Board's adopted calendar, and this fact became one facet of the total negotiations which were still in progress. These negotiations culminated on February 7, 1971 in a resolution of many of the difficulties which separated the parties and resulted in a "Memorandum of Agreement," hereinafter "Agreement" (P-3) signed by negotiators for the Board and the local education association on February 8, 1971.

This Agreement (P-3) contained two references pertaining to the five days of school which teachers had missed because of the "job action." Specifically, it contained two sentences with respect to the possibility that the days could be "made up"; namely,

> "*** The question of reprisals was improperly raised and doesn't belong in the discussions.
> "The question of make up days shall remain the prerogative of the Board of Education.***"

These references to "reprisals" and "make up days" are the principal elements in the controversy herein.

Petitioners maintain that they understand the Agreement (P-3) to mean that each of the five days missed could and would be made up and that the absences, *per se*, would not be reason for monetary reprisals against them. The Board maintains that it never made a commitment to permit all such make-up days, and that, to the contrary, the Board's stated and final position precluded such total make up as the teachers now aver they were promised.

Testimony concerning these contentions will be summarized in essence at the conclusion of this narrative recital. Suffice it to say here, that in the weeks between February 8, 1971, and February 27, 1971, the Board and petitioners discussed this matter of make-up days a number of times, but recorded no further agreements in writing.

Thereafter, on February 28, 1971, the Board sent the following bulletin to "All Personnel" of the district: (R-1)

> "*** Due to the 'Job Action' of the period February 1 through February 5, which amounts to 5 working days, the check due March 15th will reflect the necessary wage adjustments. "We are informing you at this time in the hope that you will have ample time to adjust your family budget.***"

However, on the evening of February 28, 1971, the Board evidently met again with petitioners to discuss the subject of make-up days. Thereafter, the Board failed to take an action to cause the checks issued to teachers on March 15,

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1971, to "*** reflect the necessary wage adjustments ***" of which the bulletin (R-1) had warned. Petitioners' pay checks were not reduced in fact, during all of March, nor in April or May.

Of some note in this regard, is a bulletin (P-9) from the President of the local education association to all fellow members dated March 1, 1971, which states:

> "*** The U.C.E.A. Negotiating Team met with the Board of Education Sunday, February 28th. The decision of the Board – Re: Make-up time will be reevaluated and a statement from the Board of Education will be forthcoming.***"

However, from March 1, 1971, through June 14, 1971, there is no further correspondence of record concerned with make-up days nor with salary deductions.

Between March 1, 1971, and June 30, 1971, several events took place which are pertinent to the above-stated issue. The President of the Board wrote to the Commissioner of Education in early May and inquired about possible penalties that might be assessed if the Board failed to provide the minimum year of 180 days which the statute provides as a prerequisite for full State support. *N.J.S.A.* 18A:58-15 The Commissioner's reply, dated May 19, 1971, said:

> "*** Thank you for your recent letter.
>
> "If official records of attendance were maintained for the school days of February 1 to February 5 inclusive, the Board of Education should have no problem in providing the minimum school year of 180 days.
>
> "If no attendance was recorded for those days and the Board of Education has provided public school facilities for at least 175 days, I will remit any penalty assessed against your apportionment of funds.***" (PR-1)

Thereafter on May 28, 1971, the Superintendent of Schools published a General School Bulletin, "To all Principals," (R-5) which said that:

> "*** The date for closing school this year will be Tuesday, June 22nd, 1971.***"

On June 15, 1971, the President of the Board addressed the following letter "To all employees of the Board of Education" (P-2):

> "*** As agreed to by Thomas Highton, president of the U.C.E.A. and the negotiating committee of the Union City Board of Education on February 28th, 1971, this check reflects a deduction of one day's pay. One additional day's pay will be deducted on the following check.***"

The President of the local education association, Thomas Highton, directly contradicts the assertion of the letter (P-2), that he agreed on February 28, 1971

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to any deduction of "pay" as the result of the "job action" absence of teachers. Specifically, he testified:

> "*** I was assured***[by the Board's negotiators] that whatever had to be done formally to guarantee that we would be able to make up the five days would be done.***" (Tr. I-53)

He also stated that he had met with the Superintendent of Schools in early March and together they had discussed five possible days for make up and decided on and scheduled two at that meeting. (Tr. I-55) He further said:

> "*** And I distinctly remember the discussion of making up the three days at the end of the year.***" (Tr. I-55)

The hearing examiner observes that the Superintendent's decision to close the Union City Public Schools on June 22, 1971, appears to have been a unilateral act on his part without formal sanction of the Board. According to testimony of the Board Secretary.

> "*** we were at a caucus and the superintendent said closing day has been moved up to June 22nd. We have so informed the principals to move up their graduations or they were informed what the graduation days were. They gave a list of the graduation days to the Board members for attendance, and we were informed that that is when the closing days were going to be.***" (Tr. II-148)

and further, at page 149,

> "*** The superintendent always decided the closing day of school.***" (See also R-6.)

The net effect of this action to close the Union City Public Schools on June 22, 1971, rather than on June 30, 1971, as provided by the Board's calendar, was to shorten the school year by a total of six school days (from 184 to 178 days). However, the schools of the district had, by agreement, been opened on two days which were previously scheduled as holidays (February 12 and May 20). Thus, the year, as reported by the Board to the State Department of Education, comprised 180 school days. (As noted, *ante,* there were no pupils in attendance on five of those days. The teachers' year comprised 175 working days; however, a full compliance with the schedule calendar would have resulted in a total of 181 working days for teachers and 181 days during which pupils were in actual school attendance.

The hearing examiner further notes that the memo of the President of the Board, dated June 15, 1971, to "all employees" (P-2) (which first informed petitioners that there would be a deduction of two days' salary from their paychecks in June) was not preceded by the formal act of the Board which authorized such withholding. Instead, the announced decision contained in the memo (P-2) to withhold the salary, preceded formal Board action by more than

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two weeks. The minutes of the meeting of the Board on June 30, 1971, contained this notation of a recommendation for action:

> "*** That the Secretary is hereby instructed to deduct 2 days salary from all personnel who were absent on a job action that occurred from February 1 to 5 inc., and that one day be deducted on June 15th and one day to be deducted in the last check in the month of June.***" (P-4)

This recommendation was, according to the minutes, approved by a majority of the Board – a total of three votes concurring, although one Board member testified he had moved the recommendation and abstained from voting.

Thus, a review of the school year in Union City during 1970-71 produces a seemingly direct dichotomy. On the one hand, the Board states it conducted a full school year's program of 180 days for the pupils entrusted to its care. For this program, the Board received its full share of State funding. On the other hand, the Board argues that the teachers in its employ, who were responsible for instructing the pupils, worked two days less than the full year.

From this seeming dichotomy, a series of questions may be propounded:

1. In the circumstances, was the Superintendent's decision to close school on June 22, 1971, a proper exercise of discretion?

2. What agreements, if any, concerned with make-up days were made between the parties herein in oral form during the period February 7 to June 14, 1971? How do, or should, such agreements, if any, modify the written agreement? (P-3)

3. Was the decision announced on June 15, 1971, (P-2) to withhold two days' pay from petitioners a lawful and proper exercise of discretion by the Board?

The hearing examiner finds that a decision with respect to questions 1 and 3, *ante,* may be made by the Commissioner from facts as reported, *ante,* and in the context of arguments of counsel. However, some additional reporting of testimony is in order with respect to what, if any, oral agreements were made between the parties as a supplement to the Agreement. (P-3) Some testimony in this regard has already been summarized and excerpted, *ante.*

On the one hand, petitioners testify that they understood the phrase contained in P-3 ("*** make up days shall remain the prerogative of the Board of Education***") to mean that they would have an opportunity to "make up" all the days they had been absent because of the job action. (Tr. I-52, 59, 60, 70, 95, 31, 32) According to the President of the Teachers' Association:

> "*** I was assured by Mr. Marotta***[negotiator for the Board] that whatever had to be done formally to guarantee that we would be able to make up the five days would be done.***" (Tr. I-53)

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This witness also testified that, subsequent to the time the Agreement (P-3) was executed, he had met with the Superintendent of Schools to discuss to make-up schedule (Tr. I-54), and that they had agreed on two days, formerly scheduled holidays, to be used for "make up." Further, he said they had an understanding that "*** we'd make up the three days at the end of the year.***" (Tr. I-55) This testimony of the President of the Teachers' Association was corroborated by testimony of a representative of the New Jersey Education Association (Tr. I-95), and by the Vice-President of the Teachers' Association. (Tr. I-30)

On the other hand, witnesses for the Board testified that while negotiations with respect to make-up days had produced some amelioration of the Board's original firm stand -- that the teachers would be required to forfeit five days of salary even though five days of school were "made up"--it was clearly understood at the close of the meeting on February 28, 1971 between negotiators for the Board and the teachers, that some make up would be permitted, but that two days' pay would be forfeit. (Tr. III-57, 60, 64, 88) (See also Tr. I-60.) According to the Board's chief negotiator:

> "*** they [negotiators for teachers] offered to make up three days and take the docking for two days instead of the five days that they were going to be docked.***" (Tr. III-61)

The testimony of this witness received corroboration from the testimony of the Secretary of the Board (Tr. II-146) and a member of the Board. (Tr. II-42-45)

Thus, it is true, as respondent states, in his Brief at page 13, with respect to the understanding of the phrase contained in P-3, that "*** the issue of credibility is drawn.***" On the one hand, the representatives of the Teachers' Association aver they were assured that it would be possible to make up and be paid for all of the days they missed in the "job action." On the other hand, the Board's representatives all testified, not only that the teachers understood they would be "docked" two days, but that the teachers themselves had put forth the proposal as a compromise in response to the Board's previous position.

However, the hearing examiner makes no finding of fact herein, grounded on such diverse and conflicting testimony with respect to the understanding, if any, which the parties in the matter, *sub judice,* reached on February 28, 1971 with respect to the phrase "*** make-up days shall remain the prerogative of the Board of Education.***" (P-3) The parol evidence with respect to an interpretation of the phrase is, in the judgment of the hearing examiner, an insufficient foundation for such a finding. However, while the testimony is conflicting, there is no conflict at all with respect to what the parties did in the weeks and months subsequent to February 28, 1971. Where a written agreement is ambiguous, the subsequent conduct of the parties in the performance of an agreement may serve to reveal their original understanding: *Michaels v. Brookchester, Inc.,* 26 *N.J.* 379 (1958); *Pusich v. Weininger,* 72 *N.J. Super.* 344 (1962).

In this regard, with respect to "conduct," the negotiator for the teachers immediately sent out a flyer (P-9), dated March 1, 1971, which stated that they

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had met with the Board. The flyer also contained the avowal:

"*** Make up time will be re-evaluated.***"

In effect, then, the negotiators of the Teachers' Association told their membership in the flyer sent subsequent to the meeting of February 28, 1971, which they had held with negotiators for the Board, that the matter of make-up days had not been finalized, as the Board now contends, to provide for a "docking" of two days' pay. The Secretary of the Board testified that he knew of this flyer (P-9) and that other members of the Board also saw it, but that they did "nothing" to counter what the Board now alleges was an inaccuracy. (Tr. III-25 According to this testimony, the Board did not feel it would be useful to "*** correct their inaccuracies***." (Tr. III-25) Accordingly, the Board never expressed a counterview to that contained in the flyer (P-9) during all the months of March, April or May 1971. Indeed, in the judgment of the hearing examiner, the Board subsequently indicated by its actions that the matter of make-up days was still a viable one, as the teachers have contended, because on March 15, 1971, the payroll for teachers failed to "*** reflect the necessary wage adjustments***" as the Board had indicated it would in the memo of the Board to all personnel dated February 28, 1971. (R-1)

Thus, in the opinion of the hearing examiner, the teachers in Union City had a right in the spring months of 1971 to believe that the matter of "make up" was not a foreclosed possibility and that, in fact, such days might still be allowed and compensated by the Board, assuming that such payments were legally proper. He so finds.

However, the hearing examiner finds that the principal question before the Commissioner at this juncture is not what the teachers of Union City were led to believe in the months of March, April, and May 1971; but, whether the belief was correctly founded in a viable, legally correct possibility. Thus, the question posed is: May a local board of education permit a make up of days lost because of a "job action" (or strike or concerted organized absence) when such "job action" and the requested make-up privilege occur, or are requested to be afforded, within the parameters of a contract period which begins on September 1, and extends through June 30 in a given school year?

The hearing examiner believes that this basic question must be answered, herein, by the Commissioner, but some recital and discussion of the "job action," *sub judice,* is a necessary prerequisite to such answer. Accordingly, the following recital and discussion is set forth.

Petitioners do not deny that there was a "job action" lasting for five days in February 1971, during which time "*** no one went to work***." (Tr. I-100) Various witnesses for petitioners also referred to the "job action" as a "strike" (Tr. I-105) or a "work stoppage." (Tr. I-50) However, counsel for petitioners maintains:

"*** First of all, it is the contention of the Petitioners in this case that the

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> job action entered into by the teachers during the first week in February was *not* a violation of any then-existing contract. There has been no adjudication of the legality of the teachers' work stoppage, principally because the Board never instituted any proceedings on the matter, which is the usual course of events in the case like the present one. The teachers and the Board were conducting negotiations for a new contract, and there is nothing in the strictures of labor law which prohibits a job action in support of a bargaining position***." (Post-Hearing Brief of Petitioner, at p. 1) (*Emphasis in text.*)

Respondent avers:

> "*** It is the position of the Board that the five day period in question was a 'strike' in plain violation of State law and a public policy and that the term 'work stoppage' is a patently impermissible euphemism for the actual fact.***" (Post-Hearing Brief of Respondent, at p. 2)

In assessing these arguments and the fact pertinent to them, it is the finding of the hearing examiner, herein, that teachers in the employ of the Board were absent without permission from their contracted and assigned posts of duty during the period February 1 to February 5, 1971, and that it is correct to characterize such absence variously as: (1) work stoppage; (2) job action; (3) strike. As the Court stated in *Board of Education of the Borough of Union Beach v. New Jersey Education Association et al.*, 53 *N.J.* 29 (1968):

> "*** That the conventional terminology of a 'strike' nowhere appears is of no moment. The substance of a situation and not its shape must control. A doctrine designed to protect the public interest is equal to any demand upon it. It does not yield to guise or ingenuity.***" (at pp. 39-40)

In common parlance, then, it is clear that there was a "strike" of five days by the teachers of Union City in February 1971, during which time an educational program was not afforded to the pupils of Union City. The hearing examiner so finds.

Such strikes are illegal in New Jersey and, again according to the Court in *Union Beach, supra:*

> "*** It has long been the rule in our State that public employees may not strike. *** And we have rejected the notion that public employees may resort to strike because they think their cause is just or in the public good. *** Defendants deny there was a 'strike.' They seek to distinguish the usual concerted refusal to work from what transpired here. *** But the subject is the public service, and the distinctions defendants advance are irrelevant to it, however arguable they may be in the context of private employment. Unlike the private employer, a public agency may not retire. The public demand for services which makes illegal a strike against government inveighs against any other concerted action designed to deny government the necessary manpower, whether by terminating existing

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employments in any mode or by obstructing access to the labor market. Government may not be brought to a halt. So our criminal statute, *N.J.S.* 2A:98-1, provides in simple but pervasive terms that any two or more persons who conspire 'to commit any act' for the 'obstruction of *** the due administration of the laws' are guilty of a misdemeanor.

"Hence, although the right of an individual to resign or to refuse public employment is undeniable, yet two or more may not agree to follow a common course to the end that an agency of government shall be unable to function.***" (at pp. 36-38)

In summary, the principal findings of the hearing examiner are as follows:

1. Petitioners engaged in a five-day work stoppage which can be labelled as a strike;

2. Thereafter, petitioners were led by the actions, or inactions, of the Board to believe that the matter of make-up days had not been finally resolved and that such make up was still a possibility.

In such a circumstance, the abrupt notice of the Board contained in the memo of the President of the Board (P-2), which was sent to all employees on June 15, 1971, and which stated that such make up would not be afforded and that, in fact, two days' "pay" would be deducted from June pay checks, was an understandably disturbing one to those affected by it. The question that remains for determination is, as stated previously, whether it was also illegal.

In this regard, there was a recent decision of the Commissioner with relevance to the matter herein controverted. In this decision, *Evan Goldman, and others similarly situated and the Bergenfield Education Association v. Board of Education of the Borough of Bergenfield, Bergen County*, 1973 *S.L.D.* 441, the Commissioner was confronted with a somewhat similar set of circumstances. While in that matter, unlike the matter, *sub judice*, there had been court litigation prior to litigation before the Commissioner, the Commissioner was asked to determine, in effect, whether two days of illegal absences of the petitioners could be "made up" by subsequent service which was over and above that required for full State reimbursement of State funds to school districts (180 days), but which service was within the parameter of a contract year ending on June 30. In considering that circumstance, the Commissioner said:

"*** Considering the illegal absence of petitioners on January 20 and 21, 1971, as a fact, and the Commissioner so holds, the Board of Education had no authority of law to remunerate petitioners the amount of two days' wages for such illegal absences and failure to render services. *Greenberg v. Board of Education of the City of New Brunswick, supra; Borshadel, supra* Such a payment would constitute a gift of public monies for services not rendered. *Joseph McKay v. Board of Education of the Borough of Red Bank, Monmouth County*, 1972 *S.L.D.* 606 ***" (at p. 446)

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Thereafter, the Commissioner dismissed the Petition and its prayer that petitioners be reimbursed for two days' salary by virtue of the fact that they had worked 182 days rather than the 180 days required for full State reimbursement, and he said:

> "*** In the judgment of the Commissioner, this Board or any local board of education in similar circumstances, may extend a school calendar to June 30, or require the presence and services of its employees until June 30, because, as in this case, the employees have been formally employed by contract for the period of time up to and including June 30.***"
>
> (at pp. 447-448)

Stated in another manner, the Commissioner held in *Goldman, supra,* that where, as in the matter herein, the teachers of a district chose to express discontent by an illegal strike, the salary for the days of their absence was forfeit, even though the schools of the district had been open for pupil instruction for a period in excess of the 180-day period required by statute for full State reimbursement. Such a holding would apparently preclude the kind of "make up" to which petitioners, herein, believe they were entitled and promised, and which the hearing examiner had held was still regarded as a viable subject for decision by the Board in the spring months of 1971.

Finally, the hearing examiner makes the following observations and findings with respect to the controverted matters herein.

1. It was farcical to say, as the Board did in June 1971, that a total of 180 school days of educational opportunity had been afforded the pupils of Union City during the 1970-71 school year. In point of fact, only 175 days had been afforded to such pupils even though a full implementation of the Board's calendar through June 1971, would have been sufficient to meet the minimum requirement for full State aid purposes and been of benefit to the pupils and the community at large.

2. The apparently unilateral act of the Superintendent to abort the Board's calendar for the 1970-71 school year before it had run its course was, in the opinion of the hearing examiner, contrary to the best interests of the pupils in Union City and at variance with repeated admonitions of the Commissioner. *Carl Moldovan et al. v. Board of Education of the Township of Hamilton, Mercer County,* 1971 *S.L.D.* 246; *Evan Goldman, supra.* Most recently in *Goldman,* the Commissioner said in this regard:

> "*** the Commissioner believes that a school calendar, once adopted by official action of a board of education, should remain as the prescribed timetable for effectuating the instructional plans of the school district for the academic year that follows, and it should not be aborted merely because the bare minimum of 180 days has been achieved. The goal should be not a minimum expenditure of time but a maximum effort toward full educational opportunity for every pupil in the State.***" (at p. 448)

3. The hearing examiner believes that if it is finally held by the

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Commissioner, that the Board is precluded by the Commissioner's decision in *Goldman*, from paying petitioners for two additional make-up days at this juncture, it is correct to say that the Board compensated petitioner for three other days in error. However, in consideration of the delayed nature of this adjudication and of all other factors, the hearing examiner recommends that no attempt to recoup the amount of such payments be ordered by the Commissioner.

Finally, and in summation, the hearing examiner has found that:

1. Petitioners had engaged in February 1971, in a job action or strike which lasted for a period of five days;

2. Thereafter, petitioners were permitted to make up or were paid for a total of three such days and were led to believe that make up of an additional two days was still a possibility;

3. In the month of June 1971, there were abrupt notices to the effect that;

   (a) the school calendar would be aborted,
   (b) two days' pay would be withheld from all teachers;

4. There is no evidence that such notices were grounded in formal resolution of the Board adopted prior to the time the notices were given.

Thus, the central issue may be posed: In the context of such findings, are petitioners legally entitled at this juncture to reimbursement of two days' pay because they were not allowed to make up two days of their absences from work in February 1971? If they are so entitled, the compensation should be ordered forthwith. If they are not so entitled, because of the decision in *Goldman, supra,* the hearing examiner recommends that other determinations of the Board with respect to compensation be allowed to stand.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, and the report of the hearing examiner and exceptions thereto filed by the parties.

In the judgment of the Commissioner, this case is a prime and distressing example of how a disagreement over negotiations between a local board of education and its teaching staff members, regardless of the outcome, has the final adverse effect of making victims of the school children who are intended to be the main beneficiaries of the public school system.

The final and irreparable fact which emerges from this dispute is that each one of the total number of pupils enrolled in the public schools of Union City

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received only 175 days of instruction during the 1970-71 school year, instead of 184 days, as originally set forth in the school calendar. This represents a substantial total loss of educational opportunity for these children.

The record before the Commissioner clearly supports the finding that the teaching staff members of the Union City School District engaged in a strike for five days beginning February 1, 1971 and ending February 5, 1971. As was hereinbefore stated, the Supreme Court of this State has ruled that public employees may not strike. *Board of Education of the Borough of Union Beach v. New Jersey Education Association et al.,* 53 *N.J.* 29, 36, 38 (1968)

Considering the illegal five-day absence of petitioners as a fact, and the Commissioner so holds, the precise issues for determination are whether or not petitioners are entitled to reimbursement of two days' wages which were deducted by the Board, and whether or not the Board's action of paying petitioners three days' wages was legal and proper.

In several previous instances, the Commissioner has held that a local board of education has no authority of law to remunerate teaching staff members, school clerical staff and other employees for illegal absences, whether resulting from a strike or other causes. *Florence P. Greenberg v. Board of Education of the City of New Brunswick, Middlesex County,* 1963 *S.L.D.* 59; *Evelyn Borshadel et al. v. Board of Education of the Township of North Bergen, Hudson County,* 1972 *S.L.D.* 353; *Evan Goldman et al. v. Board of Education of the Borough of Bergenfield, Bergen County,* 1973 *S.L.D.* 441

However, in this case petitioners claim that they did perform their teaching duties on two days which had originally been scheduled in the school calendar as vacation days. Also, petitioners assert that they were willing to teach for three additional days beyond the ending date of the academic year in June 1971, as set forth in the school calendar. The Board admits that it paid a total of three days' wages to petitioners, one of which was for "good behavior," and deducted two days' wages from each petitioner.

It is not necessary to repeat the rather lengthy record of conferences which took place between the parties following the five-day strike in February 1971, all of which centered upon the school calendar and petitioners' efforts to avoid deductions in their wages for the five days of illegal absence. It suffices to say that both parties lacked a clear understanding of the purpose of a school calendar and its role in the relationship between the Board and the teaching staff members.

In *Carl Moldovan et al. v. Board of Education of the Township of Hamilton, Mercer County,* 1971 *S.L.D.* 246, the Commissioner extensively reviewed the purposes of the school calendar and the relevant statutes which are *in pari materia.* The Commissioner stated the following conclusion:

> "*** The whole of these parts clearly indicates that the Legislature has provided for: (1) a defined school year, (2) the adoption of a school

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> calendar, (3) a minimum number of 180 days of operation of public schools in order for a local board to receive an apportionment of state aid, and (4) compulsory school attendance with penalties for the violation thereof. These statutes *in pari materia* serve the State policy and the deeply-rooted purpose of the law to provide for '*** a thorough and efficient system of public schools for the instruction of all the children in the State***.' " (at p. 251)

Each district board of education in this State bears the responsibility to conduct the public schools within its charge in the best interests of the children to be served. *Clinton F. Smith et al. v. Board of Education of the Borough of Paramus et al., Bergen County,* 1968 *S.L.D.* 62, affirmed 1968 *S.L.D.* 69, dismissed New Jersey Superior Court, Appellate Division, September 8, 1969 This overriding purpose of the public schools is clearly expressed in *Bates v. Board of Education,* 72 *P.* 907 (*Calif. Sup. Ct.* 1903), *McGrath v. Burkhart,* 280 *P.* 2*d* 864 (*Calif. App.* 1955), quoted with approval in *Victor Porcelli et al. v. Franklyn Titus, Superintendent of the Newark Board of Education and the Newark Board of Education, Essex County,* 1968 *S.L.D.* 225, affirmed by the State Board of Education April 2, 1969, affirmed 108 *N.J. Super.* 301, 312 (*App. Div.* 1969), *cert. denied* 55 *N.J.* 310 (1970):

> "***' The public schools were not created, nor are they supported for the benefit of the teachers therein, *** but for the benefit of the pupils and the resulting benefit to their parents and the Community at large. '***" (at p. 229)

As the Commissioner previously stated in *Moldovan, supra,* and *Goldman, supra,* a local board of education has the authority and the required duty to adopt a school calendar as part of the instructional plan which will best serve the interests of the children attending the public schools within the district.

In *Moldovan, supra,* the Commissioner further stated the following:

> "*** The school calendar is in essence the prescribed time schedule for effectuating the instructional plan for the school year. Except as provided for by *N.J.S.A.* 18A:25-3 [that no teaching staff member shall be required to perform his duties on a public holiday], the calendar is binding upon all employees of the school district, but does not limit the particular days or the number of days that the local board of education may require various employees or groups of employees to report for duty. For example, the Commissioner notices that, in many school districts, teachers as well as other employees are required to perform duties and services on days which are designated by the school calendar as vacation days for the pupils.***" (at p. 253)

In *Goldman, supra,* the Commissioner took notice of the long-established practice in public school districts of holding professional workshops, seminars and other similar meetings on days not designated for attendance by pupils. The Commissioner stated that this "*** is a beneficial and necessary function to

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assist members of the teaching staff to better perform their duties.***" (at p. 447)

In the instant matter, the Board erred in not providing the 184 days of instruction for its pupils as provided for in its school calendar. In the judgment of the Commissioner, this Board and every other local board in similar circumstances, may extend the school calendar until June 30, because as in this case, the teaching staff members have been formally employed by contract and receive remuneration for the period of time up to and including June 30. In its response to the hearing examiner's report, the Board agrees that it and the teaching staff members should have provided 184 days of instruction for the pupils. The Board states that, acting on the assumption that 180 days would be sufficient, and assuming that the five strike days would be counted for state school aid purposes, it terminated the school year on June 22, 1971. It is this action that petitioners' claim deprived them of the opportunity to teach for three additional days. Of course, petitioners' position is based upon the assumption that the addition of the days of instruction for pupils would remove the possibility of their losing wages as a result of the strike. But the Board has no authority of law to pay wages to its employees for such illegal absence. Therefore, the Board's payment of three days' wages was an improper action, and the Commissioner so holds. At this point in time, it would not be practical for the Board to attempt to recoup the total sum which it paid in wages for the three days.

Petitioners' contention that they should be paid two days' wages because they were deprived of the opportunity to provide extra days of duties is groundless, and their cause of action is without merit, since the Board had no legal authority to pay them for the five days of illegal absence. Petitioners' claim is based on an erroneous assumption that they are required to perform their duties for only 180 days in order to earn their full contracted salaries. If that view were to prevail, it would create a situation wherein teaching staff members could strike for any number of days in the school calendar in excess of 180, without suffering any financial penalty for such an illegal act. Clearly such a holding would create an individual evil wholly contrary to the public policy of this State.

The Commissioner is constrained to repeat the statement made in *Goldman, supra,* that the school calendar, once adopted by official action of a local board of education, should remain as the prescribed timetable for effectuating the instructional plan of the school district for the academic year, and it should not be aborted merely because the bare minimum of 180 days has been reached. The goal should not be a minimum expenditure of time but a maximum effort to provide the fullest educational opportunity for every pupil in this State.

For the reasons stated above, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

February 4, 1974

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Thomas Highton et al.,

Petitioners-Appellants,

v.

Board of Education of the City of Union, Hudson County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 4, 1974

For the Petitioners-Appellants, Saul R. Alexander, Esq.

For the Respondent-Appellee, Scipio L. Africano, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

June 5, 1974

Thomas Aitken,

Petitioner,

v.

Board of Education of the Township of Manalapan, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Chamlin and Schottland (Michael D. Schottland, Esq., of Counsel)

For the Respondent, Krusen & Dawes (John I. Dawes, Esq., of Counsel)

Petitioner, a nontenured teaching staff member employed during the 1971-72 and 1972-73 school years by the Board of Education of the Township of Manalapan, Monmouth County, hereinafter "Board," avers that he is entitled to a third year of employment because he was not afforded timely written notice of his contract renewal or nonrenewal for the 1973-74 school year. The Board denies petitioner's allegation and maintains that such notice was properly given.

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A hearing in this matter was conducted on October 3, 1973 at the office of the Monmouth County Superintendent of Schools, Freehold, by a hearing examiner appointed by the Commissioner. Subsequent to the hearing, Briefs were filed by counsel. The report of the hearing examiner is as follows:

Petitioner, a teacher employed by the Board as a substitute teacher during the 1970-71 school year was thereafter, during the years of 1971-72 and 1972-73, employed by the Board as a full-time teaching staff member. However, at some time in March or April 1973, he was apprised, in oral form, that there was some question with respect to the renewal of his contract for the 1973-74 school year.

While not denying this fact, petitioner avows, in the Petition herein, that the Board never did finally and conclusively decide his status prior to April 30, 1973, as they were required to do by law. Also, says petitioner, even if the Commissioner holds that the Board had so decided, no timely notice of this decision was given to him. He maintains, therefore, that this failure entitled him to assume that, as of May 1, 1973, he was assured of employment by the Board for the 1973-74 school year.

The Board asserts that petitioner knew his employment status was uncertain at an early date in April 1973, and that on April 13, 1973, he was afforded both oral and written notice that his contract would not be renewed. On this date, the Board avers, petitioner met with the Superintendent of Schools and other school officials, and immediately thereafter was informed by telegram and letter of his status. Therefore, in the Board's view, it had conformed with the law which is pertinent to such notice.

Thus, the issues, which require a finding of fact herein, may be concisely stated:

1). Did the Board, prior to April 30, 1973, decide, either in private or public session, not to renew petitioner's contract for the 1973-74 school year?

2). If it did, was "written notice" of such decision, as required by law, *(N.J.S.A.* 18A:27-10) given to petitioner thereafter in timely sequence?

The statute of pertinence herein is *N.J.S.A.* 18A:27-10, which was recently enacted by the New Jersey Legislature and was effective for the first time during the 1972-73 school year. It provides in pertinent part, that "written notice" must be afforded before April 30 in any given school year to all nontenured teaching staff members whose contracts are not to be renewed for a succeeding school year or, in the alternative, that contracts will be awarded. Specifically, the statute provides:

"On or before April 30 in each year, every *board of education* in the State *shall give* to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

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> "a. A *written offer* of a contract for employment for the next succeeding year***, or
>
> "b. A *written notice* that such employment will not be offered." *(Emphasis supplied.)*

Thus, it is clear that it is the local board of education which must decide the status of its nontenured employees each year, and it must do so on or before April 30. It is equally clear that subsequent to such decision, but within the same time parameter, the decision must be transmitted by the Board through its administrative agents in "written form" to such employees.

The proofs presented by petitioner herein have been assessed, in the context of the clear and precise statutory language, by the hearing examiner. As a result of this assessment, the hearing examiner finds that a preponderance of the believable evidence educed at the hearing leads to the firm conclusion that:

> (1) the Board had not finally decided petitioner's status by April 30, 1973, but even if it were held to the contrary;
>
> (2) no proper notice of such decision was transmitted in written form to petitioner in timely sequence thereafter.

Certain pertinent testimony that led to these findings is set forth as follows:

With regard to (1), *ante,* it was the testimony of the Superintendent of Schools that the Board had met on March 22, 1973, and that a principal subject of discussion that evening was the employment of personnel for the 1973-74 school year. According to the Superintendent's testimony, on that occasion the Board decided after a study of certain performance reviews that a new contract would not be offered to petitioner. (Tr. 63) This testimony was both corroborated (Tr. 73) and contradicted (Tr. 82) by the President of the Board who said, with respect to the March 22 meeting, that the Board, on that occasion, had voted to refuse petitioner a new contract and:

> "***At the conclusion of the meeting I instructed Mr. Barrett [Board Secretary] to inform Mr. Swalm [Superintendent] to issue the official notices as were required.***" (Tr. 78)

The contradiction, however, is important, and occurred with reference to a meeting of the Board which was conducted by the President on May 1, 1973, after the deadline date of April 30 which is set forth in the statute. *N.J.S.A.* 18A:27-10 On that occasion, the Board President testified as follows:

> "***I opened the meeting [of May 1, 1973], naturally, and Mr. Murphy [a representative of the local teacher's association] then proceeded to ask me if we had, in fact, made a decision [with respect to the employment status of petitioner].***

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"Mr. Anderson: [hearing examiner] ***What was said? What did you say?

"***I said that we had not reached a decision.***" (Tr. 82)

Such latter testimony of the Board's President was a direct and positive affirmation of the testimony of petitioner with respect to the meeting of May 1, 1973. Petitioner recited the events of that evening in this manner: (Tr. 24-25)

> "***When we went inside, Joe [Joseph Murphy, President of the local teachers association] was introduced to everybody and we sat down and Joe made the statement that was the list that was in the Board Meeting subject to change because my name was not on it, and Mr. Morelli [President of the Board] said 'Yes, it was.; and he said, 'Therefore, have you made a decision on Tom's [petitioner] case?' and he said, 'No, we have not.'
>
> "Joe then repeated again, 'In other words, you are trying to say to me that you have not made–the Board has not made a final decision pertaining to Tom's case?' and he said, 'No, Joe. That is the reason we are here: To make it fair and hear your side of the story.'
>
> "Again, Joe repeated, for the third time, 'Well, to make it perfectly clear, you have not made a decision?' and Mr. Morelli said, 'Yes, Joe. That is what we are here for.' "

(See also the testimony of Mr. Hayden Messner, a representative of the New Jersey Education Association (Tr. 93), and the testimony of Mr. Joseph Murphy (Tr. 10). Such testimony, together with that of petitioner and the Board President, *ante,* serves, in the judgment of the hearing examiner, to confirm a finding that the Board had not, prior to April 30, 1973, reached a decision with regard to petitioner's employment status for the 1973-74 school year.)

Additionally, the hearing examiner observes that petitioner's testimony makes reference to a "list that was in the Board meeting." The reference was to a list of teaching staff members approved by the Board for reemployment for the 1973-74 school year and such list was approved by the Board at a regular meeting held April 22, 1973. Petitioner's name was not contained therein.

This completes a recital of the principal items of testimony with respect to the finding of the hearing examiner, *ante,* that the Board had not, prior to April 30, 1973, definitely decided petitioner's status with respect to his employment during the 1973-74 school year.

However, if this finding is not sustained, it is relevant to discuss the proofs with respect to (2), whether or not petitioner was afforded the "written notice" that his contract would not be renewed for the 1973-74 school year as required by statute. *N.J.S.A.* 18A:27-10

The evidence in this regard is documentary in its essential substance and

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consists of a telegram and letter which the Superintendent addressed to petitioner immediately subsequent to the time of their meeting on April 13, 1973.

The letter of that date (P-3) is quoted in its entirety as follows:

"***Upon the basis of your performance review I have recommended to the Board of Education that a contract not be issued to you for 1973-74.***"

The telegram of the same date (P-2) made reference to the letter and stated:

"***After careful consideration no change in plan (sic) official letter mailed April 13.***"

Later, on May 2, 1973, a similar telegram (R-1) was sent to petitioner and, again, the reference contained therein was to the letter (P-2) of April 13, 1973.

Thus, the finding with respect to whether or not the Board did or did not provide petitioner with the timely "written notice" that his contract would not be renewed rests entirely on the letter from the Superintendent to petitioner (P-3), *ante*, which apprised him only of the Superintendent's recommendation that petitioner not be reemployed by the Board. Consequently, the hearing examiner has found, on the basis of all available written documentation, that "written notice" was not afforded petitioner in this instance as required by law (*N.J.S.A.* 18A:27-10), since such notice was nowhere contained, or explicitly set forth, in the documentation at the hearing, *ante.*

Finally, it is noted that, in compliance with a second statute of relevance herein (*N.J.S.A.* 18A:27-12), petitioner sent a letter dated May 17, 1973 to the Board and stated therein that he would accept employment for the 1973-74 school year. This letter was timely in that the statute of reference (*N.J.S.A.* 18A:27-12) requires such notification "in writing, on or before June 1" in each school year.

In summary, the hearing examiner finds that the Board had not decided petitioner's status as a teaching staff member as required by law on or before April 30, 1973, but even if it is held that it did, no "written notice" of the Board's action was transmitted to him. Additionally, the hearing examiner finds petitioner did notify the Board in writing of his intention to return to the Board's employ for the 1973-74 school year, and that such notification was timely and in conformity with statutory prescription.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter and the report of the hearing examiner. He notes that no exceptions thereto were filed within the specified time.

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The Commissioner finds and determines that the Board did not conclusively determine petitioner's status with respect to employment for the 1973-74 school year prior to April 30, 1973. Also, no written notice of a decision by the Board to refuse petitioner employment for the 1973-74 school year was afforded petitioner on or before April 30, 1973, as required by *N.J.S.A.* 18:27-10. The notice by the Superintendent (P-3) of his decision not to recommend a contract for petitioner does not satisfy the clear requirement of the statute for written notice by a Board of a decision not to offer such contract for the ensuing school year. To hold otherwise would render the statute, *N.J.S.A.* 18A:27-10, meaningless.

It is a well-accepted principle, frequently stated by the courts and by the Commissioner, that:

> "*** Statutory language is to be given its ordinary meaning in the absence of specific intent to the contrary.***" *Abbott Dairies v. Armstrong,* 14 *N.J.* 325 (1954)

> "*** Construction that will render any part of a statute inoperative, superfluous or meaningless is to be avoided.***" *Hoffman v. Hock,* 8 *N.J.* 406, 407 (1952)

Accordingly, the Commissioner determines that, absent written notice to petitioner on or before April 30, 1973 of a decision by the Board not to offer petitioner a contract for the succeeding school year, and, in view of the written acceptance of such employment by petitioner (P-6) as required by *N.J.S.A.* 18A:27-12, a contract between the Board and petitioner is in effect for the school year 1973-74. Such contract must provide the benefits accorded by petitioner's 1972-73 contract with the Board, but with such increases in salary as may be required by Board policy during the 1973-74 school year. *N.J.S.A.* 18A:27-11 The Commissioner directs the Board to restore petitioner forthwith to his position as a teacher in the schools of the Township of Manalapan, and further directs the Board to provide petitioner with a copy of his 1973-74 employment contract.

Additionally, the Commissioner directs the Board to pay to petitioner any salary withheld from him during the period beginning September 1973, to this date, mitigated by any earnings of petitioner during this period.

Finally, with regard to petitioner's prayer for the awarding of counsel fees in the instant matter, the Commissioner can find no statutory provision which permits such relief. The Commissioner stated in *Noorigian v. Board of Education of Jersey City,* 1972 *S.L.D.* 266:

> "*** The Commissioner has previously determined that there is no provision in the statutes for payment of interest, costs and legal fees.***
>
> "Nor can there be found any precedent or statutory authority for awarding counsel fees as claimed by petitioner.***" (at p. 272)

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In accord therewith, the Commissioner denies petitioner's prayer for the award of legal fees.

COMMISSIONER OF EDUCATION

February 5, 1974

In the Matter of the Tenure Hearing of Daniel T. Carrow, School District of the City of Paterson, Passaic County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Robert P. Swartz, Esq.

Charges were certified on May 31, 1972 against Daniel T. Carrow, hereinafter "respondent," a tenure teacher in the Paterson School System, by the Paterson Board of Education, hereinafter "Board," which essentially alleged conduct unbecoming a teacher, insubordination and inefficiency. The Board certified that such charges would be sufficient, if true in fact, to warrant dismissal or reduction in salary, and at the same time, suspended respondent without pay pending a determination of the charges filed with the Commissioner of Education on June 2, 1972.

Upon receipt of the charges certified by the Board against respondent, the Commissioner appointed a hearing examiner to conduct a hearing into this matter. In an effort to provide respondent with every opportunity to defend against the charges, *sub judice*, and in the interest of conducting a fair and impartial hearing into this matter, the hearing examiner, on his own Motion, continually extended the time for respondent to answer the Board's charges. The following sequence of events, all part of the record, occurred prior to the time a hearing was held on June 8, 1973 in the office of the Bergen County Superintendent of Schools:

1. On June 6, 1972, the hearing examiner sent a copy of the Board's charges to respondent and directed him to file an answer within ten days.

2. When no answer to the charges was received, a letter was sent on July 11, 1972 to the Passaic County Superintendent of Schools seeking his assistance in contacting respondent. This effort was unsuccessful.

3. On August 4, 1972, counsel for the Board filed an Affidavit of Service of Charges and testified that he personally served respondent with a copy of the Board's charges on June 1, 1972.

4. The hearing examiner tried unsuccessfully to contact respondent by

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telephone on four separate occasions in August 1972, and on one occasion in September 1972.

5. On September 1, 1972, counsel for the Board called the hearing examiner by telephone and stated that he planned to file a Notice of Motion for Judgment on behalf of the Board.

6. On October 26, 1972, a communication was received from the Board's counsel indicating that he was submitting a Notice of Motion with a copy of a letter which was mailed to respondent by certified mail, return receipt requested.

7. The hearing examiner was able to contact respondent's residence by telephone at which time he spoke with a man who claimed to be respondent's cousin. Said person agreed to have respondent return the hearing examiner's telephone call. The call was not returned.

8. A similar telephone communication was held on November 29, 1972 with a person alleging to be the mother of respondent. She, also, assured the hearing examiner that respondent would return his call which again failed to occur.

9. On December 12, 1972, counsel for the Board filed a supplemental Affidavit of Service of Notice of Motion for judgment in its favor with the Division of Controversies and Disputes which was accompanied by an Order of Dismissal.

10. Finally, on May 17, 1973, after the preceding efforts had been exhausted, a date was set down for hearing.

The hearing was conducted on June 8, 1973 by a hearing examiner appointed by the Commissioner at the office of the Bergen County Superintendent of Schools. Respondent did not make an appearance. The report of the hearing examiner is as follows:

The following charges of conduct unbecoming a teacher, insubordination and inefficiency, were filed against respondent by the Board:

"***_First Count_*

"1. On numerous occasions, the said Daniel T. Carrow failed to inform the Board of Education of his intention to be absent from school, in violation of the rules and regulations of the Board of Education of the City of Paterson, specifically from October 4, 1971 to October 8, 1971; January 17, 1972 and January 31, 1972.

"2. The said Daniel T. Carrow has constantly failed to report student cuts, absences and tardiness in violation of the rules and regulations of the Board of Education which further results in a lack of control over students.

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"3. Due to his excessive absences from school, approximately forty-one days from September, 1971 through April 27, 1972, there is a lack of student academic advancement.

"4. Further, due to his failure to prepare lessons in advance of class, there is a lack of student academic advancement.

"*Second Count*

"*** On January 7, 1972, the Board of Education caused to be served upon the said Daniel T. Carrow at his home address by Certified Mail-Return Receipt Requested, a written notice of his inefficiency specifying the nature thereof with such particulars to give him an opportunity to correct and overcome the same. The letter containing the written notice of inefficiency was returned as unclaimed.

"2. On or before January 25, 1972, the same written notice of inefficiency was personally served upon the said Daniel T. Carrow. A copy of said written notice is attached hereto and marked Exhibit 'A'.***"

The Assistant Superintendent of Schools testified that the Board's policy requires that teachers report their anticipated absences by a telephone-tape arrangement which is in operation twenty-four hours a day for the purpose of communicating such information to the appropriate school authorities. (Tr. 8)

Further testimony showed that respondent on October 4, 5, 6, 7, and 8, 1971, as well as January 17, 1972, absented himself from his classroom responsibilities without prior approval of the principal or Superintendent and, in fact, without prior notification of his intended absences. (Tr. 8-10)

A report of respondent's total absences, from September 1971 through April 19, 1972, is contained in a letter dated April 19, 1972 to the Assistant Superintendent of Schools from the principal of the John F. Kennedy High School where respondent was assigned to teach. This report shows:

"*** Item #1 – Mr. Carrow's absentee record since January 7, 1972. He has been officially reported absent on the following days: January 17, 18, 19, 20 and 21. He was absent on January 24, 25, 26, 27 and 28 due to the death of his sister as reported to our school secretary, Mrs. London, also absent on January 31 and failed to report his absence by telephone on January 31, 1972 as required; additional absences on February 1, 3, 4 and 8, March 1, 2, 14, 16 and April 18 and 19. Since September, Mr. Carrow has been absent 38 days not including 4 days allowed for the funeral of his sister. Due to this excessive absence, there remains a lack of student academic achievement.***" (P-1)

In a subsequent communication dated April 26, 1972 from the principal to the Assistant Superintendent of Schools, respondent was reported absent April 20 and 21, 1972. (Exhibit "F") These days increase the total number of days reported absent from September 1971 to April 26, 1972 to forty,

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excluding four days of absence allowed because of the death of respondent's sister.

Further testimony educed at the hearing concerning respondent's failure to report pupil cuts, absences, and tardiness from his classes was offered by the Assistant Superintendent of Schools.

> "*** Q Now, Dr. Weir, can you tell us in your opinion does the failure of a teacher to report student cuts, tardiness and absences interfere with the educational process?
>
> "A In my opinion, it is unprofessional violation of the rules and regulations of the Board of Education.***" (Tr. 13-14)

In a letter dated April 19, 1972 to the Assistant Superintendent of Schools, the high school principal stated:

> "*** Item #2 – Mr. Carrow's continued failure to keep accurate attendance records, including his neglect in reporting and referring student's cuts and tardiness, has resulted in a lack of administrative control over the students in his classes. His department supervisor, *** and five administrators have indicated that Mr. Carrow has never submitted any referrals for the above infractions since his assignment at John F. Kennedy High School.***" (P-1)

The Board averred that the principal's statement, *ante*, introduced into evidence, was supported by written reports from the department supervisor dated March 9, 1972 (Exhibit "B") and April 18, 1972 (Exhibit "C").

In support of the charges of respondent's lack of preparation for classroom assignments and alleged inefficiency, which has resulted in a lack of pupil advancement, the Board relied on the written testimony of the high school principal dated April 19, 1972, which is reproduced in part as follows:

> "*** Item #3 – Mr. Carrow has been unable to improve in providing for individual differences in his classes, and has not motivated desired control over the students in his classes.**
>
> "Item #4 – *** [The] Head of the Mathematics Department, ***[the] Vice Principal and former mathematics instructor for over twenty years, have observed Mr. Carrow's classes. They have indicated to me that in their experienced judgment, there remains a definite lack of learning taking place with Mr. Carrow's students. *** However, I cannot submit any measurement statistics regarding achievement in his geometry classes. I did find a definite lack of preparation on the part of Mr. Carrow and his students.***" (P-1)

In the absence of any testimony to the contrary, the hearing examiner finds that respondent demonstrated insubordination by his:

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(a) failure to comply with the Board's ruling pertaining to the procedure to be used for reporting intended teacher absences as charged;

(b) failure to comply with the Board's ruling as it pertained to pupil cuts, absences and tardiness.

Respondent has also demonstrated inefficiency in view of the following findings:

(a) He failed to prepare lessons in advance of class for his own use or that of a substitute teacher during his absences.

(b) He failed to keep accurate attendance records of pupils resulting in a lack of administrative or supervisory control over the pupils in his classes.

(c) Respondent failed to supply information to his immediate supervisor pertaining to the results of tests which were given to assess pupil achievement.

(d) Respondent did not adequately follow through on suggestions made by his immediate supervisor which were designed to improve his teaching performance.

In view of respondent's failure to acknowledge his responsibilities to the Board and, more importantly, to his pupils, the hearing examiner finds that respondent has also demonstrated conduct unbecoming a teacher as charged by the Board.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the findings of the hearing examiner. He notes that counsel for the Board has waived review of the hearing examiner's report in the instant matter.

The Commissioner also observes that although respondent was given ample opportunity to answer the charges certified against him by the Board in the first instance, he apparently decided not to do so.

When a hearing was conducted into this matter approximately one year after the certification of charges was made by the Board, respondent absented himself from such hearing causing the hearing to be conducted without representation or defense presented in his behalf.

The Commissioner has previously considered and determined matters in which respondents have chosen not to answer charges to defend themselves. See *In the Matter of the Tenure Hearing of Mert P. Hyland, School District of the Township of Millburn, Essex County*, 1968 *S.L.D.* 253; *In the Matter of the Tenure Hearing of Richard Royer, School District of the Township of Brick,*

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Ocean County, 1973 *S.L.D.* 460. In the decisions cited *supra*, the Commissioner upheld the charges stated herein because of the absence of any verbal or written defense.

The Commissioner concurs with the findings of the hearing examiner and he determines that the Board acted pursuant to statutory prescription in the certification of the charges against respondent. The Commissioner, therefore, finds the charges to be true in fact against respondent, and he determines that said charges are sufficient to warrant his dismissal from employment as of the date of his suspension.

COMMISSIONER OF EDUCATION

February 19, 1974

Edmond M. Kiamie,

Petitioner,

v.

Board of Education of the Township of Cranford, Union County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rubenstein & Glick (Leslie P. Glick, Esq., of Counsel)

For the Respondent, Sauer and Kervick (James F. Kervick, Esq., of Counsel)

Petitioner, a citizen and taxpayer of the Township of Cranford, alleges that the Board of Education of the Township of Cranford, hereinafter "Board," adopted a formal resolution containing an agreement of employment with its Superintendent of Schools for the school years, 1972-73 and 1973-74, which is improper and illegal, and which constitutes an extravagant and wasteful misuse of public moneys.

The Board answers that it has the legal authority to adopt the resolution and agreement of employment which are challenged by petitioner, and the Board also asserts that said agreement does not constitute a misuse of public funds, but represents instead a reasonable exercise of its discretionary authority.

The stipulation of the relevant material facts obviates the need for plenary hearing. This matter is submitted to the Commissioner for Summary Judgment on documents marked in evidence and Briefs.

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The Superintendent of Schools has been employed by the Board for almost thirty years in the positions of teacher and junior high school principal and in other capacities. On July 16, 1969, he was appointed Superintendent of Schools, and he has acquired a tenure status in that position.

This dispute is based solely on the resolution and agreement of employment (Exhibit J-2) adopted by the Board at its regular meeting held June 19, 1972, which is set forth in entirety as follows:

"Agreement of Employment

"This agreement between Vincent F. Sarnowski and the Cranford Board of Education is made the nineteenth of June, 1972.

"Whereas Mr. Sarnowski wishes to retire on June 30th, 1974; and

"Whereas the Board wishes to facilitate such retirement and assure a smooth transition in the leadership of the Cranford school system,

"Now, therefore, it is hereby mutually agreed by and between Mr. Sarnowski and the Board that:

"1. The Board hereby offers, and Mr. Sarnowski hereby accepts, the terms and conditions of employment herein set forth for the school years July 1, 1972 to June 30, 1973 and July 1, 1973 to June 30, 1974.

"2. For the period July 1, 1972 to June 1, 1973, Mr. Sarnowski shall serve the Cranford school system in the capacity of Superintendent of Schools and the Board shall pay Mr. Sarnowski an annual salary of $27,500.00

"3. Mr. Sarnowski hereby tenders his resignation from the position of Superintendent of Schools of the Cranford school system as of June 1, 1973, and the Board hereby accepts such resignation.

"4. For the period June 1, 1973 to June 30, 1974 Mr. Sarnowski shall serve the Cranford school system as a member of the professional staff, and the Board shall pay Mr. Sarnowski an annual salary of $29,500.00. On June 30, 1974, Mr. Sarnowski shall retire and terminate his employment by the Board, and the Board hereby accepts such retirement and termination.

"5. Mr. Sarnowski understands that the Board intends to screen candidates for the position of Superintendent of Schools during the 1972-73 school year, and intends to hire a new Superintendent of Schools, effective July 1, 1973, for the 1973-74 school year. Mr. Sarnowski agrees to cooperate with the Board in transferring the leadership of the school system

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to the new Superintendent and agrees to perform such duties as the Board shall request during the 1973-74 school year.

"6. If either party shall breach or fail to perform any of its obligations under this agreement, then the other party may, at its option, declare the entire agreement null and void.

"June 19, 1972 Vincent F. Sarnowski

"June 19, 1972 Richard J. Anderson
Board President

"June 19, 1972 John E. Dwyer, Jr.
Board Secretary"

An examination of the minutes of the Board meeting held June 19, 1972 (Exhibit J-1) discloses the following entry which is pertinent to and preceded the Board's adoption of the agreement:

"*** Mr. Sarnowski then read a statement of his agreement with the Board for an early retirement. He will step down as Superintendent June 1, 1973 and retire from the school system June 30, 1974. He has a total committment (sic) to the school system and this is letting him explore interests he has never had time for. This was discussed for several months with the Board before the decision was made.***"

The Board's formal action adopting the agreement is recorded in the minutes of the June 19, 1972 meeting (Exhibit J-1) as follows:

"***Dr. Dougherty moved for appointment of the Superintendent of Schools (Addendum 6-19-10). The motion was seconded by Mr. Umland. It includes a revision of 1971-72 salary rate and appointment for 1972-73 school year; adoption of two year contract. A roll call vote was taken and it passed with only Mr. Massa opposed.***"

After the instant litigation had ensued, the Board adopted a resolution at a special meeting held March 1, 1973 (Exhibit R-2) regarding this controverted agreement. This resolution reads as follows:

"BE IT RESOLVED by the Board of Education of the Township of Cranford, in the county of Union, New Jersey that a certain Resolution adopted by the Board of Education of the Township of Cranford on June 19, 1972 relating to the employment of Vincent F. Sarnowski and the contract entered into by the Board of Education of the Township of Cranford and Vincent F. Sarnowski on said date providing for his employment during the period beginning July 1, 1972 and ending June 30, 1974 is hereby ratified and confirmed this 1st day of March, 1973 (Addendum 3-1-2)."

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The minutes of the March 1, 1973 special meeting (Exhibit R-2) indicate the adoption of the above-stated resolution as follows:

> "*** Mrs. Walsh then moved for approval of the following resolution:*** The motion was seconded by Mr. Baechtold. A roll call vote was taken and the motion carried. Ayes 5, Mr. Strom, Mr. Baechtold, Mr. White, Mr. Baron and Mr. Warhaftig. Noes 4, Mrs. Walsh, Mr. Massa, Mr. Hurley and Mrs. Charles.***"

Petitioner contends that the Board's action on June 19, 1972, which increased the Superintendent's salary for the 1971-72 school year by $1,000 from $24,500 to $25,500, was violative of *N.J.S.A.* 18A:29-15. This statute reads as follows:

> "Nothing contained in this article shall be construed to interfere with or discontinue any salary schedule now in force; provided, such schedule shall meet the requirements of this article, nor to prevent the adoption of any salary schedule which shall meet its minimum requirements, nor to prevent the payment of extra compensation for additional service, nor to prevent the payment of any bonus pursuant to law, but no bonus payment may be made in lieu of an employment or adjustment increment."

Petitioner argues that the portion of the above statute which provides that "*** no bonus payment may be made in lieu of an employment or adjustment increment" prohibits just such an action as was taken by the Board. The Commissioner does not agree. The statute *N.J.S.A.* 18A:29-15 is part of the act *N.J.S.A.* 18A:29-6 *et seq.*, which prescribes a minimum salary guide for all teaching staff members employed in any school district in this State. *N.J.S.A.* 18A:29-15 specifically permits, *inter alia*, that local boards of education may adopt any salary schedule which meets the minimum requirements of the act, pay extra compensation for additional service, and pay a bonus pursuant to law.[1] The prohibition that a bonus payment may not be made "*** in lieu of an employment or adjustment increment" is intended to prevent a local board of education from offering a bonus instead of a salary increment which would advance its teaching staff members upward to a higher step on the salary schedule. The payment of a bonus under such a condition would defeat the purpose of *N.J.S.A.* 18A:29-6 *et seq.* as intended by the Legislature.

The facts in this matter clearly show that the Board's adoption of a revised and increased salary for the Superintendent for the 1971-72 school year does not constitute a bonus in lieu of an employment or adjustment increment, and the Commissioner so holds. In this instance, the Board obviously decided that the Superintendent was deserving of a salary increase and therefore acted formally to approve it. There is no evidence that this salary increase was intended to or actually did serve as a bonus in lieu of a salary increment. Nor is there any evidence that a separate salary scale existed for the Superintendent on

---

[1] *P.L.* 1951, *c.* 3; *P.L.* 1952, *c.* 38; *P.L.* 1954, *c.* 150.

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June 19, 1972 when the Superintendent's salary was increased for 1971-72. Therefore, the Commissioner determines that the Board's action approving an increase in the Superintendent's 1971-72 salary was properly within the Board's discretion.

In regard to the two-year appointment of the Superintendent, petitioner alleges that the Board is a noncontinuous body and, therefore, could not bind its successor to the terms set forth for the second year of the two-year agreement. Also, petitioner avers that by adopting this two-year agreement the Board was attempting to achieve by indirection what it could not do directly; that is, to replace a Superintendent possessing a tenure status without formal charges and a hearing. The Board argues that it is legally empowered to bind a successor board in matters involving the employment of personnel, and cites *N.J.S.A.* 18A:17-15 as authority to appoint a superintendent for a term of five years. The pertinent portion of *N.J.S.A.* 18A:17-15 provides as follows:

> "The board of education of a type I district and of any type II district, now having a superintendent of schools, may appoint, for a term not exceeding five years, a superintendent of schools by the recorded roll call majority vote of the full membership of the board.***"

A review of the legislative history of this statute and others *in pari materia* will be useful for clarifying the issue in this case. Prior to 1952, a statutory differentiation was made between the chief school administrators of Chapter 6 and Chapter 7 school districts. In its comprehensive 1903 law, the Legislature authorized Chapter 6 boards of education to appoint a superintendent of schools (*c.* 1, *L.* 1903, § 50, 2*d Sp. Sess.*) and provided further that (1) such appointment must be by a majority vote of the whole number of members, (2) at such salary as the board might determine, which could not be reduced thereafter, and (3) that the superintendent could be removed by a majority vote. (*c.* 1, *L.* 1903, § 64, 2*d Sp. Sess.*) Chapter 7 districts, by comparison, were authorized to appoint a suitable person as supervising principal, to define his duties and fix his salary. (*c.* 1, *L.* 1903, § 87, 2*d Sp. Sess.*)

In 1909 the Legislature enacted the Teachers' Tenure Act (*R.S.* 18:13-16), which provided, *inter alia,* for the acquisition by supervising principals of the protection afforded by a tenure status. The superintendent of a Chapter 6 school district received no such protection. As the result of this state of affairs, *R.S.* 18:6-37 was amended by *c.* 272, *L.* 1931, which provided that a superintendent could be appointed for a term not to exceed five years, and further, that any reappointment could be "*** for a term not to exceed five years, or without term to continue at the pleasure of the board." Although this amendment provided that the superintendent could receive one or more five-year appointments, that position still was not afforded the permanent protection of a tenure status as was a supervising principal under the Teachers' Tenure Act.

This situation was drastically changed by the enactment of *c.* 236, *L.* 1952. This legislation amended *R.S.* 18:6-37, 18:7-70, and 18:13-16 with the effect that (1) all supervising principals were made superintendents of schools with the same powers and duties as superintendents in Chapter 6 school districts,

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and (2) all superintendents were included in the positions afforded tenure protection by the Teachers' Tenure Act. This legislation abolished the position of supervising principal, and any distinctions between that position in a Chapter 7 school district and the position of superintendent of schools in a Chapter 6 school district was ended.

The legislative intent of the 1931 law providing for a five-year term for a superintendent was to make it possible for a local board of education to attract a competent school administrator by insuring that he would have adequate opportunity to demonstrate his capabilities of leadership. Although a superintendent could not acquire a tenure status prior to 1952 (*c.* 235, *L.* 1952), he could be guaranteed a term sufficient in length to enable him to study the school system, design and implement a program, and by so doing demonstrate the competency of his leadership. From 1931 to 1952 a superintendent could also be reappointed for successive five-year terms by the local board.

The enactment of *c.* 236, *L.* 1952 substantially diminished the necessity for extended, five-year appointments although the authority to appoint a superintendent for a term not to exceed five years was retained. Under the new revision in 1952, and the present law (*N.J.S.A.* 18A:28-5), once the superintendent has served the probationary period required to attain a tenure status, no further reappointment is necessary or appropriate. The superintendent then enjoys a legislative status which needs no further action by the local board of education, and which cannot be disturbed except for cause, following formal charges and a hearing before the Commissioner. *N.J.S.A.* 18A:6-9 *et seq.* A local board of education may of course fix a shorter period of time than the required three consecutive calendar years, for the acquisition of a tenure status by its superintendent. The controlling provision is *N.J.S.A.* 18A:28-5, which reads in pertinent part as follows:

> "The services of all *** superintendents*** shall be under tenure during good behavior and efficiency *** after employment in such district or by such board for: (a) three consecutive calendar years, or *any shorter period which may be fixed by the employing board for such purpose****." (*Emphasis ours.*)

In *Clifford L. Rall v. Board of Education of the City of Bayonne, Hudson County*, 54 *N.J.* 373 (1969) the Supreme Court of this State upheld the adoption by the Board of a resolution which shortened the period of time for acquisition of tenure by its Superintendent of Schools to six and one-half months.

The Commissioner has held in previous instances that local boards of education may utilize the provisions of *N.J.S.A.* 18A:17-15 and proffer a multiple-year employment contract to a new Superintendent, only when there is a vacancy in that position, and at no other time. *Henry S. Cummings v. Board of Education of Pompton Lakes et al., Passaic County,* 1966 *S.L.D.* 155 In *Cummings,* the Commissioner pointed out the well-established maxim that a local board of education is a noncontinuous body whose authority is limited to

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its own official life and whose actions can bind its successors only in those ways and to the extent expressly provided by statute. *Skladzien v. Bayonne Board of Education,* 12 *N.J. Misc.* 603 (*Sup. Ct.* 1934), affirmed 115 *N.J.L.* 203 (*E. & A.* 1935); *Evans v. Gloucester City Board of Education,* 13 *N.J. Misc.* 506 *(Sup. Ct.* 1935), affirmed 116 *N.J.L.* 448 (*E. & A.* 1936) An example is *N.J.S.A.* 18A:17-15, which provides for a multiple-year contract of employment for a superintendent.

In *Cummings, supra,* the Commissioner set aside a three-year contract for the Superintendent, which was adopted in 1965, during the course of an existing three-year contract which previously had been adopted in 1963 and would have expired in 1966. The Commissioner pointed out that there was no vacancy and therefore no necessity for the 1965 board to act, and by so doing usurp the prerogative of the 1966 board. It was held that the 1965 board had no authority to reach forward beyond its own official life and into the term of its successor to make a decision not due until 1966.

Applying the law to the facts in the instant matter, the Commissioner finds and determines that the Board's action of June 19, 1972, adopting a two-year contract for its Superintendent of Schools for the 1972-73 and 1973-74 school year was *ultra vires,* and therefore must be set aside. The Board did have the authority to adopt on June 19, 1972, the provisions of employment for the first year, 1972-73, of the agreement, and therefore those provisions may be considered proper, particularly in view of the fact that the 1972-73 school year is concluded and past.

The Commissioner must also consider the action taken at the special meeting held March 1, 1973, by the successor Board, which ratified and confirmed the two-year agreement. The practical effect of this March 1, 1973 Board resolution was to adopt the provisions of employment for the Superintendent for the 1973-74 school year, as set forth in the agreement. (Exhibit J-2) Therefore, the 1973 Board or successor Board did legally adopt the exact same employment provisions for 1973-74, during its own official term, which its predecessor had improperly adopted on June 19, 1972. This March 1, 1973 action by the 1973 Board, which breathed life into the 1973-74 portion of the Superintendent's employment agreement was within its discretionary authority and was proper.

Finally, the Commissioner will consider the substance of the 1973-74 employment agreement. The terms of the agreement (Exhibit J-2) are hereinbefore stated and do not require duplication. In essence, the Superintendent agreed to serve the Cranford School District during the 1973-74 school year as a member of the professional staff, but not as Superintendent, at a stipulated salary. The agreement makes clear the Board's intention to employ a new Superintendent for the 1973-74 school year, and sets forth the past Superintendent's agreement to cooperate in effectuating a smooth transition of administrative leadership. The exact duties required to be performed by the former Superintendent during the 1973-74 school year are not enumerated in the agreement (Exhibit J-2), other than "*** to perform such duties as the

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Board shall request during the 1973-74 school year.***" The record before the Commissioner is barren of any proof that the former Superintendent is without any duties and thus not performing any professional services during the 1973-74 school year, which state of affairs would render his 1973-74 employment agreement invalid for bestowing a gift of public funds for services not rendered. *Joseph McKay v. Board of Education of the Borough of Red Bank, Monmouth County,* 1972 *S.L.D.* 606 Absent such proof that the former Superintendent performs no duties and provides no professional services, the Commissioner must determine that the provisions of his 1973-74 employment agreement (Exhibit J-2) are legal and proper.

For the reasons expressed herein, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

February 19, 1974

Edmond M. Kiamie,

Petitioner-Appellant,

v.

Board of Education of the Township of Cranford, Union County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 19, 1974

For the Petitioner-Appellant, Rubenstein and Glick (Leslie P. Glick, Esq., of Counsel)

For the Respondent-Appellee, Sauer and Kervick (James F. Kervick, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

June 5, 1974

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Daniel Rivera et al.,

Petitioners,

v.

Board of Education of the City of Perth Amboy et al., Middlesex County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Petitioners, Middlesex County Legal Services Corporation (Melville D. Miller, Jr., Esq., of Counsel)

For the Respondents, Antonio and Flynn (Alfred D. Antonio, Esq., of Counsel)

Petitioners are pupils and residents of the School District of the City of Perth Amboy, the vast majority of whom are of Puerto Rican or other Spanish-speaking heritage, who, as a class, lack a functional mastery of the English language.[1] Most of the pupils are of non-English-speaking heritage or language ability. Petitioners allege that the Board of Education of the City of Perth Amboy *et al.* named in this Petition of Appeal, hereinafter "Board," has not taken into account petitioners' inability to learn in classes conducted only in English, thereby denying them an equal educational opportunity and failing to provide them with a "thorough and efficient" education as mandated by *Art.* VIII, *Sec.* IV, *Par.* 1 of the New Jersey Constitution.

The Board denies generally that it is failing to provide a thorough and efficient system of schools for its constituents and avers that it has taken all reasonable steps to provide the kinds of instruction needed within the limits of their ability to carry that financial burden.

The Board did not press the Motion to Dismiss for the entire class, but offered a Motion in the alternative that the Commissioner of Education should determine how the class action should proceed and whether or not all the subclasses named in the Petition of Appeal should be considered eligible for the requested relief, if granted.

Oral argument of counsel on the Motion was held on May 11, 1973 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. After granting the time extensions requested by counsel, petitioners filed their Brief on June 15, 1973; respondents' Brief was filed on July 31, 1973, followed by petitioners' Reply Brief dated August 6, 1973.

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[1]The hearing examiner defines "functional mastery of the English language" as that minimum level of daily language usage necessary for ordinary communication and understanding at each grade level, and in the social and business environment of the community and society at large.

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Petitioners aver that the educational deprivation caused to its class of constituents in the Spanish-speaking community is not limited to those pupils attending school; rather, it is generally applicable to the following four subclasses, who are all in need of a more adequate program in English. They are also in need of initial instruction in Spanish to assure them an adequate basis of communication through which they may make the transition to English:

> "Subclass A – All members who are currently enrolled in Perth Amboy public schools.
>
> "Subclass B – All other members who are between 6 and 16 years of age, inclusive, and who are not enrolled in Perth Amboy public schools.
>
> "Subclass C – All other members who are under 20 years of age, and who are not enrolled in Perth Amboy public schools, regardless of whether they have enrolled in private or alternative schools or are not in any school.
>
> "Subclass D – All other members who at any time while they were between the ages of 5 and 20 attended the Perth Amboy public schools. ***" (Petition of Appeal, at p. 7)

Petitioners give the following example of a pupil who was educationally deprived in school, in support of their delimitation of the subclasses, *ante*:

> "Assume a Juan Rodriguez who was 17 in 1969, and was a key example and product of the educational failure of Perth Amboy schools. Juan is 21 in 1973. In 1974, when this case may finally be decided, he will be 22. He would come within Subclass D of this petition, as someone over 20 deeply wronged and entitled to relief. Stubbornly, senselessly, the officials alleged to be responsible for that wrong seek to deny him that relief by means of this challenge to the class and subclasses herein.***" (Petitioners' Brief, at p. i)

Petitioners argue that the "***main class encompasses *all* the people who would be entitled to relief if the legal violations and duties set forth in the Petition are established. The subclasses distinguish between groups of people *within* the main class. The distinctions are made *solely* because of the differences between the groups as to the *kind of relief* necessary to make them whole ***." *(Emphasis in text.)* (Petitioners' Brief, at p. 1)

Petitioners' requested relief is extensive; however, it may be summarized as follows:

a) extensive instruction in English
b) extensive instruction in the native language
c) abolition of conventional grade placement
d) cease using standard English language testing materials
e) remedial educational offerings

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f) other appropriate relief as required
g) instruction in native history, culture and heritage
h) free evening school classes with the above enumerated offerings
i) identification of all dropouts and notification of their right to further free public school education
j) assurances that fully qualified bilingual teachers are used
k) monitor all program offerings by appointing a Citizens Review Council
l) bar special class placement for petitioners.

(Petitioners do not differentiate between the kinds of relief available to each class.)

Petitioners argue further that they are entitled to a presumption that they are right on both facts and laws, and that factual disputes can be resolved only after a hearing. Also, "*** legal issues which depend on the prior resolution of factual issues can be resolved only ***" after a hearing. (Petitioners' Brief, at p. 2)

Petitioners rely also on *N.J.S.A.* 18A:33-1 which prescribes in part, "*** courses of study suited to the ages and attainments of all pupils between the ages of five and 20 years.***" Also, *N.J.S.A.* 18A:4-25, in part, requires local boards to submit courses of study to the Commissioner for his approval. (Petitioners' Brief, at pp. 10-12) Additionally, petitioners cite *N.J.S.A.* 18A:4-23 which gives the Commissioner supervision over all schools receiving State aid, *N.J.S.A.* 18A:48-1 *et seq.* which provides in part for public evening schools, and *N.J.S.A.* 18A:49-1 which provides for evening schools for foreign-born residents.

The Board denies that it is not granting, at least in part, the relief sought by petitioners. However, the Board does not press to dismiss the claim for relief sought by petitioners in subclass A, as defined at the oral argument of counsel on May 11, 1973. That definition limited subclass A to all those pupils between the ages of five and twenty who are currently enrolled in the Perth Amboy School System. (Tr. 10-11)

Further, the Board argues that subclasses B, C, and D, as described by petitioners, clearly lack any established legal basis for the remedies they seek; therefore, subclasses B, C, and D should be dismissed as proper parties in the matter, *sub judice.*

The statutes provide for a free public school education to certain persons between the ages of five and twenty. *N.J.S.A.* 18A:38-1 *et seq.* The hearing examiner finds no essential disagreement between the parties with respect to petitioners' claim for relief in subclass A.

The parties disagree entirely on subclasses B, C, and D. In summary, it may be said that the relief sought by these subclasses would apply to all dropouts, private school pupils, those who attended the Perth Amboy schools, but are now over the age of twenty, and those persons otherwise eligible for free public school education by statute who have never enrolled in school.

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Petitioners claim that there are factual issues in dispute and that they are entitled to a presumption that their factual allegations are true for the purposes of proceeding, as a class, to discovery and a hearing. Therefore, petitioners argue further, the legal issues which depend on the prior resolution of factual issues can be resolved only after a full hearing. (Petitioners' Brief, at pp. 1-2)

Petitioners cite from *Rules of the Court, R.* 4:32-1 (a) and (b) and *R.* 4:32-2, to support their argument for including all subclasses of the main class for the purposes of this Petition of Appeal as follows:

> "***1. R. 4:32-1(a) (1) – *joinder of all impracticable* –
>
> Petitioners contend each of the subclasses literally involves a cast of thousands. This must be assumed until hearing; taking the petition allegations as true, huge numbers have been denied education.
>
> "2. R.4:32-1(a) (2), (3) *common questions of law and fact, claims typical of class* –
>
> "The claims of petitioners are in fact identical to those of the subclass members, as are the questions of law and fact.
>
> "3. R.4:32-1 (a) (4) – *representative parties will fairly and adequately protect the class interests* –
>
> "Identical educational interests, absence of any conflicting interests, and representation of petitioners by attorneys experienced in constitutional issues satisfy this test.
>
> "4. R.4:32-1 (b). Only *one* of the (b) sections need to be satisfied; actually *two* are involved. Within the meaning of 4:32-1 (b) (2), respondents have continually failed to recognize or provide educational relief for petitioners as a class (failure to act on grounds generally applicable to the class), and injunctive and declaratory relief is appropriate for the class as a whole.
>
> "Moreover, R. 4:32-1 (b) (3) is also satisfied. Common questions predominate; there are *no* questions restricted or applicable only to individual members. Resolution of all of these common identical claims in a single class action is clearly most efficient. As to the facts noted in the rule: no class members have individual interests; there is no prior litigation on the issue against respondents; and the action is eminently manageable, as the numbers of class members is finite, their names ascertainable, and the questions of law and fact reduce to identical, straightforward issues. There is no justification for barring any of the subclasses under the standards in the rule.***
>
> "Type or ease of notice is not a precondition or standard for determining maintainability. It is mentioned here only in the hope of expediting further proceedings in this action.
>
> "Notice problems in this are miniscule compared with difficulties

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encountered and met in nationally-oriented derivative, antitrust or consumer actions requiring notice to millions of persons, most of unknown identity. As indicated by the 'best notice practicable' language of R. 4:32-2(b), notice is a flexible concept, and must be tailored to the particular situation. Here there are a finite number of class members involved and they live within a very small geographical area. The following considerations apply:

> "1. For non-students, local newspaper notice in Spanish is a convenient, inexpensive, useful way to supplement regular mail notice to individuals whose identities and addresses are known.
>
> "2. At a minimum, all persons in school records with Hispanic surnames should be notified.
>
> "3. School records for present and past years can be culled to turn up any persons who have already been identified as having language problems.
>
> "4. Extensive attempts to identify individual class members (as opposed to general newspaper notice and individual notice to persons presently known), can and should be deferred until after plenary hearing, because the subclass distinctions are only important *after* petitioners prevail and the question becomes one of administering appropriate relief.
>
> "In short, notice is not an obstacle. Suitable methods are available, and R. 4:32-2(b) makes clear that respondents are required only to undertake 'reasonable effort,' in the circumstances, to identify.***" *(Emphasis in text.)* (Petitioners' Brief, at pp. 14-17)

Petitioners cite also *Riley v. New Rapids Carpet Center*, 61 *N.J.* 218, 222 - 223 (1972) to support their contention that they are

> "*** *entitled to the presumption that their factual allegations are true and a view of those facts most favorable to support their legal position.* ***" *(Emphasis in text.)* (Petitioners' Brief, at p. 7)
>
> "*** *The class action rule is to be liberally construed in favor of the proponents of the class, and courts should grant at least tentative or conditional certification except in clear or extraordinary cases.****" *(Emphasis in text.)* (Petitioners' Brief, at p. 7)

With respect to petitioners' subclasses B, C, and D, the Board avers that all eligible pupils who apply for admission to the Perth Amboy Public Schools are enrolled. The Board contends that the statutes place the burden of enrollment of pupils in the schools on their parents.

The Board summarized as follows: -

> "*** Inclusion of such a class [subclasses B, C, D] would require more

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than the Statutes or the law or common sense require us to do, to wit: To reach out and scour the City to determine if there are any eligible students not attending school. This would place a duty upon us that is impossible of performance.***" (Respondents' Brief, at p. 4)

The Board argues, finally, that the Petition of Appeal should be limited to "*** all students members (sic) in Perth Amboy public schools not born in the Continental United States.***" (Respondents' Brief, at p. 5)

Since the parties are in essential agreement in regard to subclass A, the hearing examiner recommends that subclass A is a proper party to seek further the relief to which it believes it is entitled.

The remaining question to be determined herein, is whether or not subclass B, C, and D are delimited, are also entitled to be considered as eligible and proper members to this class action.

There can be no question that the statutes provide for a free public school education to all persons between the ages of five and twenty who meet the conditions detailed in *N.J.S.A.* 18A:38-1 *et seq.* and *N.J.S.A.* 18A:33-1 *et seq.* Also, *N.J.S.A.* 18A:38-25 states that the parents of pupils between the ages of six and sixteen shall cause their children to attend school. Additionally, there is statutory authority for public evening school *(N.J.S.A.* 18A:48-1 and 48-2); evening school for foreign-born residents *(N.J.S.A.* 18A:49-1 *et seq..);* and adult education (*N.J.S.A.* 18A:50-1 *et. seq.*).

N.J.A.C. 6:24-1.11 provides as follows:

"The Commissioner shall have authority to administer oaths and affirmations; examine witnesses and receive evidence; issue subpoenas; rule upon offers of proof; take or cause depositions to be taken whenever the ends of justice would be served thereby; regulate the course of the hearing; and dispose of procedural requests or similar matters."

The hearing examiner finds, therefore, that the matter, *sub judice,* is a controversy arising under the school laws and that the Commissioner has jurisdiction to hear such matters as class actions in the interest of justice for all the proposed petitioners.

The education statutes empower the Board to provide the kind of educational opportunities sought by petitioners which, if offered, would benefit members of all subclasses. Therefore, if petitioners prevail in some or all of their arguments and prayers for relief, that relief would be available to some or all of the subclasses.

For this reason, the hearing examiner recommends that the entire class (subclasses A, B, C, D) be represented in the Petition of Appeal before the Commissioner.

Although the *Rules of the Court* define procedural aspects of class actions

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and provide direction and technical assistance, they are not binding on the Commissioner.

The hearing examiner recommends, therefore, that the Commissioner entertain this Petition of Appeal as a class action with the following notification limits: (*R.*4:32-2 (b))

1. Written notice is to be made to all pupils using the Spanish and English languages.

2. Written notice is to be made to all homes through the enrolled pupils using the Spanish and English languages.

3. Notice is to be made in the local newspaper using the Spanish and English languages and is to be directed toward those individuals described in subclasses B, C, and D. This is petitioners' burden.

4. Other notices shall be prepared by petitioners and distributed by the Board in No. 1 and No. 2 (above).

As petitioners emphasize in their Brief, extensive attempts to give notice to individuals are not required at this stage. (Petitioners' Brief, at p. 17) If petitioners prevail in their argument and relief is ordered, a more appropriate time for more extensive notification to the subclasses and/or individuals would arise after the litigation. It should be noted that the hearing examiner does not here decide the standing of the parties.

The hearing examiner recommends, therefore, that this matter be accepted as a class action by the Commissioner for the entire class and that the litigants begin with a conference of counsel to delineate any remaining procedural problems.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record and the Briefs in the instant matter and observes that neither party has filed any exceptions to the report of the hearing examiner.

The Commissioner concurs with the report and conclusions of the hearing examiner and determines that he has the authority to hear class actions arising under the school laws of this State.

The Commissioner directs the litigants to follow the notification specifics set forth in the hearing examiner's report (*R.*4:32-2 (b)) and remands this matter to the Assistant Commissioner of Education in charge of Controversies and Disputes. He further directs that it be processed routinely pursuant to the rules for processing a Petition of Appeal. *N.J.A.C.* 6:24-1.2 *et seq.*

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The Motion to Dismiss certain of the subclasses described in the report of the hearing examiner is therefore denied.

COMMISSIONER OF EDUCATION

February 22, 1974

Case dismissed February 24, 1975.

In the Matter of the Annual School Election Held in the School District of Carteret, Middlesex County.

COMMISSIONER OF EDUCATION

DECISIONS

Petitioner Louis G. Mangieri, a candidate for membership on the Carteret Board of Education, alleges that the drawing for ballot position for the 1974 school election was improperly conducted, and that the nominating petition filed by one other board candidate was defective. Petitioner prays for relief in the form of an Order by the Commissioner setting aside the results of the drawing and declaring that the nominating petition of Elmer Resko is invalid.

An inquiry was conducted on January 31, 1974 at the conference room of the Middlesex County Superintendent of Schools by a representative of the Commissioner of Education. It was agreed at the inquiry that the matter be submitted for Summary Judgment by the Commissioner.

Testimony at the inquiry revealed that at 8:00 p.m. on January 7, 1974, the Board Secretary, acting pursuant to *N.J.S.A.* 18A:14-13, conducted a drawing for position of candidates on the ballot for the annual school election to be held in the district on February 13, 1974.

Petitioner first alleges that the drawing for position on the ballot was improperly conducted in that cards with candidates' names were placed in a box, and the box was not turned over but shaken from side to side in such manner as to make it difficult to believe that the cards could alter position. Additionally, it is alleged that the top of the box was removed and the cards were hand-held by the Board Secretary for the drawing for positions.

The first allegation, that the box was not turned over when shaken, is found to be true in fact as confirmed by testimony of the Board Secretary and others at the inquiry. However, the Commissioner finds no defect or statutory violation since *N.J.S.A.* 18A:14-13b makes no such requirement but states only that:

> "***The box shall be turned and shaken thoroughly to mix the cards and the cards shall be drawn one at a time:***"

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The testimony of the Board Secretary, describing the actions employed by him in shaking and turning the box, was corroborated by the Board President and others at the inquiry who had been present at the drawing and establishes the conclusion that the cards could have been mixed or altered in position as required by the statute.

The additional allegation that the top of the box was removed and the cards hand-held is found to be true in fact. The Board Secretary's testimony, corroborated by all others who testified except petitioner, establishes the fact that, after shaking the box, he inserted his hand in the aperture in the top of the box (a cardboard shoe box) and withdrew the first card, whereupon the top of the box came off with his hand as he withdrew it. He announced that the first card withdrawn established the first listing on the ballot. Thereafter, he grasped all of the four remaining cards in his left hand and, without altering the position of the cards or allowing his gaze to rest upon the cards, took the remaining cards in sequence from top to bottom and laid them upon the table before him, announcing their positions as number two, number three, number four, and number five, respectively.

The Commissioner finds that the procedure was not properly followed as set forth by the statute wherein it is required by *N.J.S.A.* 18A:14-13b that:

"***the cards shall be withdrawn one at a time.***"

There is, however, no evidence that the Board Secretary, in his failure to comply with this one aspect of the statute, acted in bad faith or with fraudulent intent. There is no showing herein that there was intentional alteration of position or a reading of the hand-held cards. Indeed, the undisputed fact was established at the inquiry that the Board Secretary, in response to an objection raised by petitioner to the procedure used previous to the drawing herein described, had begun again the entire procedure. It is shown that he took great pains to see that the cards were mixed by a person other than himself prior to their placement in the box, and that he asked those present if they were satisfied with the way it was shaken. No objection was voiced at that time. Such efforts obviate a conclusion that the Board Secretary was motivated by bad faith in his conduct of the drawing.

While the Commissioner cannot condone the failure to adhere precisely to the statutory requirement for drawing the cards one at a time from within the box, he concludes that there was essential compliance with the statute. Therefore, he will not set aside the results of the drawing and finds and determines that the election process is *not* invalidated herein by the procedures used in the drawing for ballot position. In similar matters wherein there was found such substantial compliance with statutory requirements, both the Commissioner and the Courts have upheld the validity of elections. *In the Matter Of The Election Inquiry In the South Brunswick District, Middlesex County,* 1972 *S.L.D.* 16; *Dimon v. Ehrlich et als.*, 97 *N.J. Super.* 88 (*App. Div.* 1967)

The remaining issue concerns the validity of the nominating petition (B-1)

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filed by Elmer Resko for a three-year term as member of the Carteret Board of Education. It is alleged that alterations are evident thereon.

A careful examination of the nominating petition (B-1) shows that an alteration or alterations were made using type correction fluid in the blank at the bottom of the petition provided for the typed or printed name of the candidate for office. The Board Secretary testified that he recalled that the name "Stella Resko" improperly appeared in this blank, and that he directed that the alteration be made by Stella Resko to sign her name as a petitioner along with the other eleven names of petitioners in the blanks provided at the middle of the petition, where her name now appears. It is also found that the name "Stella Resko" also appears on the petition as the name of the deponent sworn and affirmed before a notary public on December 28, 1973 in compliance with *N.J.S.A.* 18A:14-11. The matter became somewhat more complex when, at the inquiry, it was revealed that the name Monroe Jacobwitz may be seen in the blank in question when the petition is held to the light and viewed from the reverse side.

It is clear that one or more alterations were made in the blank which now bears the printed name Elmer Resko. It is also clear that the only proper name which should appear there is the name of the candidate, Elmer Resko. Any other name rendered the petition defective. However, in its wisdom the Legislature provided for timely correction of such defects. *N.J.S.A.* 18A:14-12 reads as follows:

> "When a nominating petition is found to be defective, the secretary of the board shall forthwith notify the candidate of the defect and the date when the ballots will be printed and the candidate endorsing the petition may amend the same in form or substance so as to remedy the defect at any time prior to said date."

The Commissioner notes that the Board Secretary acted in accord with the statutory provision for correcting the defective petition in that he promptly notified the candidate, who thereafter in timely fashion had Stella Resko sign her name in its proper place as a petitioner. Such action, coupled with the printing of the name ELMER RESKO in the blank where it should have originally appeared, rendered the nominating petition complete, with proper validation, as required by *N.J.S.A.* 18A:14-10 and *N.J.S.A.* 18A:14-11.

Absent any finding of illegal or improper action with respect to the nominating petition herein controverted, the Commissioner finds no evidence of an invalidating defect with regard to the nominating petition of Elmer Resko.

COMMISSIONER OF EDUCATION

February 27, 1974

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Board of Education of the Borough of Fairview,

Petitioner,

v.

Mayor and Council of the Borough of Fairview, Bergen County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Sal J. Jesuele, Esq.

For the Respondents, Cosmo Palmisano, Esq.

Petitioner, hereinafter "Board," appeals from the action of respondents, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37, certifying to the Bergen County Board of Education a lesser amount of appropriation for school purposes for the 1973-74 school year than the amount proposed by the Board in its budget which was defeated by the voters.

A hearing in this matter was held on September 24, 1973 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. Supplemental data was filed thereafter by the Board as required by the hearing examiner. (Tr. 45, 59, 68, 76, 80) The report of the hearing examiner is as follows:

At the annual school election held on February 13, 1973, the Board submitted to the electorate a proposal to raise by local taxation $1,381,863 for current expenses and $39,800 for capital outlay of the school district for the 1973-74 school year. The proposal for current expenses was rejected by the voters, and, thereafter, the Board submitted its budget to Council for its determination of the amount of current expenses necessary to operate a thorough and efficient school system in the Borough of Fairview, pursuant to the mandatory obligation placed on Council by *N.J.S.A.* 18A:22-37.

After consultation with the Board, and a review of the proposed budget, Council made its determination and certified to the Bergen County Board of Taxation an amount of $1,335,863 for current expenses for the school district for 1973-74. That amount represented a reduction of $46,000 from the amount originally presented to the voters by the Board.

The Board avers that a reduction in its current expense budget of $46,000 is unreasonable and of such magnitude to jeopardize a thorough and efficient educational program for 1973-74.

Conversely, Council states as its underlying determinations and supporting reasons for its action that such economies were independently determined and were properly related to educational considerations and in no way threaten a thorough and efficient system of schools. A listing of the reductions suggested

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by Council is noted below, followed by an analysis and recommendations of the hearing examiner:

Account Number	Item	Board's Proposal	Council's Proposal	Amount Reduced
CURRENT EXPENSE:				
J720	Maint.-Contr. Servs.	$ 14,100	$ 9,100	$ 5,000
J810	State Retirement	11,000	9,200	1,800
J810b	Social Security	5,600	2,900	2,700
J820b	Health Insurance	11,000	9,400	1,600
J820c	Insurance	13,300	9,900	3,400
J870	Tuition	648,300	630,300	18,000
J-4	Adult Ed.-Sals.	1,620	1,120	500
Total Current Expense		$704,920	$671,920	$33,000

It will be readily noted that the amount of $33,000 of proposed reductions in the above chart is $13,000 less than Council's reduction of $46,000, *ante*. The remaining $13,000, Council alleges, may be provided by the Board in its revenue section of the budget by appropriating $10,000 from its unappropriated free balance in its current expense account and by the use of $3,000 which Council believes is payable to the Board from the federal government for flood damage to the gymnasium floor.

With respect to Council's proposal that the Board appropriate $10,000 from the unappropriated free balance in its current expense account, the hearing examiner finds that the Board's 1972-73 annual audit report, on file at the State Department of Education, reveals a deficit in the Board's current expense account of $70,145.82. The hearing examiner accordingly recommends that the Commissioner restore the $10,000 herein controverted to the revenue section of the Board's budget.

There is no persuasive testimony nor proof in the record that the Board may with assurance receive an additional $3,000 payment from the federal government for flood damage relief. In recognition of the uncertainty of such aid, the hearing examiner recommends that the $3,000 be restored to the revenue section of the Board's budget.

J720 Maintenance – Contracted Services *Reduction $5,000*

Council asserts that the increase of this line item by fifty percent over the amount expended in 1972-73 is unwarranted and proposes a moderate increase of $1,100 over the amount budgeted by the Board in 1972-73. It further contends that the Board has provided under capital outlay for certain building repairs.

The Board maintains that even its proposed budget line item is inadequate to effect necessary repairs to provide safe and adequate schoolhouses for its educational program. It lists as evidence of such needed repairs deteriorated paint, plaster, sills, cornices, roofs, hot water heater, fire brick, doors, fences,

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entrances, valves, floors, plumbing, electrical equipment, chalkboards, gutters, cement walks, ventilators, and windows. Additionally, the Board desires to contract installation of numerous cabinets, shelves and study facilities.

The hearing examiner notes that each of the schools of Fairview is over fifty-five years old and finds herein convincing proof of the need for such repairs in order to avert the greater cost of replacement of numerous of the aforementioned items. Emergency repairs at School No. 2, totaling $3,900, are necessary and required by the Board's insurance carrier. However, it is found that replacement of some windows and lockers, as well as repairs to roofs, gutters, fences, and wind barriers, were provided within the capital outlay portion of the budget approved by the voters. In recognition of the foregoing, it is recommended that a limited restoration of $2,300 be made to this line item.

Summary:	Reduction by Council	$5,000
	Amount Restored	2,300
	Amount Not Restored	2,700

J810 State Retirement Payments *Reduction $1,800*

Council maintains that the Board expended only $8,510.52 from this line item in 1972-73, an amount less than Council's determination of $9,200, which Council believes will adequately fund the Board's obligations.

The Board Secretary, however, testified that one 1972-73 bill in excess of two thousand dollars was received late and must be absorbed in the 1973-74 payments from this line item. (Tr. 40)

The hearing examiner finds that the June 30, 1972 audit shows that payments to P.E.R.S. and T.P.A.F. during 1971-72 were $9,974.66, considerably in excess of Council's determination for this line item for 1973-74, a year in which the Board must make payments for additional personnel. For this reason, and in recognition of the 1972-73 bill which must be absorbed in 1973-74 payments, the hearing examiner recommends that $1,800 be restored to this line item.

Summary:	Reduction by Council	$1,800
	Amount Restored	1,800
	Amount Not Restored	–0–

J810b Social Security *Reduction $2,700*

The hearing examiner required at the hearing (Tr.45) submission by the Board of accurate data pertinent to this fixed charge. This data, submitted January 3, 1974, shows actual 1973 third and fourth quarter payments of $2,265.33 and estimated payments based on the higher rates for the 1974 first and second quarters of $2,775. It is therefore determined that the Board's needs for this line item for the year total $5,040.33. Accordingly, the hearing examiner recommends that $2,150 be restored to provide the Board with a total of $5,050 for this line item.

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Summary:

Reduction by Council	$2,700
Amount Restored	2,150
Amount Not Restored	550

J820b Health Insurance *Reduction $1,600*

Data requested by the hearing examiner (Tr. 62) and submitted by the Board on January 3, 1974, reveals that the 1973-75 agreement negotiated by the Board and the Fairview Education Association requires the Board to pay the full premium of a health care plan covering all teachers and their dependents, whereas previously the Board was obligated to pay for the teachers' premiums only. The exact cost of such premiums is shown to total $16,128.69, an amount in excess of the $11,000 budgeted by the Board prior to reduction by Council. Recognizing the clear obligation of the Board, the hearing examiner recommends that the full amount of $1,600 be restored.

Summary:		
	Reduction by Council	$1,600
	Amount Restored	1,600
	Amount Not Restored	–0–

J820c Insurance *Reduction $3,400.*

Data was required by the hearing examiner beyond that presented at the hearing (Tr. 59) and was submitted by the Board on January 3, 1974. This data reveals that insurance contracted by the Board, including additional insurance as proposed by the Board's insurance advisors, calls for total premiums in 1973-74 of $8,845.75. It is clear that Council's determination of $9,900 is adequate for this line item. The hearing examiner recommends that the reduction be sustained.

Summary:		
	Reduction by Council	$3,400
	Amount Restored	–0–
	Amount Not Restored	3,400

J870 Tuition *Reduction $18,000*

The hearing examiner required, at the hearing, additional data pertinent to tuition charges to be submitted by the Board. (Tr. 71) This data, received January 3, 1974, reveals annual tuition charges for the four hundred ninety Fairview tuition students enrolled September 30, 1973, including one half of an adjustment due Cliffside Park for 1972-73 tuition, total $597,740.24. This is seen to be adequately covered by Council's determination of $630,300 for this line item. Accordingly, the hearing examiner recommends that the reduction be sustained.

Summary:		
	Reduction by Council	$18,000
	Amount Restored	–0–
	Amount Not Restored	18,000

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J-4 Adult Education – Salaries *Reduction $500*

Council maintains that $1,120 is sufficient to operate the Board's adult education program. Conversely, the Board states that it has severely curtailed this program in recent years and desires to offer certain vocational courses for adults in response to numerous requests from citizens.

The hearing examiner notes that the Board's 1972-73 audit report shows an expenditure in this line item of only $560. He finds no evidence of well-formulated plans for expansion of the Board's program that could not be funded by Council's determination for this line item of $1,120. Absent such evidence, it is recommended that the reduction be sustained.

Summary:	Reduction by Council	$500
	Amount Restored	–0–
	Amount Not Restored	500

The following table summarizes the hearing examiner's recommendations:

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
	Unapprop. Free Bal.	$10,000	$10,000	$ –0–
	Payment Flood Damage	3,000	3,000	–0–
J720	Maint.-Contr. Serv.	5,000	2,300	2,700
J810	State Retirement	1,800	1,800	–0–
J810b	Social Security	2,700	2,150	550
J820b	Health Insurance	1,600	1,600	–0–
J820c	Insurance	3,400	–0–	3,400
J870	Tuition	18,000	–0–	18,000
J-4	Adult Ed.-Sals.	500	–0–	500
Total Current Expense		$46,000	$20,850	$25,150

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record in the instant matter including the report of the hearing examiner and the findings and recommendations contained therein. He notes that no exceptions thereto were filed within the period of time allotted for such filing pursuant to *N.J.A.C.* 6:24-1.6.

The Commissioner concurs with the recommendations and total determination as found in the report of the hearing examiner and finds that the amount of $20,850 must be added to the amount previously certified by the Council to be raised for current expenses of the School District of Fairview in order that the Board of Education may provide a thorough and efficient system of public schools. The Commissioner, therefore, directs the Mayor and Council

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of the Borough of Fairview to certify to the Bergen County Board of Taxation the additional amount of $20,850 to be raised by local taxation for school purposes for the 1973-74 school year.

COMMISSIONER OF EDUCATION

March 5, 1974

Point Pleasant Beach Teachers' Association,

Petitioner,

v.

Board of Education of the Borough of Point Pleasant Beach et al., Ocean County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Anton and Ward (Donald H. Ward, Esq., of Counsel)

For the Respondent, Harold Feinberg, Esq.

The Point Pleasant Beach Teachers' Association, hereinafter "Association," appeals from the actions of the Board of Education of the Borough of Point Pleasant Beach, hereinafter "Board," and the Superintendent of Schools, hereinafter "Superintendent," in filling coaching positions with persons considered unqualified by the Association.

This matter is submitted for adjudication by the Commissioner of Education on the exhibits and Briefs of counsel.

The two counts of the Petition of Appeal allege the following:

1. A school custodian employed by the Board was appointed by the Superintendent to assist the junior varsity baseball coach during the spring of 1973 when qualified, certified teachers were available to act as coaches.

2. A *part-time* teacher from Lavallette, a sending district, was appointed as a junior varsity coach after an "emergency" was declared by the Superintendent because of a coaching vacancy, and approval for the appointment was given by the Ocean County Superintendent of Schools.

A summary of background events leading to the matter now in contention is required for a full understanding of the instant matter.

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The Superintendent notified the varsity baseball coach by letter of February 20, 1973, that he would not recommend him for reemployment as baseball coach for that spring. Subsequently, the matter became the subject of a grievance filed by the Association on behalf of the dismissed coach. The following notice was then posted by the administration on February 21, 1973:

> "Effective today, in addition to the Freshman Coach opening, the following coaching positions are open:
>
> Varsity Baseball Coach
>
> J. V. Baseball Coach
>
> Any one interested please apply, in writing, no later than Friday, February 23, 1973, to the Office of the Superintendent of Schools." (Respondent's Exhibit)

The initials or check marks of eighty-six teachers were inscribed on the bottom of the notice and check lists, indicating that the notice had been read by them.

A letter to Association members dated February 22, 1973, and signed by the President, Vice-President, and Grievance Committee Chairman of the Association, reads as follows:

> "We are sure that everyone is quite confused by the notices coming from the Superintendent's Office—the 'open-closed-open again' baseball coaching positions.
>
> "By certain maneuvers, i.e., rescinding one notice, putting a dismissal in writing to the teacher, and then resubmitting the same notice of the coaching vacancies, the Superintendent is attempting to correct his by-passing a very important article in our contract, namely, Schedule D, 'Extra-Curricula Position'—methods of dismissal.
>
> "The Grievance Committee has received legal advice from Mr. Donald H. Ward, the Association's attorney, who stated that these latest maneuvers have not changed the situation. Our contract has still been violated. He suggested that we move to Level three of our grievance procedure asking for full re-instatement of the teacher to the position involved and/or compensatory damages.
>
> "Teachers who may be planning to apply for these positions should be aware that we do not regard them as 'open' until the matter has been resolved through binding arbitration."

The record shows that two teachers applied for the freshman coaching position on February 14 and 16, 1973, prior to the announced vacancies in the varsity and junior varsity coaching positions. The Association contends that several other teachers were eligible to coach junior varsity and varsity baseball, but no evidence was shown that anyone applied in writing as the

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Superintendent's memo, *ante,* required. In fact, the Commissioner finds that the Association's letter, *ante,* was designed to discourage applicants for the vacant positions. The posted notice elicited no written request for consideration for the junior varsity coaching position. However, the President of the Association applied for the freshman coaching position on March 6, 1973, and was subsequently appointed to that position. Another teacher applied and was appointed as varsity coach according to a May 17, 1973 letter from the Superintendent to the Ocean County Superintendent of Schools. The vacant junior varsity coaching position, therefore, became the object of the instant dispute.

On April 6, 1973, the Superintendent wrote the Ocean County Superintendent of Schools for permission to employ a coach from one of the Board's sending districts, certifying that an emergency existed. The Ocean County Superintendent of Schools approved the appointment pursuant to *N.J.A.C.* 6:29-6.3 which reads as follows:

> "(a) No person not certified as a teacher and not in the employ of a board of education shall be permitted to organize public school pupils during school time or during any recess in the school day for purposes of instruction; or coaching or for conducting games, events, or contests in physical education or athletics.
>
> "(b) Every person appointed subsequent to June 1, 1960, to coach, teach or train individual pupils or school teams for interschool athletic competition shall be a certified member of a school faculty in that same school district and shall be employed full-time during the regular school day when classes are in session. He shall be officially designated by the district board of education for the duties for which he is to be held responsible.
>
> "(c) School districts shall be permitted to employ certified, full-time employees of their constituent or sending districts, or of a vocational school within the same county as designated in *N.J.S.A.* 18A:54-11, to work on a part-time basis in the inter-scholastic program, providing the superintendent of schools of the receiving district certifies an emergency exists to the county superintendent, upon whose approval the individual may be employed for one year." As amended *R.* 1972 *d.* 88, eff. May 8, 1972, and *R.* 1973 *d.* 223, eff. August 10, 1973

The Association contends that the teacher employed as junior varsity coach from the sending district was not a full-time employee as required in *N.J.A.C.* 6:29-6.3, and therefore, the Superintendent misled the Ocean County Superintendent of Schools by not notifying him of that fact. The Association avers also that several teachers were qualified, available and willing to coach baseball, but that the Superintendent rested on the technical language of the Master Agreement with the Board which required that written applications be made for coaching positions. (See the May 26, 1973 letter to the County Superintendent from the Vice-President of the Association.)

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The Association argues also that use of a custodian as a coach is expressly forbidden by *N.J.A.C.* 6:29-6.3.

The Association prays that:

1. The Commissioner clarify the status and employment of a part-time employee as a coach, and determine whether or not an emergency existed in the spring of 1973.

2. The Commissioner direct the Superintendent and the Board that custodians may not be employed as coaches.

The Board does not deny using a non-certificated person to "help out" and perform coaching duties. However, the Board asserts that the person appointed is not a custodian, but the Supervisor of Operations and Maintenance (Respondent's Letter Brief, at p. 2) paid as part of the administration, and is not on the custodians' salary guide. The Superintendent explained the function of the aforementioned appointee as follows:

> "*** The 'custodian' that [the Association] refers to is actually our Supervisor of Operations and Maintenance *** who has no formal status with our baseball team. He is employed by our Board of Education, and is voluntarily helping the varsity coach during the current baseball season with the knowledge and consent of the administration. In the incident referred to by [the Association] there was an intra-squad game in progress and the varsity coach *** was present on the field the entire time and was in charge of all of the activities. [The appointee] is not replacing any certificated teacher in this situation. There is a full complement of coaches – viz., Varsity, J.V. and Freshman.***" (Respondent's letter of May 17, 1973)

The Commissioner determines, however, that there is no expressed authority to be found anywhere that permits a board to employ any person other than a certificated teacher as a coach. In this respect the Board is directed to follow the provisions of *N.J.A.C.* 6:29-6.3 when making coaching appointments in the future. The Board's assertion that the Supervisor of Operations and Maintenance is paid as part of the administration and that he did not instruct nor coach but was only "helping," does not give the Board the authority to use the Supervisor in such a fashion.

Regarding the appointment of a part-time teacher as coach, the Commissioner notes that no proof was offered that the teacher employed as a coach was employed as a teacher on a part-time basis only by the sending school district of Lavallette. This allegation is not denied by the Board. The Superintendent notified the Ocean County Superintendent of Schools and requested permission to employ the teacher in question as follows:

> "*** We approached Mr. Rodgers, who is employed by the Lavallette Board of Education. He was willing and available to coach.

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> "Since no faculty member applied from the Beach system for this position, we are requesting that he be allowed to coach for us for the remainder of the 1972-73 school year.***" (Respondent's Exhibit "B")

For the purposes to be served by this decision, the Commissioner will assume that the teacher in question was a part-time teacher employed by the school district of Lavallette. No determination need be made as to whether or not he was so employed since the coaching appointment requires the approval of the County Superintendent of Schools and must be made on a one-year basis.

The Administrative Code, *N.J.A.C.* 6:29-6.3, clearly states that coaches employed from sending districts must be "certified" as teachers and employed by the sending district on a "full-time" basis. The intent of this rule is, in part, to avoid the evil of hiring professional athletes and other uniquely qualified persons as minimal part-time employees, as a guise for acquiring their coaching talents. A further intent of the rule is to insure that boys and girls will be coached by teachers who have been trained to develop the mind, body and character of their pupils.

For the above reasons, the Commissioner further directs the Board to follow the rules found in *N.J.A.C.* 6:29-6.3 and employ only full-time teachers as required.

There is no further relief necessary since the 1973 baseball season is past and the salient issues have been addressed in a way that should avoid any repetition of this matter in the future.

COMMISSIONER OF EDUCATION

March 5, 1974

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**In the Matter of the Tenure Hearing of William Fleming,
School District of the Borough of Hawthorne, Passaic County.**

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board of Education, Jeffer, Walter, Tierney, Hopkinson & Vogel (Reginald F. Hopkinson, Esq., of Counsel)

For the Respondent, Anthony J. Sciuto, Esq.

The Board of Education of the Borough of Hawthorne, hereinafter "Board," has certified a series of three charges against respondent, a tenured teaching staff member in its employ, pursuant to the statutory prescription contained in the Tenure Employees Hearing Law. *N.J.S.A.* 18A:6-10 *et seq.* In the Board's judgment such charges, if proven true in fact, would constitute evidence of unbecoming conduct or other just cause sufficient to warrant respondent's dismissal or a reduction in his salary. Respondent denies all charges against him.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner of Education at the office of the Passaic County Superintendent of Schools, Paterson, on November 29, 1973. The report of the hearing examiner is as follows:

The charges against respondent herein were founded in a series of incidents involving respondent which occurred on June 19, 1973, although one of the charges, Charge No. 2, was specifically set forth with respect to an alleged incident of the previous day. The charges will be considered *seriatim*.

Charge No. 1

> "That on the 19th of June, 1973, during the school year, and while in the employment of the Hawthorne Board of Education, said William Fleming met a male student 17 years of age and took that student to a tavern in the Borough of Hawthorne. There said William Fleming purchased liquor for said student and facilitated said student to imbibe in intoxicating liquors. Said act, in causing and abetting a student in violating State Statutes which forbid any individual under the age of 18 years to be served intoxicating liquors, as well as to jeopardize the safety of the student and expose the Board of Education of the Borough of Hawthorne to serious consequences, was a deliberate and intentional act of said William Fleming of the most serious consequences, and was compounded by a subsequent effort by said William Fleming in urging the student to falsely relate to inquiring school authorities as to said incident, in violation of N.J.S. 33:1-81 et al."

Respondent admitted that on June 19, 1973, he met a pupil, hereinafter identified as "T.T.," on the school grounds, and that he invited T.T. to "*** go

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to lunch.***" (Tr. 73) Respondent also admitted that he and T.T. then proceeded together to the Hideway Bar (Tr. 73) which is located a short distance from Hawthorne High School. Subsequent to their lunch at the Bar, respondent urged or suggested that T.T. not admit, if asked, that he had been there. (Tr. 79)

While admitting these elements of Charge No. 1 were true, respondent also admitted that subsequent to the time of the lunch in the Bar he was asked a question by the Superintendent of Schools concerning where he had been, and that the answer he gave was falsified. (Tr. 81) (According to the Superintendent, at first respondent stated he had gone "*** to a nearby garage to refuel his car.***") (Tr. 12)

While admitting these things, *ante*, respondent denied that part of Charge No. 1 which states that he "purchased liquor" for T.T. and "facilitated said student to imbibe." Respondent's testimony in this regard was that he and T.T. had entered the Hideway Bar together but that T.T. had sat at a table and respondent had separated from him and sat "*** at the bar.***" (Tr. 74)

Respondent's testimony with respect to what food or drink had been consumed was as follows:

"***

A. I had a hamburger and two mugs of beer.

"Q. Do you recall what (T.T.) had?

"A. I believe he had a Coke. He had a big tall mug of Coke, or something. I don't know.

"Q. Do you know if he had alcoholic beverage?

"A. He certainly did not***."

(Tr. 74-75)

This testimony of respondent was similar to that of the proprietor of the Hideway Bar who said:

"***

A. I served Mr. Fleming and I served this fellow (T.T.). Both of them had hamburgers. Mr. Fleming had a mug of beer and young (T.T.) had a frosted glass of Coca Cola and I served it to him at the table.***" (Tr. 60)

Such testimony of respondent and the proprietor of the Hideway Bar is directly in contradiction to that of T.T. who stated that he had sat for lunch "At the bar in the corner" rather than at a table. (Tr. 23) T.T. said further:

"*** we each ordered a sandwich and a glass of beer, and we talked a little, and I had a sandwich. And then I played a couple of games of pool

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and then Mr. Fleming and I had a game of pool and then we left the Hideway Bar about a half an hour later and I went to school.

"Q. (T.T.), just go back a little when you were playing a game of pool, did you have anything else? Did you have another beer?

"A. Yes, I had one more.

"Q. And who paid for the beer?

"A. Mr. Fleming because I won the game.

"Q. I see. There was a bet as to who was to pay?

"A. No, it's just tradition, if you lose the game, you buy a beer.***" (Tr. 21)

T.T. also testified he was told by respondent to indicate

"*** that if anybody asked me where we were, that we were swimming at a neighbor's pool, we took a dip. And then I went back to the high school, and he said he was going to check out and I went downstairs to the weight lifting room.***" (Tr. 21-22)

Thus, the testimony herein proves a sharp contradiction which can be resolved only through an assessment of the credibility of the respective witnesses.

In this regard, the hearing examiner gives greatest weight to the testimony of T.T. His appearance at the hearing was that of a mature seventeen-year-old boy, and his convincing enunciation of the facts as he remembered them was complete with detail. Furthermore, his statement that he had been served beer twice on June 19, 1973, and that respondent had paid for it once received strong corroboration from the testimony of the Superintendent of Schools. This official stated without equivocation that respondent had admitted, on or about June 26, 1973, that both he and T.T. had consumed beer on June 19, 1973 at the Hideway Bar. (Tr. 14-15) The Superintendent said his memory with respect to respondent's admittance with regard to such consumption was "vivid" and that respondent had "made light" of the entire incident. (Tr. 100)

Accordingly, the hearing examiner finds it to be true in fact that on June 19, 1973, respondent took T.T. to the Hideway Bar, Hawthorne, New Jersey, for lunch and that, while seated together at the bar of that establishment, they each were served, and consumed, sandwiches and beer. The hearing examiner also finds it to be true in fact that respondent purchased one beer of the two consumed by T.T. on that date, and that subsequently respondent urged T.T. to falsify a story with respect to the incident and specifically with respect to the place where the luncheon was consumed.

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Charge No. 2

"On the 18th of June, 1973, said William Fleming, without proper authorization, did improperly and without authority leave his place of employment and without notice to any appropriate administrative official remained absent from his school post from 12 noon to attend the race track."

The vice-principal of Hawthorne High School testified to the truth of this charge. His testimony was that on June 19, 1973, at approximately 7:30-8:00 a.m., he was engaged in casual conversation with respondent, and that respondent had indicated he had gone to Monmouth Park Race Track on the previous afternoon and had "*** hit the daily double.***" (Tr. 27) Whereupon, the vice-principal testified:

"*** When he said he hit the daily double, I questioned him. I said, 'How could you hit the daily double if you were supposed to be in school?' And he replied that he took the afternoon off because he didn't have any exams scheduled.***" (Tr. 27)

The vice-principal then indicated he had reprimanded respondent and told him not to "*** do it again.***" (Tr. 27) This testimony received corroboration in its essential details from the testimony of a fellow teacher of respondent. (Tr. 51)

It is noted here that the school calendar, a copy of which was requested by the hearing examiner on the day of the hearing, indicates that the last day of school in Hawthorne was June 21, 1973. The notation in the calendar for that date is:

"Last Day of School – One Session Day – Students – Full Day – Teachers."

It is also noted that Hawthorne High School's Teachers' Handbook contains this direction:

"Teachers' Hours

"Teachers are to sign in each day by 7:55 a.m. and may leave at 3:02 p.m. (except Fridays – may leave at 2:56 p.m.)" (PR-4)

and Article VIII of the negotiated Agreement between the Board and its teaching staff states:

"A. 1. A teacher's work day may not normally exceed a total of seven hours, which normally will allow for signing in fifteen (15) minutes before and signing out fifteen (15) minutes after the regular daily school schedule, except on Fridays and days when school is recessed early at which time teachers may leave with pupil dismissal." (PR-5)

Both of these latter documents were also furnished subsequent to the hearing.

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Respondent categorically denied in his testimony that he had gone to the race track on June 18, 1973, but admitted that he had left school at approximately 11 a.m. on that date. He said his early leave was for the purpose of looking for a "summer job." (Tr. 68-69)

He also testified, however, that there had been a conversation on that morning of June 18, 1973 about the races and the "daily double." He said:

> "*** We had a discussion with reference to the daily double, you know. and I happened to say I hit it and I didn't hit it. I didn't even go, really, with the understanding that he wouldn't get upset over it, that I did go to the track. You know my exam was over at eleven and I left, which I was reprimanded by my chairman. I really didn't know that I had to stay in the building.***" (Tr. 69)

Thus it is noted that respondent admitted he said on June 19, 1973, that he had "hit" the daily double on the previous day at the race track. However, he stated at the hearing "*** I didn't hit it. I didn't even go, really***." (Tr. 69) For purposes of this adjudication it is not necessary to determine whether or not respondent spent June 18, 1973 at the race track while school was still in session for teachers.

The fact is that respondent admitted he absented himself from school on the occasion to "*** look for a summer job ***" (Tr. 68), and it is this unauthorized absence which is the crux of Charge No. 2.

Accordingly, the hearing examiner finds it to be true in fact that on the afternoon of June 18, 1973, respondent absented himself from his place of employment in the Hawthorne schools and that such absence was contrary to the Board's published rules, *ante,* in this regard.

Charge No. 3

> "On the 19th of June, 1973, said William Fleming in the faculty dining room did state to his immediate superior, the Vice Principal, Joseph Livatino, that he would absent himself the next day, June 20, by calling in sick, and when an admonition was made that such action would be improper, particularly in view of a one-week suspension for using foul language to a student, said William Fleming did disrupt and commit acts of disorderly conduct of an outrageous nature including vociferously stating:
>
> "(A) 'that the Vice Principal was a F--k--g rubber.'
>
> "(B) He shoved and pushed Mr. Livatino, the Vice Principal, continued into the hallway shouting obscenities, went to the parking area of the school and continued shouting obscenities, calling him 'a F--k--g rubber' contrary to the provision of N.J.S. 2A:170-26 and thereby disrupting school affairs in violation of N.J.S. 2A:170-28;

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"all in violation of said William Fleming's obligation to be in attendance at his assigned teaching duty; to pursue and follow instructions of his superior and to refrain from unbecoming conduct contrary to the provisions of N.J.S. 18A:6-10."

The hearing examiner notes for the record that the incidents which comprise the allegations of Charge No. 3 are alleged to have occurred in the faculty dining room of the Hawthorne High School at a time shortly after respondent had returned from the Hideway Bar. Further, it is noted that respondent essentially admitted all of the specific charges herein:

1. He admitted that on June 19, 1973, he stated he was going to take the following day off as a sick day. (Tr. 71, 93)

2. He admitted he cursed the vice-principal of Hawthorne High School and used the obscenities which are alleged herein. (Tr. 70-71)

3. He admitted that he "brushed" the vice-principal and "pushed him back." (Tr. 70)

There is no essentially contradictory testimony in these admissions. It is noted that the vice-principal maintained he was "shoved" (Tr. 29), while other witnesses used the verb "pushed" in describing that incident. (See Tr. 38-39, 48 for testimony of fellow teachers and Tr. 28 for testimony of the vice-principal.)

While, as noted, respondent essentially admitted the allegations contained in Charge No. 3, he also maintained that the vice-principal cursed him in return and offered to fight him in the school gymnasium. (Tr. 71-72)

Having reviewed all of the evidence with respect to Charge No. 3, the hearing examiner finds the charges to be true in fact. This is founded on the conclusion that there is no essential difference in the testimony with respect to whether or not respondent "pushed" or "shoved" the vice-principal of Hawthorne High School on June 19, 1973. The words are similar in meaning and each of the words connotes the use of physical force.

In summation, the hearing examiner finds it is true in fact that:

1. On June 18, 1973, respondent absented himself from his place of employment without permission. (Charge No. 2)

2. (a) On June 19, 1973, respondent took a seventeen-year old pupil to Hideway Bar where together they purchased and consumed a lunch which included beer, the cost of which was paid, at least in part, by respondent. (Charge No. 1)
(b) Respondent urged the pupil to falsely relate to inquiring school authorities as to said incident. (Charge No. 1)

3. On June 19, 1973, respondent did state he was going to call in sick on June 20, 1973, when in fact he was not sick, and thereafter,

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following a reprimand, he did direct curses and obscenities at the vice-principal of the school and did shove or push him. (Charge No. 3)

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record in the instant matter, the report of the hearing examiner, and the exceptions thereto as filed by counsel for respondent pursuant to *N.J.A.C.* 6:24-1.16.

The Commissioner is in agreement with the findings set forth in the report of the hearing examiner and herewith proceeds to determine the penalty that may justly be imposed for the violations herein admitted or otherwise found to be true in fact.

On June 18, 1973, respondent absented himself from his place of employment in a manner and at a time contrary to the policies of the Board. Such premeditated contravention of policy is reprehensible. Yet this act, standing alone within the context of a long period of satisfactory service to the public schools, would be insufficient reason for dismissal. *In the Matter of the Tenure Hearing of William Megnin, School District of the Township of Wayne, Passaic County,* 1973 *S.L.D.* 641

However, the Commissioner holds that this infraction is raised to a higher magnitude of seriousness by the events of June 19, 1973, and that the events of the two days must be joined to reach a final determination.

Respondent's action in taking a seventeen-year-old pupil to a bar, consuming with him an alcoholic beverage, and thereafter urging the pupil to falsify his answers to inquiring school authorities constituted gross misconduct sufficient to substantiate the Board's charge of conduct unbecoming a teacher. Respondent's subsequent attack upon the vice-principal in a coarse display of physical violence and obscenities further compounded respondent's demonstrated disregard for his professional responsibilities.

The Commissioner repeats his position with respect to the protection of tenure as previously articulated *In the Matter of the Tenure Hearing of Joseph A. Maratea, Township of Riverside, Burlington County,* 1966 *S.L.D.* 77:

> "*** The Commissioner is assiduous to protect school personnel in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control. An employee is not entitled to tenure, however, when, by his own acts or failures, he creates conditions under which the proper operation of the schools is adversely affected. When the responsibility for the conditions unfavorable to the effective operation of the schools rests with the employee then, the Commissioner holds, the protection of tenure is forfeit.***" (at p. 106)

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Similarly the Commissioner has said in *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County,* 1974 *S.L.D.* 97 that:

> "*** Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully violates the law, as in this matter, and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.***"

Having found the charges against the respondent to be true in fact and of such moment to constitute gross conduct unbecoming a teacher, the Commissioner determines that William Fleming has forfeited his rights to tenure in the School District of Hawthorne. He therefore directs the Board of Education to dismiss respondent as of the date of his suspension.

COMMISSIONER OF EDUCATION

March 5, 1974

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In the Matter of the Annual School Election Held in the School District of Penns Grove–Upper Penns Neck Regional, Salem County.

COMMISSIONER OF EDUCATION

DECISION

At the annual school election held on February 5, 1974 in the Penns Grove-Upper Penns Neck Regional School District, Salem County, the electorate was required to approve or disapprove a resolution adopted by the Penns Grove-Upper Penns Neck Regional Board of Education which proposed an expenditure of $2,382,621 for the current expenses of the school district in the 1974-75 school year. At the conclusion of the tally of ballots cast, the announced results with respect to such resolution or public question were as follows:

	At Polls	Absentee	Total
Yes	257	–0–	257
No	257	–0–	257

Pursuant to a written request from the President of the Penns Grove-Upper Penns Neck Regional Board of Education, an authorized representative of the Commissioner of Education conducted a recount of the ballots cast on this public question on February 14, 1974 at the office of the Salem County Superintendent of Schools. At the conclusion of the recount, with ten ballots contained in five Exhibits reserved for the Commissioner's determination, the tally stood as follows:

	Uncontested	Absentee	Total
Yes	256	–0–	256
No	250	–0–	250

* * * *

The Commissioner has reviewed the ten (10) ballots referred to him for determination. It is noted that nine of the ballots are included in the first four Exhibits (A, B, C, D) and that each of these ballots contains a proper mark in an appropriate square immediately preceding the resolution which sets forth the public question. Therefore, the Commissioner holds that each of these ballots must be added for or against such question.

This determination is grounded both in the clear inference of statutory prescription (*N.J.S.A.* 19:16-3f) and in prior decisions of the Commissioner which have held that a ballot cast by a properly qualified voter is not rendered totally invalid by the fact that it may be invalid in part. *In the Matter of the Recount of the Ballots Cast at the Annual School Election in the Borough of North Caldwell, Essex County*, 1954-55 *S.L.D.* 110 The statute of reference provides:

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"If a voter marks more names than there are persons to be elected to an office, or writes or pastes the name of any person in the column designated personal choice, whose name is printed upon the ballot as a candidate under the same title or office, or his choice cannot be determined, his ballot shall not be counted for that office, *but shall be counted for such other offices as are plainly marked." (Emphasis supplied.)*

Accordingly, the following tally of ballots from Exhibits A, B, C, and D may be added to the total of ballots which are uncontested:

	A	B	C	D	Subtotal
Yes	1			1	2
No	5	1	1		7

There remains for consideration the one ballot contained in Exhibit E. This ballot is proper in all respects except that the mark in the appropriate square preceding the word "yes" is a mark which appears to be a cross (X) and a plus (+), one superimposed over the other. However, the Commissioner finds no reason to conclude that such a mark is an attempt to distinguish the ballot, and, absent such finding, he holds herein, as he has held similarly in the past, that the ballot may be counted. *In the Matter of the Annual School Election Held in the Township of Randolph, Morris County,* 1965 *S.L.D.* 69

Subtotal – Add to Tally	Yes	– 1
	No	– 0

In summary, when the tally of votes contained in the Exhibits is added to the tally of uncontested votes, the result stands as follows:

	Uncontested	**A**	**B**	**C**	**D**	**E**	**Absentee**	**Total**
Yes	256	1			1	1	–0–	259
No	250	5	1	1			–0–	257

Accordingly, the Commissioner finds and determines that the resolution of the Penns Grove-Upper Penns Neck Regional Board of Education which was presented to the electorate of the regional school district in the referendum of February 5, 1974, has been duly approved by such electorate, and it is now required that the sum of $2,382,621 be raised for current expenses of the district for the ensuing 1974-75 school year.

COMMISSIONER OF EDUCATION

March 5, 1974

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In the Matter of the Annual School Election Held in the School District of the Borough of North Plainfield, Somerset County.

COMMISSIONER OF EDUCATION

DECISION

At the annual school election held on February 13, 1974, the announced results of the balloting for candidates for three seats for full terms of three years each and one set for a full term of two years on the North Plainfield Board of Education, Somerset County, were as follows:

For Three-Year Term	At Polls	Absentee	Total
William J. Boehm	523	11	534
Winifred G. Letso	473	10	483
Anthony Sa	469	10	479
Mrs. Frank Cowen	–0–	1	1

For Two-Year Term	At Polls	Absentee	Total
Nancy Quackenbush	321	4	325
Maurice Lipton	315	9	324

The following results were also announced for the current expense appropriation for the 1974-75 school year:

Current Expense

At Polls		Absentee		Total	
For	Against	For	Against	For	Against
331	337	6	7	337	344

A written request dated February 19, 1974, was received from Candidate Maurice Lipton for a recount of the votes cast for the candidates on the ballot for a full term of two years. In addition, a letter request of the same date was also received from the Secretary of the Board of Education, asking that there be a recount of the votes cast on the current expense appropriation for the 1974-75 school year.

Pursuant to such requests an authorized representative of the Commissioner of Education was appointed to conduct a recount of the ballots cast. The recount, which was conducted on February 28, 1974 at the voting machine warehouse in Somerset County, was confined to those votes cast for the two candidates for a full two-year term and the current expense appropriation item.

The Commissioner's representative reports that, at the conclusion of the recount of the ballots on the voting machines, and a review of the report of the

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canvass of absentee ballots, there was no official change in the tally of votes.

* * * *

The Commissioner finds and determines that Nancy Quackenbush was elected to a full two-year term on the Board of Education of the Borough of North Plainfield and that the current expense appropriation item for the 1974-75 school year was defeated by the voters at the annual school election held February 13, 1974.

COMMISSIONER OF EDUCATION

March 8, 1974

In the Matter of the Annual School Election Held in the School District of the Township of Hopewell, Cumberland County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the voting for three members of the Board of Education of the Hopewell Township School District for full terms of three years each at the annual school election held on February 13, 1974, were as follows:

	At Polls	Absentee	Total
Daniel P. Calabrese	76	–0–	76
Owen H. Probasco	96	–0–	96
John S. Dunn, Jr.	67	–0–	67
George L. Schull III	76	–0–	76
Eugene R. Borchers	87	–0–	87

Pursuant to a written request by Candidate George L. Schull III, a recount of the votes cast for the five candidates named above was conducted by an authorized representative of the Commissioner of Education on February 27, 1974 at the office of the Cumberland County Superintendent of Schools, Bridgeton.

In the course of the recount it was noted that some ballots contained erasures. However, there was no evidence that such erasures were meant to distinguish the ballots, and they were correctly added to the tally according to the prescription of the statute *N.J.S.A.* 19:16-4 which provides:

> "*** No ballot which shall have, either on its face or back, any mark, sign, erasure, designation or device whatsoever, other than is permitted by this Title, by which such ballot can be distinguished from another ballot, shall be declared null and void, unless the district board canvassing such ballots,

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or county board, judge of the Superior Court or other judge or officer conducting the recount thereof, shall be satisfied that the placing of the mark, sign, erasure, designation or device upon the ballot was intended to identify or distinguish the ballot.***"

See also *In the Matter of the Annual School Election Held in the School District of the Township of Voorhees, Camden County*, 1971 *S.L.D.* 66; *In the Matter of the Annual School Election Held in the School District of the Borough of Bogota, Bergen County*, 1970 *S.L.D.* 83.

The Commissioner so holds in this matter.

At the conclusion of the tally the results stood as follows:

	At Polls	Absentee	Total
Daniel P. Calabrese	76	–0–	76
Owen H. Probasco	97	–0–	97
John S. Dunn, Jr.	68	–0–	68
George L. Schull III	77	–0–	77
Eugene R. Borchers	87	–0–	87

The Commissioner finds and determines that Owen H. Probasco, George L. Schull III and Eugene R. Borchers were duly elected to seats of three full terms of three years each on the Hopewell Township Board of Education at the annual school election held on February 13, 1974.

COMMISSIONER OF EDUCATION

March 8, 1974

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In the Matter of the Annual School Election Held in the School District of the Borough of Keansburg, Monmouth County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting at the annual school election held February 13, 1974, in the School District of the Borough of Keansburg, Monmouth County, for three members of the Board of Education for full terms of three years each were as follows:

	At Polls	Absentee	Total
Karl J. Strauch	224	4	228
Richard J. Fleming	610	3	613
F. Gary Stover	627	7	634
Robert A. Bruno	377	3	380
Jeri A. Alexander	363	5	368
James E. Moran	387	7	394

Pursuant to a letter request from Robert A. Bruno, dated February 20, 1974, the Commissioner of Education directed his authorized representative to conduct a recheck of the totals on the voting machines used in this election. The recheck was made at the warehouse of the Monmouth County Board of Elections in Freehold on March 8, 1974.

The Commissioner's representative reports that the announced tally set forth above was confirmed.

* * * *

The Commissioner finds and determines that Richard J. Fleming, F. Harry Stover and James E. Moran were elected to full terms of three years each on the Borough of Keansburg Board of Education at the annual school election held on February 13, 1974.

COMMISSIONER OF EDUCATION

March 11, 1974

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Elizabeth Rockenstein,

Petitioner,

v.

Board of Education of the Township of Jamesburg, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rothbard, Harris & Oxfeld (Sidney Birnbaum, Esq., of Counsel)

For the Respondent, Brigiani and Cohen (William G. Brigiani, Esq., of Counsel)

Petitioner, a fifth grade teacher, was employed for three consecutive academic years by the Board of Education of the Township of Jamesburg, hereinafter "Board," and was not offered her fourth, or tenure, contract. She alleges that the Board is in violation of her contractual, constitutional, and statutory guarantees and that the Board's refusal to reemploy her is based on arbitrary and discriminatory reasons. Petitioner prays that she be made whole for her lost earnings and be given employment by the Board.

The Board denies the allegations as set forth, *ante,* and avers that it has met its contractual obligation to petitioner. The Board avers also that neither party has any further obligation to the other and that petitioner, as a nontenure teacher, is not entitled to the relief she seeks.

The facts of the matter were adduced at hearings held in the office of the Middlesex County Superintendent of Schools, New Brunswick, on November 27, 1972, and on January 5, February 1, May 9, and June 22, 1973. Briefs were filed by counsel subsequent to the termination of the hearings. The report of the hearing examiner follows:

The Board admits that it employed petitioner for three consecutive academic years with contracts for the school years 1968-69, 1969-70, and 1970-71.

Petitioner testified that she was a faculty representative of the Jamesburg Education Association (the local teachers' association which was the recognized bargaining agent with the Board pursuant to *Chapter* 303, *Laws* of 1968) and accompanied two other teacher representatives to the principal's office in late February 1971 to complain about a memo he had sent to the entire teaching staff (Tr. I-16-26) which reads as follows:

> "It is becoming quite obvious that many of our teachers are not adhering to Board Policy and professional judgement (sic).

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"Commencing immediately *all* teachers will be expected to be in their classrooms at the designated time.

"I must emphasize again, that the above statement emphasizes classroom attendance and not teacher lounge relaxation.

"I will be available to discuss the above statement with anyone to explain fully, 'if needed,' the meaning of this directive."

The record shows that some teachers were upset by the tone of this memo because they felt it was sarcastic. (Tr. I-19, 139) (Tr. II-18) Another teacher representative testified that some faculty members complained to her about the memo and indicated that the principal should address only those faculty members who were violating the Board policy on lateness, and that the entire faculty, most of whom were in their classrooms on time, should not be redressed or subject to such memos because of the shortcomings of a few. (Tr. I-140) (Tr. II-17-19, 89)

The Superintendent testified that he met with the principal after receiving the same complaint from the president of the local teachers' association and told the principal that perhaps minor or trivial matters, such as this, could be handled better in the future through departmental chairmen rather than through memos. (Tr. II-87-97)

Petitioner testified further that as a result of her meeting with the principal in late February while accompanied by the two aforementioned teachers, she thereafter was subjected to two classroom evaluations in rapid succession within a week and a half of the meeting with the principal and that those evaluations were unfavorable. (Tr. I-27-29) Prior to these two classroom evaluations in early March 1971, petitioner testified that it had been the established practice to evaluate nontenure teachers two or three times a year and that the evaluations were spaced several months apart. However, after her meeting with the principal following the memo (R-1), her back-to-back evaluations caused her much concern, and she asked for a meeting with the principal to discuss his observations of her teaching. (Tr. I-29-39)

The record shows also that every one of her evaluations in prior years had been favorable, through October 1970. (P-2, 3, 4, 5) However, the double written evaluation (P-6), dated March 1971, was used as the basis for her non-reemployment. (Tr. IV-36) The Superintendent testified that he recommended to the Personnel Committee of the Board that, based on the principal's recommendation, petitioner not be rehired.

Petitioner's testimony concerning the principal's memo (R-1) and her subsequent meeting with him was corroborated by the two teachers who accompanied her. (Tr. I-142) (Tr. II-20, 37-44) Reemployment by contract was not applicable to the other two teachers because they held tenure in the district.

Petitioner testified, also, that she later received a note in her mailbox on

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March 15, 1971, instructing her to see the Superintendent. When she met with him, she averred she was told that she would not be reemployed because of her lack of rapport with the principal (Tr. I-41), and that she should meet with the principal to see if she could reestablish the rapport between them. Petitioner then wrote a letter (P-7) to the principal requesting another meeting to discuss her problems and he replied as follows: (Tr. I-42)

> "In response to your correspondence dated March the 16th, I see very little if any usefulness in prolonging a topic which has already been adjudged by this Administration and the Board of Education.
>
> "The concept indicated above, referes (sic) to your contractual status with this school system, which will terminate at the end of this school year.
>
> "It is the combined opinion of the Personnel Committee of the Board of Education and this office that your philosophy and professional services may be much better suited to some other school district.
>
> "May I at this time, take this opportunity to extend my assistance to you in any possible reference situation for future professional employment."

Petitioner contends that her contract has been terminated, *inter alia,* because she exercised her constitutional right to free speech, and that she was the only nontenure teacher who approached the principal to complain about his memo. (R-1) The record shows that petitioner did not speak while in the principal's office during that fateful meeting (Tr. I-21, 26, 42) (Tr. II-20), and that only one of the teacher representatives spoke in their behalf. Another topic allegedly discussed during that meeting with the principal was the dismissal time printed in the Board Handbook. The teachers understood that they had to follow the directives stated therein; however, the printed dismissal time was 3:35 p.m., and the teachers were accustomed to leaving at 3:45 p.m. The principal's position was that the Handbook contained a typographical error and that the dismissal time was actually 3:45 p.m. (Tr. I-141) (Tr. II-19, 20)

In summary, petitioner avers that the Board's determination not to reemploy her was based on the recommendation of the principal, which was improper, illegal, unconstitutional, arbitrary, and discriminatory.

The principal testified that he heard through the "rumor clinic" in the school that some teachers were unhappy about his memo, *ante.* However, he testified that he did not recall any meeting with three teachers as previous testimony indicated, to discuss the controversial memo, nor did he recall any meeting to discuss a discrepancy between teacher dismissal time as printed in the Board Handbook, and the administrative practice which enforced a later dismissal time (Tr. III-109-112); neither did the principal recall a meeting with the Superintendent to discuss ways, other than memos, of handling specific problems. (Tr. III-112-113) (Tr. II-4)

The Superintendent testified that he was aware that a meeting took place

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between the principal and the three aforementioned teachers, and that there was a "need for a clarification" of the controversial memo issued by the principal. He testified that he had a discussion with the president of the teachers' association about the memo and the teacher dismissal time as printed in the Board Handbook. (Tr. II-87) He testified also that he later discussed with the principal the handling of such memos involving "trivial" matters, possibly through departmental chairmen, as a "better administrative procedure." (Tr. II-87-90) Although the principal did not recall this discussion with the Superintendent, he did not deny that it might have occurred, nor did he recall nor deny being given any suggestions on the future handling of such matters. (Tr. III-112-114) He later testified that the Superintendent had never said a word to him about the alleged incident. (Tr. IV-4)

The principal's testimony clashes sharply with that of the teacher witnesses. Two of the three aver that, as a result of the alleged meeting with the principal concerning the controversial memo, they were evaluated twice by the principal in the next several days and that both evaluations were unfavorable.

The principal testified, however, that he was evaluating a teacher in a relocatable classroom outside the main building and that said classroom was attached to petitioner's in what was identified as an "alpha-beta" unit. He testified as follows about his observation of petitioner who was in the adjacent unit, while he was conducting a teacher evaluation in the other unit:

> "*** are you able to tell this tribunal what observations were made which indicated your 1971 evaluation and (sic) being different from your October 1970 evaluation? A Yes. You would have to understand the circumstances of our community being very small we have six relocatable classrooms and when I was observing one of the teachers, the walls were fairly thin and *I had structurally observed for at least a good hour and a half no teaching going on in Mrs. Rockenstein's class around that time and as I walked into the Teacher's room to observe I had found her to be actually be sitting at her desk in (sic) a multitude of book work being utilized by the students in the class,* in other words, there was one of the complete changes of professional areas of ability I had seen at that time.***" (Tr. III-69) *(Emphasis supplied.)*

He testified later that petitioner appeared to be half asleep and that the students were working in notebooks. (Tr. III-102-106) This observation and others led finally to his recommendation that petitioner not be reemployed. He based this recommendation on his two evaluations of her in March 1971. (Tr. IV-36)

One Board member testified that the Board voted to reemploy teachers on the basis of the recommendations of the Personnel Committee, and that the principal had recommended that petitioner not be rehired. (Tr. III-7-9) His testimony was corroborated by two other Board members (Tr. III-37-39, 46-48) and the Superintendent (Tr. II-112) who also testified about his personal observation of her teaching as follows:

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***

"Q Did you ever observe her in class?

"A Not formally.

"Q Had you ever been in her classroom?

"A I have passed by it, looked in.

"Q You passed by it and looked in. Now, are you telling us that you can evaluate a teacher by passing by their (sic) door and looking in?

"A I can evaluate a teacher on the basis of past experience, her background, her potential and various other items.

"Q Did you ever observe her teaching in the classroom?

"A Formally, no.***" (Tr. II-108)

However, his own recommendation to the Board was that she not be reemployed based on his "informal" observations and interviews with new applicants who appeared to have the "potential" for better success than did petitioner. (Tr. IV-108-112) He also testified that he hired a replacement for petitioner who was more qualified than petitioner because of his overall background and because "*** he was a man***." (Tr. II-182) He qualified this statement by saying

***

"A –and in terms of elementary education, there is a philosophy that perhaps you should get more men into the area; and with a good primary background, I felt that he would be a potential asset to the system.***"

and,

"***

A That he was a man and that it is part of the overall educational experience to have, in addition to women, also to have men in the elementary area so that they can better relate to the boys and girls; and on that basis, I look for a balance in the teaching staff.***"
(Tr. II-182, 184)

Having received such testimony, the hearing examiner finds it unconvincing as a reason for a recommendation to deny reemployment to petitioner. He concludes, instead, that the real reason for such denial was the complaint expressed by the three teachers against the memo of the principal and their question with respect to published dismissal time.

All witnesses were sequestered; however, the teacher witnesses testified about the memo, *ante,* and their reaction to it and about the Board Handbook.

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These matters and their conversation with the principal about them was corroborative and not conflicting. Moreover, the demeanor of the teacher witnesses exhibited a willingness to cooperate and to tell what they remembered to the best of their ability. Their testimony was forthright and entirely believable to the hearing examiner.

On the other hand, the principal could give no substantial reason for his two successive observations of petitioner in early March 1971, and his subsequent recommendation that she not be reemployed, other than his incredible testimony that he listened through a thin wall for ninety minutes from another teacher's classroom at a time when nothing was taking place in petitioner's classroom. The hearing examiner notes that no reason must be given by an administrator who decides to observe any teacher; however, the circumstances involved in this particular matter–the coincidences of the principal's two observations of petitioner and the other teacher witnesses in early March 1971, the resultant negative written evaluations, and the recommendation by him that petitioner not be reemployed, which occurred so shortly after their meeting–lead to a conclusion that petitioner was improperly terminated by the Board for exercising her right to free speech.

All of the testimony shows that petitioner did not speak during the meeting with principal; however, she was present when the spokeswoman rendered the teachers' complaint, and her presence was her symbolic expression of support for the statements made by her colleague. In *Tinker v. Des Moines School District,* 393 *U.S.* 503 (1969) the Court defended the right of students to wear armbands as a passive symbolic expression of free speech. Certainly, a teacher has no lesser right to engage in a passive expression of views.

The hearing examiner finds, therefore, that petitioner's very presence at this meeting, even though she did not speak, led to her termination which was an arbitrary, unreasonable, and unconstitutional violation of her rights.

The principal's testimony about listening through a thin wall for ninety minutes was inconsistent. He testified that he heard nothing at all while in the adjacent classroom, not even children's voices. (Tr. III-69) He testified that petitioner was "in a half sleeping situation." (Tr. III-104) He testified that as he walked into her class petitioner "immediately***rose from her desk or subsequently some few seconds after that to get organized," (Tr. III-105) and began to give "direction[s]" to her pupils. (Tr. III-106) He testified also that from the time she began teaching in the school until October 1970, petitioner had exhibited all the qualities he had been looking for in a teacher. (Tr. IV-6) He testified later that he heard nothing going on in petitioner's classroom "for several hours" while he was observing in the adjacent classroom through "paper-thin walls," (Tr. IV-8) and that "it appeared she had her head down on the desk, sleeping, the kids were busily engaged in a multitude of workbooks and no structured lesson was going on," and that he did not attempt to awaken her. (Tr. IV-13) He also testified that he stood in the back of the classroom unnoticed for about five minutes (Tr. IV-14), that he walked in and sat in the

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back of the room (Tr. IV-18), that he does not recall whether he sat down or stood up (Tr. IV-25), and that she did not give the pupils any instructions. (Tr. IV-19)

The record shows also that, irrespective of the thickness of the walls between the relocatable units, if the principal listened from the back of the adjacent classroom for ninety minutes as he testified, he was at least thirty-five to forty-four feet from petitioner, and they were separated by two walls, nine feet apart, which contained between them the boys' and girls' lavatories and two cloakrooms. Each side of the rear of the relocatable units was connected through a nine foot corridor with two doors enclosing each corridor, one at each end. (P-9) (Tr. IV-29-34)

The hearing examiner finds it unbelievable that the alleged ninety-minute observation could have taken place as described by the principal. Further, there are several inconsistencies in the reference to the accompanying details, *ante*, and it stretches credibility to believe that an administrator would allow nothing to go on in a classroom for ninety minutes without investigating or taking action. It is also inconceivable that a teacher could sleep, or be half asleep, in a room full of fifth graders for ninety minutes without any noise or sounds being made by the pupils. There is nothing in the record to indicate that this was other than a normal, ordinary class of pupils. It is also curious, under the circumstances, that no written record was made that petitioner apparently slept at her desk on this occasion.

Nor can the testimony of the Superintendent be given credence. He testified about his informal observations as follows:

***

"Q And does your testimony relate to the fact that you would come to the portable, walk up the steps, stand at the door there, look in and then walk away and not go in; is that what you were referring to?

"A No; partly passing through.

"Q In order to pass by the portable–

"A Pass through the door.

"Q Doesn't the door lead to the outside?

"A Right. There are four doors there.

"Q And would you, in the middle of the winter, December, January or February, just walk by the door–the outside door of the portable and glance in there?

"A I try to make it a point whenever possible, to get through all the school buildings.

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"Q All right. Fine. This is your recollection that this is what you did do, as far as where Betty was?

"A It is possible, yes. Probably. It is possible.

"Q And you would just glance in and would not stand at the window to see what was going on and you couldn't hear what was going on?

"A No; just looking through or even stand at the side.***"

(Tr. II-147-148)

No formal observations were made by the Superintendent; therefore, he apparently made his recommendation not to reemploy petitioner based on his informal observations and the recommendation of the principal.

The hearing examiner notes that the relocatable unit was elevated and that it was necessary to climb two or three steps and open two doors to enter an alpha or beta unit.

Summarizing, it is the hearing examiner's judgment that petitioner's employment was terminated improperly in violation of her constitutional right of free speech. In *Patricia Meyer v. Board of Education of Sayreville, Middlesex County,* 1971 *S.L.D.* 140, remanded from the State Board of Education, reversed by the State Board of Education on April 12, 1972, and affirmed N. J. Superior Court (Appellate Division) March 29, 1973, the State Board of Education commented as follows:

"*** We cannot conceive that there is any less an unconstitutional deprivation of re-employment where a Superintendent, for an unconstitutional reason, makes a recommendation that is automatically approved, for all practical purposes, than a determination made by a Board itself for an unconstitutional reason. The constitutional protection to petitioner, in either case, is destroyed.***"

In *Patricia Meyer, supra,* the State Board of Education found that the local board of education violated her constitutional right to organize and participate in union activities.

In the matter, *sub judice,* the hearing examiner recommends, therefore, that the Commissioner find that petitioner's constitutional right to free speech was violated and that the termination of her employment by the Board was wrongfully made for improper, arbitrary, discriminatory, and unconstitutional reasons.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record in the instant matter, the

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report of the hearing examiner, and the exceptions thereto as filed by counsel for respondent.

Respondent's argument, set forth in the exceptions filed pursuant to *N.J.A.C.* 6:24-1.16, that the decision not to re-hire was based in part upon the desire to effect a better balance of men and women on its school staff, is without merit. A decision to reemploy may not be based upon sex in contravention of an individual's personal rights and freedom.

That a board need not give reasons to a nontenured teacher regarding its decision not to reemploy is not disputed, so long as there is a presumption of proper conduct on the part of the Board or its agents. *Mary C. Donaldson v. Board of Education of the City of North Wildwood, Cape May County,* 1969 *S.L.D.* 127 There is, however in the instant matter, the alleged violation of constitutional rights of petitioner. Such rights must be assiduously guarded and protected.

Likewise, it is undisputed that petitioner's organizational activity falls short of the involvement of that of *Patricia Meyer, supra,* in that it was limited to a single reported incident which involved no job action and, indeed, no expressed words on her part. The Commissioner opines, however, that the mere presence of petitioner at a meeting with the principal to protest the principal's memo was indeed an eloquent expression protected by the First Amendment of the United States Constitution and by the New Jersey Constitution of 1947, *Art.* 1, *Par.* 19 which reads in pertinent part:

> "*** Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing."

The Commissioner agrees with, affirms, and takes for his own, the finding of the hearing examiner that, for unconstitutional and otherwise improper reasons, petitioner was not reemployed by respondent. He therefore orders the Board of Education of the Township of Jamesburg to restore petitioner to her teaching position forthwith. However, the Commissioner finds no authority or precedent for the granting of petitioner's prayer for retroactive pay for lost earnings from September 1972 to the time of restoration. To this limited extent the prayer for relief is denied.

COMMISSIONER OF EDUCATION

March 13, 1974

Pending before State Board of Education

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Salvador R. Flores,

Petitioner

v.

Board of Education of the City of Trenton, Mercer County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Pellettieri and Rabstein (Ruth Rabstein, Esq., of Counsel)

For the Respondent, McLaughlin, Abbotts & Cooper (James J. McLaughlin, Esq., of Counsel)

Petitioner, the nontenured Superintendent of Schools of the City of Trenton, Mercer County, avers that the Board of Education of the City of Trenton, hereinafter "Board," has employed inappropriate criteria in an evaluation of his professional performance. He further contends that such evaluation as is herein controverted was an arbitrary, capricious, and unreasonable action and, therefore, should be rendered a nullity. The Board denies any impropriety with respect to petitioner and maintains that the Petition of Appeal fails to state a cause of action upon which relief can be granted by the Commissioner of Education of New Jersey. At this juncture the Board moves for Summary Judgment on the pleadings as a matter of law.

An oral argument with respect to the Board's Motion for Summary Judgment was conducted on November 27, 1973 by a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton. A Memorandum of Law has been filed by the Board and petitioner has submitted a Brief. These submissions and the record of the oral argument are presented directly to the Commissioner for decision.

The Commissioner has reviewed the record herein, and finds that the instant controversy is submitted for adjudication in the context of certain material facts which are not in dispute. These facts may be stated in a concise manner as follows:

On the seventh day of September 1972, the Board resolved to employ petitioner as its Superintendent of Schools "***for a period commencing approximately two weeks after the execution of this agreement, and terminating on June 30, 1975.***" (Contract of Employment attached as Exhibit A to Petition of Appeal) (The contract contains no clause to provide for termination on notice.) Thereafter on September 27, 1972, the parties herein executed the formal contract (Exhibit A) between them. Such contract specifies the amount of mininum compensation payable as salary to petitioner by the Board in each

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of the years of his scheduled employment and details a total of eleven paragraphs of other understandings and agreements.

Included, in this latter regard, is paragraph 7 which has pertinence to the dispute, *sub judice.* It provides:

> "The Superintendent agrees to submit annually to an appropriate evaluation by the Board of his performance hereunder."

Pursuant to his contract of employment, petitioner began his service in the employ of the Board in late September 1972, and has continued in it to the present day. At no time has the Board ever served him with notice that it intended to abrogate such contract for cause, nor has the Board ever filed charges with the Commissioner to seek petitioner's removal prior to the time his contract expires by its stated terms.

However, in early June 1973, the Board met in a meeting or meetings and proceeded to evaluate petitioner's performance by the use of criteria contained in a "Superintendent's Evaluation Summary Chart." (Annexed to the Petition of Appeal as Exhibit B) (There is no contention that petitioner was present during such meeting or meetings nor that he was ever asked to defend what, in effect, became charges against him—*i.e.*, that his morals were poor.)

It is this Chart which is the principal source of controversy herein, and it is reproduced in its entirety as follows:

"Superintendent's Evaluation Summary Chart"

F	D	C	B	A	1. Health
					2. Morals
					3. Appearance
					4. Judgment
					5. Decision making
					6. Interest in improving instruction
					7. Ability to organize and plan
					8. Program evaluation
					9. Personnel administration competence
					10. Staff cooperation
					11. Staff communication
					12. Personnel evaluation
					13. Ability to develop leadership
					14. Ability to delegate
					15. Employment recommendations
					16. Board relations
					17. Adherence to Board policies
					18. Board representation
					19. Overall competence
					20. Courage and integrity
					21. Ability to face controversy
					22. Accomplishments and achievements

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23. Innovative practices
24. Administrative experience and knowledge of teaching skills.

It is noted that the left hand columns were evidently intended to be used for grading the Superintendent in a manner similar to that used by many school systems to grade pupils. In any event, the Board so used them and awarded the Superintendent the following marks:*

A – 5
B – 24
C – 18
D – 59
F – 38

*(According to Exhibit B)

Subsequently, according to petitioner, the Board "*** wrongfully released said evaluation to the press and otherwise caused the same to be made public.***" (Petition of Appeal, unp) The Board denies such assertion in its Answer to the Petition of Appeal, and counsel for the Board stated at the oral argument of November 27, 1973, that he was unaware that the Board had ever acted to release the results of its evaluation of the Superintendent.

However, for purposes of this adjudication, the Commissioner finds it unnecessary to make a determination in this regard. It is sufficient, if for no other reason, that the Board's evaluation of petitioner depended, in part at least, on an evaluation of petitioner's "morals," and that the result of such evaluation, when known to a rather large number of persons, is not assured of positive and strict confidentiality. Therefore, the Commissioner will set forth certain views with respect to the total evaluative procedure employed herein.

Initially, however there is the substantive Motion of the Board which is posed for determination. In the Board's view, it has done nothing more with respect to petitioner than that which petitioner agreed it could do in the contract terms by which he was employed. (Exhibit A, *ante*) Therefore, the Board argues that, even if a full plenary hearing were ordered by the Commissioner, it would serve no purpose and provide no possibility of relief.

Further, the Board avers that there is no genuine issue of material fact contained in the pleadings since the Board has filed no charges against petitioner with the Commissioner and since such charges, in the absence of a notice clause, are a prerequisite to any decision that could lawfully dismiss petitioner prior to the date of June 30, 1975. This avowal of the Board is grounded in certain prior decisions of the Commissioner. *Nicholas Karamessinis v. Board of Education of the City of Wildwood, Cape May County,* 1973 *S.L.D.* 351; *Amorosa v. Board of Education of the City of Bayonne, Hudson County,* 1966 *S.L.D.* 214; *McLean v. Board of Education of the Borough of Glen Ridge et al., Essex County,* 1973 *S.L.D.* 217; *McKeown et al. v. Board of Education of the Gateway Regional High School District, Gloucester County,* 1968 *S.L.D.* 210

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Petitioner disputes this view and opposes the Motion for Summary Judgment on two principal grounds; namely that

> 1. the evaluation of petitioner by the Board is not an "appropriate evaluation" within the terms of the contract and may ultimately affect the substantial rights of petitioner arising under the school laws and;
>
> 2. a failure to afford petitioner a hearing with respect to his contention concerning the appropriateness of the evaluation performed by the Board would represent a deprivation "*** of his property without the due process of law accorded him by the Constitution of the United States and the State of New Jersey." (Petitioner's Brief, unp)

Thus, petitioner advances the proposition that the crucial question herein is the "appropriateness" of the evaluation performed by the Board, and he offers to produce evidence to prove that such evaluation is "inappropriate." (Petitioner's Brief, unp) In petitioner's view, then, a hearing should be afforded by the Commissioner with respect to this controversy in order that petitioner may clear his good name and right the wrong which has allegedly been done to him.

The Commissioner has reviewed the contentions of the parties herein and has noted the substantive nature of the arguments with respect to the merits of the evaluative instrument employed by the Board in this instance. However, the Commissioner finds no need to proceed to a hearing to determine the appropriateness of such instrument.

The evaluative criteria set forth in the instrument are clear and the employment by the Board of any criterion concerned with morals—even if such criterion were employed as only one of many—constitutes a *prima facie* intrusion on those fundamental rights of liberty and property which are possessed by all citizens of the United States, unless the employee so judged is afforded an opportunity to be heard. The Commissioner so holds.

This judgment is founded on the decision of the Supreme Court of the United States in *Board of Regents of State Colleges et al. v. Roth,* 408 *U.S.* 564; 92 *S. Ct.* 2701, 33 *L. Ed.* 2*d* 548 (1972). In this decision the Court was concerned with the requirements of procedural due process in instances wherein a contract renewal was proposed to be denied to nontenured personnel. Thus, the concern was a different controversy than the matter, *sub judice.*

However, in the course of the decision in *Roth, supra,* the Court had occasion to discuss the constitutional concepts of "Liberty" and "Property" generally and to delineate specific areas wherein such concepts demand a full compliance with all the requirements of procedural due process. These concepts and the specific delineations pertinent thereto are as appropriate to the adjudication, *sub judice,* as they were in *Roth* and accordingly they are set forth in some detail below:

> " 'Liberty' and 'property' are broad and majestic terms. They are among the 'great [constitutional] concepts *** They relate to the whole domain

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> of social and economic fact ***. *National Ins. Co. v. Tidewater Co.*, 337 *U.S.* 582, 646 (Frankfurter, J., dissenting). For that reason, the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights. The Court has also made clear that *the property interests* protected by procedural due process *extend well beyond actual ownership of real estate, chattels, or money.*
>
> "*** 'While this Court has not attempted to define with exactness the liberty *** guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely *freedom* from *bodily restraint* but also the right of the individual to contract, to engage in any of the common occupations of life *** and generally to enjoy those privileges long recognized *** as essential to the orderly pursuit of happiness by free men.' *Meyer v. Nebraska* 262 *U.S.* 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed. *** For *where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.'*** " *(Emphasis supplied.)* (at pp. 571-573)

In the instant matter, the facts which are clear from the record may be rightfully placed in the context of the above decision. Further, when the facts are so placed, there emerges some inescapable conclusions:

1. Petitioner's "good name" was at stake when the Board purported to rate his "Morals," and before judgment was rendered "in this regard, an opportunity to be heard was essential."

2. Since no such opportunity was offered, petitioner was denied the procedural due process to which he and every other citizen of the United States is entitled.

3. Having denied petitioner such entitlement, the Board could not rightfully reach a judgment, as it did, concerned with his "Morals."

4. Such judgment, unless reversed, may act to bar petitioner's constitutional entitlement to the "Liberty" he must have to seek another position if he so chooses and may have eroded his property rights to a contracted employment through June 1975.

5. Such a judgment is patently illegal, and unconstitutional and must be set aside.

The Commissioner so holds.

Further, the Commissioner holds that the evaluative document here employed, and the judgments made thereon, is a nullity in the circumstances and

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of no worth or effect. Accordingly, he directs the Board to remove such document from its records and the record of petitioner forthwith if, in fact, it is therein contained.

This ruling for petitioner leaves intact those powers for the "government" and "management" of the public schools which are conferred on all local boards of education, by statutory prescription. *N.J.S.A.* 18A:11-1 As the Commissioner has said in *William A. Wassmer et al. v. Board of Education of the Borough of Wharton, Morris County,* 1967 *S.L.D.* 125:

> "*** Local boards of education are vested with broad powers in the making of decisions affecting the day-to-day operation of the schools under their jurisdiction. They have the authority to adopt rules and policies for the government and management of the schools, provided such laws are not inconsistent with the school laws or rules of the State Board. *R.S.* 18:7-56 In the exercise of this authority boards of education are constrained to act reasonably and in ways which are not arbitrary or capricious. *Angell et al. v. Board of Education of Newark,* 1959-60 *S.L.D.* 141, 143, dismissed by State Board of Education, October 17, 1964 ***" (at pp. 126-27)

However, the ruling herein is an extension of the limiting provision contained in *Wassmer* in the sense that, in addition to the provisions of the school laws and rules of the State Board, it is incumbent on local boards to be fully cognizant of the constitutional protections which are afforded to all citizens of the United States.

Nevertheless, the Commissioner is of the opinion that the Board herein can develop criteria in written or unwritten form for the evaluation of its Superintendent of Schools which will not intrude on his personal rights, but will retain the Board's prerogatives intact. If, for instance, the Board wishes to evaluate petitioner's "reputation, honor or integrity," it may do so; but, in such instances, as the Court stated in *Roth, supra,* "notice and an opportunity to be heard are essential."

However, in this regard, the Commissioner recommends that the Board confer with its legal counsel, with its Superintendent, and with expert consultants from outside its district in order that such criteria as may be developed will be appropriate to the need and to insure that the use of it will not be abusive or unfair.

Finally, the Commissioner determines that the decision contained herein is fully dispositive of the substantive aspects of the Petition of Appeal and, accordingly, that no further hearing is required. To this extent the Motion is denied and the Petition is otherwise dismissed.

COMMISSIONER OF EDUCATION

March 13, 1974

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Salvador R. Flores

Petitioner-Appellee,

v.

Board of Education of the City of Trenton, Mercer County,

Respondent-Appellant.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 13, 1974

For the Petitioner-Appellee, Pellettieri and Rabstein (Ruth Rabstein, Esq., of Counsel)

For the Respondent-Appellant, Merlino and Andrew (Robert B. Rottkamp, Jr., Esq., of Counsel)

The State Board of Education grants the Motion to Dismiss, and affirms the decision of the Commissioner of Education. The Motion for Counsel Fees is denied on the ground that there is no precedent or statutory authority for the awarding of counsel fees.

November 6, 1974

Pending before Superior Court of New Jersey

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Eugene Somma, Neil Rothman, and the Long Branch Education Association,

Petitioners,

v.

Board of Education of the City of Long Branch, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Chamlin and Schottland (Michael D. Schottland, Esq., of Counsel)

For the Respondent, Giordano, Halleran & McOmber, (Richard D. McOmber, Esq., of Counsel)

Petitioners Somma and Rothman, teachers who are members of the unincorporated Long Branch Education Association, hereinafter "Association," together with the teaching staff members who are also members of the Association, all of whom are employed by the Board of Education of the City of Long Branch, hereinafter "Board," allege that the Board's action withholding one day's wages from all teaching staff members who were absent from the elementary schools on March 28, 1972, and who subsequently did not report for duty on June 26, 1972, was improper. Petitioners also assert that the Board's failure to remunerate all teaching staff members for their day of service on June 26, 1972, was illegal and improper.

The Board answers that the absence of a large number of teaching staff members from the elementary schools on March 28, 1972, constituted an illegal work stoppage, and therefore, those teachers who received a reduction of one day's salary had forfeited any right to payment of such salary. The Board admits that those teaching staff members who reported to school on June 26, 1972, a day not previously scheduled in the school calendar, did not receive a wage reduction for their absence on March 28, 1972. The Board claims that all of its actions in this matter have been within the authority granted to it by the New Jersey statutes, decisions of law, and the common law.

Petitioners pray for relief in the form of an Order by the Commissioner of Education directing the Board to reimburse one day's wages to each teaching staff member who received a reduction for absence on March 28, 1972, and to pay one day's wages to each teaching staff member who reported to work on June 26, 1972.

Testimony and documentary evidence were educed in this matter at a hearing held March 12, 1973 at the office of the Monmouth County Superintendent of Schools, Freehold, before a representative appointed by the Commissioner. The report of the Commissioner's representative is as follows:

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The Superintendent of Schools of Long Branch, called as petitioners' first witness, testified that the Long Branch School District operates a senior high school for grades ten, eleven, and twelve, a junior high school for grades seven, eight, and nine, and eight elementary schools containing various grades. (Tr. 5-7) The Superintendent further testified that Petitioner Rothman, the president of the Association, came to his office on March 27, 1972 between the hours of 4:00 and 5:00 p.m., and handed him a letter addressed to the Board, dated March 27, 1972, and signed by Petitioner Rothman as president of the Association. The body of this letter is reproduced in its entirety as follows:

> "Please be advised that the 326 members of the Long Branch Education Association will absent themselves from school tomorrow, March 28, as a protest against the irresponsible action of the Long Branch City Council in cutting necessary funds from the Board of Education budget.
>
> "This action is taken by the Association in an effort to dramatize its concern for quality education in Long Branch. It is hoped that this action will result in a restoration of the necessary funds.
>
> "Teachers will return to school on Wednesday, March 29, 1972." (Exhibit P-1)

The Superintendent testified that he also received a telegram addressed to him and signed by Petitioner Rothman as president of the Association, dated 5:15 p.m. on March 27, 1972. (Exhibit P-2) The Superintendent stated that he received the telegram at an unspecified time on March 27, 1972, but following his receipt of the letter, *ante,* from Petitioner Rothman. The content of the telegram is substantially similar to that of the letter with the exception that the telegram states 355 members of the Association, whereas the letter states 326 members.

According to the Superintendent, Petitioner Rothman handed him the letter (Exhibit P-1) and advised him that the entire membership of the Association would absent themselves on March 28, 1972, as a protest against the Long Branch City Council's action reducing the 1972-73 school budget by $100,000. (Tr. 55-56) The Superintendent testified that he indicated very specifically to Petitioner Rothman that the teaching staff could not do what they proposed, because March 28, 1972, was scheduled as a regular school day, and the teachers therefore had the obligation to perform their teaching duties. (Tr. 56, 62, 64)

Immediately following his receipt of the letter (Exhibit P-1), the Superintendent testified, he held a conference with the assistant superintendents, principals, vice-principals, supervisors, and director of personnel. (Tr. 12-13) As a result of that conference, the Superintendent testified, he made the decision to close all of the public schools within the district on March 28, 1972. (Tr. 13, 66) The Superintendent asserted that it was necessary for him to confer with his administrative and supervisory staff because a decision to close down the public schools would have many effects, the first being the effect on children

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of working parents. Also, the Superintendent testified, if schools were to be closed, the crossing guards employed by the police department had to be informed, the hot lunch program had to be called off, and many other employees such as teacher aides and bus drivers and auxiliary personnel had to be notified. (Tr. 14, 65, 175) At the close of the conference, the Superintendent testified, he instructed members of the administrative staff to implement his decision to close the public schools the following day, March 28, 1972, unless they were informed to the contrary before the end of that evening. (Tr. 13)

The Superintendent averred that he then telephoned both the home and the office of the President of the Board, requesting that the President telephone him. (Tr. 13) Next, the Superintendent stated, he telephoned radio station WJLK at approximately 6:50 p.m. and asked the station to broadcast the notice that all Long Branch public schools would be closed on March 28, 1972. (Tr. 16, 18, 19, 68) The Superintendent testified that he heard this announcement broadcast over radio station WJLK at approximately 7:04 p.m. (Tr. 19-20) Following this broadcast, the Superintendent testified, he received a telephone call from the President of the Board, and they discussed the Superintendent's decision to close the public schools on March 28, 1972. (Tr. 20) As a result of that discussion, the Superintendent asserted, he telephoned radio station WJLK at approximately 7:10 p.m. and asked the station to rescind the original announcement and broadcast that the junior and senior high schools would be closed the following day, March 28, 1972, and that all elementary schools within the district would be open. (Tr. 21-22, 68-69) According to the Superintendent, he heard this second announcement on radio station WJLK at approximately 7:14 p.m., at the end of the fifteen-minute news broadcast. (Tr. 21) The Superintendent testified that he also telephoned radio stations WRLB and WHTG at approximately 7:20 p.m., about thirty minutes after his first telephone call to WJLK, which was at 6:50 p.m., and he asked these two radio stations to broadcast the announcement that the junior and senior high schools would be closed on March 28, 1972, and that all elementary schools would be open. (Tr. 17-18, 23, 68) The Superintendent did not hear this message broadcast over stations WRLB and WHTG. (Tr. 23) The second message given to and broadcast by the three radio stations, that the elementary schools would be open the following day, also contained the notice that the elementary schools would operate on a single or half-day session on March 28, 1972. (Tr. 25-26) The Superintendent also testified that he did not know how many broadcasts were made by radio station WJLK during the evening of March 27, 1972, following the 7:00 p.m. news, regarding the closing of any of the Long Branch schools on March 28, 1972. (Tr. 27)

Under cross-examination the Superintendent testified that during his telephone conversation with the President of the Board, the point was discussed that every effort should be made to keep at least part of the school system open, and the Superintendent agreed with this point of view. (Tr. 169-170) The Superintendent testified that it was his judgment that it would be easier to operate the eight elementary schools than to attempt to operate the junior and senior high schools located on one campus with a combined enrollment exceeding three thousand pupils. Also, the Superintendent believed that the

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parents of the younger children enrolled in the elementary schools would not have sufficient time to engage sitters or arrange for other care and supervision for their children. (Tr. 168, 171-172) According to the Superintendent, in his discussion with the Board President and the making of the final decision to close the junior and senior high schools, no consideration was given to the relationship between the Board and the City Council, and the school budget reduction which was to be the subject of a meeting on the evening of March 28, 1972. (Tr. 173)

The Superintendent testified that, on March 28, 1972, the total number of pupils on roll in the elementary schools was 3,004, and that 52.9 percent or 1,589 pupils were in school that day. The normal percentage of attendance is 93 percent, the Superintendent testified. (Tr. 53) According to the Superintendent, the total number of classroom teachers and other professional staff assigned to the elementary schools on March 28, 1972, was 175, and 34 or 19.6 percent were present that day. (Tr. 53-54) (Exhibit R-1) The Superintendent stated that, for the entire 1971-72 school year, elementary school pupils received 181 days of instruction and junior and senior high school pupils received 180 days of instruction. (Tr. 50)

On March 28, 1972, the Superintendent assigned each of his two assistants to supervise four elementary schools, and he personally visited all eight elementary schools. (Tr. 72) In the judgment of the Superintendent, a learning experience was taking place for the elementary school pupils who were present on March 28, 1972. (Tr. 73) The elementary schools were closed at approximately 11:00 a.m. on that date. (Tr. 51, 75)

The following is a tabulation of the number of teaching staff members who were present and absent from the various elementary schools on March 28, 1972:

School	Total Assigned	Total Present	Total Absent
Broadway	12	3	9
Church Street	8	0	8
Elberon	21	1	20
Garfield	20	6	14
Gregory	20	0	20
Lenna Conrow	25	13	12
Morris Avenue	18	0	18
West End	15	7	8
Auxiliary Personnel*	36	4	32
Totals	175	34	141

*Includes nurses, guidance counselors, librarians, and teachers of physical education, art, music, and remedial reading. (Exhibit R-1)

According to the Superintendent, he was able to secure sufficient personnel to staff the elementary schools on March 28, 1972. (Tr. 72)

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An examination of the minutes of the regular meeting of the Board held May 17, 1972, discloses the following action taken regarding March 28, 1972:

> "*** Motion was made by Mr. Migliaccio, seconded by Mrs. Nicas and carried that the Board give all elementary teachers who did not report for work on March 28, 1972 the alternative of either having a day's pay deducted from their salary or working an extra day on Monday, June 26, 1972.***" (Exhibit P-5)

In response to this action by the Board, the president of the Association, Petitioner Rothman, sent a communication dated June 6, 1972 to the Board, which reads in entirety as follows:

> "Be advised that the Long Branch Education Association intends to take appropriate action in the event that elementary teachers are docked a day's pay.
>
> "The option offered by the Board of Education to those elementary teachers who participated in the day of protest on March 28, 1972 (ie. report to work on June 26, or suffer the loss of a day's pay) is considered by the Association as discriminatory and therefore illegal; consequently, it will be challenged.
>
> "We suggest a meeting with representatives of the Board to discuss and hopefully avert the contemplated action of the Board.
>
> "Be it further advised that the Long Branch Education Association has urged its members not to report to school on June 26. The Building principals will also be advised of this." (Exhibit P-6)

In reply to the Association's June 6, 1972 letter, *ante,* the Board sent a communication under date of June 8, 1972 to the president of the Association. This letter which was signed by each of the five members of the Board, reads as follows:

> "This will acknowledge your letter of June 6, 1972, addressed to the Long Branch Board of Education.
>
> "Referring specifically to paragraph 4 of your letter, please be advised that those members of the Association who are scheduled to work on June 26, 1972, in lieu of their unauthorized absence on March 28, 1972, and who do not report to their assigned school on June 26, 1972, will have a full day's pay deducted. The amount of the deduction will be in accordance with the description in the current contract between the Long Branch Education Association and the Board of Education.
>
> "Further be advised that the same teachers who will have a day's pay deducted shall not receive their June 30, 1972 checks until they present to the Secretary of the Long Branch Board of Education a cashier's check in the amount of one day's pay as shown on the letter addressed to each

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individual teacher scheduled to work on June 26, 1972." (Exhibit R-3)

The Board sent a form letter dated June 21, 1972 to each teaching staff member who had been absent from his elementary school duties on March 28, 1972, as the result of participation in the protest. A blank space was provided in the last sentence of the second paragraph of this form letter for the insertion of the amount of one-two hundredths of the respective teaching staff members' annual salary, which was considered the equivalent of one day's wages. This letter is self-explanatory and reads as follows:

> "As you know, the Board of Education has directed that the teachers who did not report for duty on March 28, 1972, would have the opportunity to either work on Monday, June 26, 1972, or receive a deduction of one day's salary.
>
> "In the event that your circumstances have changed and you find you are unable to work on Monday, June 26, 1972, in order to receive your June 30th check, it will be necessary for you to remit to the *"Long Branch Board of Education"* a *Certified Cashier's* Check in the amount of $ _____ which is your equivalent of a day's pay.
>
> "In the event you choose the deduction, your Cashier's Check in the above mentioned amount must be presented to the Secretary of the Board of Education at 6 West End Court, no later than June 30th, since our bookkeeping must be completed and our books closed due to the end of the fiscal year.
>
> "I hope the above will clarify the situation." (Exhibit P-7)

According to the Superintendent, the majority of the elementary teaching staff members who participated in the protest by absenting themselves from their school duties on March 28, 1972, elected to report to school on June 26, 1972, and therefore did not receive a deduction of one day's wages from their salaries. (Tr. 76)

On March 28, 1972, several members of the elementary school teaching staff were absent for legitimate reasons, such as personal illness, and these individuals were not required to report to school on June 26, 1972, or in the alternative receive a deduction of one day's wages. (Exhibit P-3) (Tr. 31)

The Superintendent testified that, because the junior and senior high schools were officially closed on March 28, 1972, those teaching staff members were not required to choose either to report to school on June 26, 1972, or receive a deduction of one day's salary. (Tr. 31, 38) All members of the junior and senior high school teaching staffs were paid for March 28, 1972. (Tr. 38)

According to the Superintendent, the elementary school pupils were not required to attend school on June 26, 1972. (Tr. 43-44) He testified that each elementary school principal was directed to plan duties to be performed by those members of his teaching staff who elected the option of reporting for duty

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on June 26, 1972, in accordance with the Board's resolution and letter. (Tr. 44) (Exhibits P-5, R-3)

The teacher who is president of the Association, Petitioner Rothman, testified that the executive committee of the Association conceived the idea to request the teaching staff members not to work on March 28, 1972, several weeks prior to the actual date the teaching staff members "took off." (Tr. 142) Prior to March 28, 1972, the executive committee members informed the teaching staff of the individual schools regarding this intention. (Tr. 142) He testified that a meeting of the general membership of the Association was held on March 27, 1972 at the Garfield School at approximately 3:00 p.m. According to the witness, the purpose of this meeting, as well as the previous executive committee meeting, was to support the Board's proposed school budget for 1972-73, which the City Council had threatened to substantially reduce. (Tr. 142-143, 159) At the general membership meeting held March 27, 1972, Petitioner Rothman testified, the members were brought up to date regarding the Association's position and advised as to what action the Association planned to take. (Tr. 143) He testified that, at the March 27, 1972 meeting, he urged the membership to attend a general Association meeting which was scheduled for the next day at 9:00 a.m. at the Lenox Avenue Temple in the City of Long Branch. The president testified that the members needed very little urging to attend the March 28 meeting because they were strongly opposed to the proposed reduction of the 1972-73 school budget by the City Council. (Tr. 146-147, 157) This witness admitted that by urging the Association members to attend the meeting scheduled for March 28, 1972, he was in effect urging them not to report for duty at their respective schools on that date. (Tr. 147) He also testified that, at the March 27, 1972 meeting, he made the statement to the Association members that a dramatic protest would be made by having them march together to the City Hall on the evening of March 28, 1972, where the City Council would be in session to vote upon the local tax allocation for the 1972-73 school budget. (Tr. 143-144, 157) The president testified that during the meeting he advised the members to listen to the local radio stations that evening, because hopefully the schools would be ordered closed on March 28, 1972. (Tr. 143)

Immediately following the March 27, 1972 general membership meeting, the president of the Association went to the office of the Superintendent of Schools and presented him with the letter which stated the intention of the teaching staff members to absent themselves from the public schools on March 28, 1972. (Tr. 144) (Exhibit P-1)

Additional testimony by this witness established that he listened to the three local radio stations during the evening of March 27, 1972, and heard conflicting reports as to whether the public schools in the district would be open or closed and which schools would be open, and for what hours, on March 28, 1972. (Tr. 148-149, 160-161) He testified that during the evening of March 27, 1972, he did not telephone any of the district's school administrators in order to determine the exact status of the school opening or closing for the next day, because he believed that the radio stations would broadcast the latest word

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regarding the situation. (Tr. 150) He recalled that the final radio announcement he heard, at approximately 11:00 p.m., was that the elementary schools would be open for a half-day session on March 28, 1972, but since other radio stations were not certain at that time, he was not positive as to the final conclusion. (Tr. 150, 164)

During the meeting which commenced at approximately 9:30 a.m. on March 28, 1972, the president did not make any announcement that the elementary schools were open that morning. (Tr. 152)

Petitioner Somma, a teacher assigned to the Gregory Elementary School, testified that he listed to radio station WRLB during the evening of March 27, 1972, and in the hour between 6:15 and 7:15 p.m. he heard an announcement that the public schools of the district would be closed the following day. He testified that he did not listen to any additional news broadcasts during that evening. (Tr. 99-100) Petitioner Somma did not report for duty at the Gregory School on March 28, 1972, but he did report on June 26, 1972. (Tr. 100) This witness testified that several days prior to the hearing, he and another teacher had questioned members of the elementary teaching staff as to whether they had heard one radio announcement or two on March 27, 1972, regarding the status of the public schools on March 28, 1972. According to Petitioner Somma, forty-six teaching staff members heard the radio announcement that the elementary schools would be closed, forty-seven heard the second announcement that the elementary schools would be open, and seven did not listen to the radio on March 27, 1972. (Tr. 101, 105-106) (Exhibit P-8)

Under cross-examination Petitioner Somma testified that, to his knowledge, at least three other teachers assisted in questioning the elementary teaching staff members regarding the radio broadcasts. (Tr. 107) He testified that the list of teachers who heard the radio broadcasts does not purport to show how many teachers knew or did not know that the elementary schools were open on March 28, 1972, but merely how many teachers heard either the first or second broadcast on March 27, 1972. (Tr. 108-109) This witness testified that he did not ask the teachers whether any had heard the second announcement that the elementary schools would be open, but had not heard the first announcement that the schools would be closed. Also, this witness did not ask any teachers who claimed to have heard only the first announcement, that the schools would be closed, whether they heard from any source other than a radio broadcast, that the elementary schools would be open on March 28, 1972. (Tr. 108)

Petitioner Somma testified that the Association sent a written notice to all teaching staff members within the district announcing the meeting which was held on March 27, 1972 at approximately 3:00 p.m. at the Garfield School. (Tr. 111) He testified that an announcement was made at that meeting that there would be another meeting of the Association held the next day at approximately 9:00 a.m. if the public schools were closed. (Tr. 109, 116) According to this witness, at the meeting held at the Garfield School on March 27, 1972, Petitioner Rothman told the teachers that there was a possibility that the public

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schools would be open on March 28, 1972. (Tr. 111-112) During the meeting held during the morning of March 28, 1972, Petitioner Somma heard at approximately 10:30 or 11:00 a.m. that the elementary schools were open that day. (Tr. 109)

Another teacher, assigned to the Lenna Conrow Elementary School, testified that on March 27, 1972, she heard one radio announcement on station WJLK that the Long Branch public schools would be closed on March 28, 1972, and that she heard no other broadcasts because she left her home for the remainder of the evening. (Tr. 118-119) This witness testified that she was first made aware of the fact that the elementary schools were open at approximately 10:15 a.m. on March 28, 1972, while she was attending the Association meeting and that she would have reported to her school if she had known that the elementary schools were open. (Tr. 120) This teacher elected not to report on June 26, 1972, and therefore received a reduction of one day's wages from her salary. (Tr. 119, 125) She also testified that she, Petitioner Somma, and five other teachers made the inquiries of other teachers regarding the radio broadcasts. (Tr. 132) (Exhibit P-8)

According to this witness, after the March 28 meeting concluded at approximately 11:00 a.m., the teachers visited parents of school children and solicited approximately 5,000 names on petitions protesting the reduction of the 1972-73 school budget by the City Council. (Tr. 133-134)

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the fact-finding report and the record in the instant matter and observes that both parties have agreed to waive receipt of the report and the filing of exceptions thereto.

The record before the Commissioner clearly supports the finding that the teaching staff members of the Long Branch School District engaged in a strike on March 28, 1972. Both the letter and the telegram (Exhibits P-1, P-2) addressed to the Board by the president of the Association on March 27, 1972, are clear evidence of the intention of the teaching staff members to improperly absent themselves from their duties on March 28, 1972. In addition, the president of the Association verbally stated this intention to the Superintendent when he personally presented the letter, *ante*, to the Superintendent on March 27, 1972. The president of the Association admits urging the teachers to attend the March 28 meeting and thus absent themselves from their respective duties. According to the president, the teachers needed little urging to do this. (Tr. 143-147)

The Supreme Court of this State has ruled that public employees may not strike. The then Chief Justice Weintraub, writing for the Court, in *Board of Education of the Borough of Union Beach* v. *New Jersey Education Association et al.*, 53 *N.J.* 29 (1968) stated, *inter alia*, the following:

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> "*** It has long been the rule in our State that public employees may not strike. *** And we have rejected the notion that public employees may resort to strike because they think their cause is just or in the public good. *** Defendants deny there was a 'strike.' They seek to distinguish the usual concerted refusal to work from what transpired here. *** But the subject is the public service, and the distinctions defendants advance are irrelevant to it, however arguable they may be in the context of private employment. Unlike the private employer, a public agency may not retire. The public demand for services which makes illegal a strike against government inveighs against any other concerted action designed to deny government the necessary manpower, whether by terminating existing employments in any mode or by obstructing access to the labor market. Government may not be brought to a halt. So our criminal statute, *N.J.S.* 2A:98-1, provides in simple but pervasive terms that any two or more persons who conspire 'to commit any act' for the 'obstruction of *** the due administration of the laws' are guilty of a misdemeanor.
>
> "Hence, although the right of an individual to resign or to refuse public employment is undeniable, yet two or more may not agree to follow a common course to the end that an agency of government shall be unable to function.***" (at pp. 36-38)

In this instance, the teaching staff members characterize their action as a "protest" and do not admit that they engaged in a work stoppage which was a strike. In *Union Beach, supra,* the then Chief Justice stated the following which is particularly pertinent to this situation:

> "*** That the conventional terminology of a 'strike' nowhere appears is of no moment. The substance of a situation and not its shape must control. A doctrine designed to protect the public interest is equal to any demand upon it. It does not yield to guise or ingenuity.***" (at pp. 39-40)

Applying this law to the facts in this case, the Commissioner holds that the teaching staff members did engage in a strike on March 28, 1972.

In previous decisions, the Commissioner has held that a local board of education has no authority of law to remunerate teaching staff members, school clerical staff, and other employees for illegal absences, whether resulting from a strike or other causes. *Florence P. Greenberg* v. *Board of Education of the City of New Brunswick, Middlesex County,* 1963 *S.L.D.* 59; *Evelyn Borshadel et al.* v. *Board of Education of the Township of North Bergen, Hudson County,* 1972 *S.L.D.* 353; *Evan Goldman et al.* v. *Board of Education of the Borough of Bergenfield, Bergen County,* 1973 *S.L.D.* 441, affirmed State Board of Education on February 6, 1974; *Thomas Highton et al.* v. *Board of Education of the City of Union, Hudson County,* 1974 *S.L.D.* 193

The distinguishing feature of this case, petitioners claim, is that the Board discriminated against the members of the elementary schools' teaching staff by closing the junior and senior high schools on March 28, 1972, keeping open the eight elementary schools, and subsequently deducting one day's wages from the

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salaries of those members of the elementary school teaching staff who elected not to report on June 26, 1972, while the teaching staff of the junior and senior high schools were paid for March 28, 1972. Petitioners also claim that the confusion regarding whether or not the elementary schools would be open on March 28, 1972, caused some teachers to be absent because, had they known that the elementary schools were open, they would have reported for their assigned duties. Petitioners present the additional argument that *N.J.S.A.* 18A:6-10 requires a hearing before a tenured teaching staff member may be reduced in pay. The statute reads as follows:

> "No person shall be dismissed or reduced in compensation,
>
> > "(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or
> >
> > "(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 the 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."

Petitioners also argue that *N.J.S.A.* 18A:29-4 requires that a local board of education which seeks to withhold salary from a teaching staff member under contract must petition the Commissioner for such relief. This statute reads as follows:

> "The commissioner shall direct the custodian of school moneys of any district to withhold the salary of any teaching staff member of the district who shall neglect or refuse to perform any duty imposed upon him by law or by the rules of the state board until the receipt of notice from the commissioner that such teacher has performed the duty."

Finally, petitioners claim that *R.S.* 34:13A-5.3 requires this Board to negotiate this dispute with the Association as the recognized representative of the teaching staff members, in order that a reasonably amicable solution might be reached.

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The Commissioner will consider each of the petitioners' arguments.

In the first instance, *N.J.S.A.* 18A:6-10, which is part of the Tenure Employees Hearing Law, is not applicable to the instant matter, and the Commissioner so holds. As was previously stated, a local board of education has no authority of law to pay teaching staff members for illegal absences. *Greenberg, supra; Borshadel, supra; Goldman, supra; Highton, supra* Such an action would constitute a gift of public moneys for services not rendered. *Joseph McKay* v. *Board of Education of the Borough of Red Bank, Monmouth County,* 1972 *S.L.D.* 606

The Commissioner does not agree that *N.J.S.A.* 18A:29-4 is applicable to the instant matter, both for the same reasons expressed regarding *N.J.S.A.* 18A:6-10 and for the reason that *N.J.S.A.* 18A:29-4 is intended to require the performance by teaching staff members of specific duties required either by statute or by rules of the State Board of Education.

Petitioners are in error by arguing that *R.S.* 34:13A-5.3 specifically directs the Board to negotiate this dispute with the Association. The pertinent portion of *R.S.* 34:13A-5.3, which requires negotiations between local boards of education and their employees, reads, *inter alia,* as follows:

> "*** A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership. Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment.
>
> "When an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.
>
> "Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them, provided that such grievance procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance procedures may provide for binding arbitration as a means for resolving disputes."

The Commissioner finds, and so holds, that an illegal absence in the form of a strike is neither a term and condition of employment nor a grievable issue.

Specifically, the Legislature has set forth the long-established remedy for

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disputes arising under the school laws by enacting 18A:6-9, which reads as follows:

> "The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner."

Any party aggrieved by any determination of the Commissioner may appeal from his determination to the State Board of Education *(N.J.S.A.* 18A:6-27), and thereafter to the New Jersey Superior Court, Appellate Division.

The instant matter is before the Commissioner by virtue of *N.J.S.A.* 18A:6-9, cited above.

Petitioners' claim of discrimination will be considered next. It is petitioners' argument that, because the junior and senior high schools were closed by the Board on March 28, 1972, and those teaching staff members were paid, the elementary school teaching staff members should not have received a deduction of one day of their wages or have been required to work the additional day on June 26, 1972. In this regard the Board states that, since the school calendar was negotiated with March 28, 1972, as a day of school, petitioners violated a contractual obligation by their absence and therefore should not be paid for March 28, 1972. In the judgment of the Commissioner, both parties are wrong in these arguments. The Board's reasoning totally overlooks the ruling of the New Jersey Supreme Court in *Union Beach, supra,* hereinbefore cited, that public employees may not strike. Also, the Board's position discloses a lack of understanding of the purpose of a school calendar and its role in the relationship between the Board and the teaching staff members.

The Commissioner extensively reviewed the purposes of the school calendar and the relevant statutes which are *in pari materia* in *Carl Moldovan et al. v. Board of Education of the Township of Hamilton, Mercer County,* 1971 *S.L.D.* 246. The Commissioner stated the following conclusion:

> "*** The whole of these parts clearly indicates that the Legislature has provided for: (1) a defined school year, (2) the adoption of a school calendar, (3) a minimum number of 180 days of operation of public schools in order for a local board to receive an apportionment of state aid, and (4) compulsory school attendance with penalties for the violation thereof. These statutes *in pari materia* serve the State policy and the deeply-rooted purpose of the law to provide for '*** a thorough and efficient system of public schools for the instruction of all the children in the State***.'***" (at p. 251)

Each district board of education in this State bears the responsibility to conduct the public schools within its charge in the best interests of the children to be served. *Clinton F. Smith et al. v. Board of Education of the Borough of Paramus et al., Bergen County,* 1968 *S.L.D.* 62, affirmed 1968 *S.L.D.* 69,

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dismissed New Jersey Superior Court, Appellate Division, September 8, 1969 This overriding purpose of the public schools is clearly expressed in *Bates v. Board of Education,* 72 *P.* 907 *(Calif. Sup. Ct.* 1903); *McGrath v. Burkhart,* 280 *P. 2d* 864 *(Calif. App.* 1955), quoted with approval in *Victor Porcelli et al. v. Franklyn Titus, Superintendent of the Newark Board of Education and the Newark Board of Education, Essex County,* 1968 *S.L.D.* 225, affirmed State Board of Education on April 2, 1969, affirmed 108 *N.J. Super.* 301, 312 *(App. Div.* 1969), *cert. denied* 55 *N.J.* 310 (1970):

> "***'The public schools were not created, nor are they supported for the benefit of the teachers therein, *** but for the benefit of the pupils and the resulting benefit to their parents and the Community at large.'***" (at p. 229)

As the Commissioner previously stated in *Moldovan, supra,* and *Goldman, supra,* a local board of education has the authority and the required duty to adopt a school calendar as part of the instructional plan which will best serve the interests of the children attending the public schools within the district. The statute, *N.J.S.A.* 18A:36-2, confers the specific duty upon each local board of education to adopt a school calendar, and this duty may not be either countermanded or surrendered by agreement. *Moldovan, supra* The provisions of the agreement between the Board and the Association (Exhibit R-2, Article XX) which provide that the parties "*** may reopen and renegotiate *** Article VII (SCHOOL CALENDAR) ***" are therefore *ultra vires. Burlington County College Faculty Assoc. v. Board of Trustees, Burlington County College,* 64 *N.J.* 10 (1973)

The Commissioner takes notice that the agreement negotiated between the parties is entitled a Collective Bargaining Agreement. (Exhibit R-2) Also, in their Briefs, both parties refer to this document as a collective bargaining agreement. The use of this terminology may be part of the reason for the misunderstanding underlying this dispute.

In *Lullo et al. v. International Association of Fire Fighters et al.,* 55 *N.J.* 409, the New Jersey Supreme Court made a detailed analysis of *Chapter* 303, *Laws* of 1968, of which *R.S.* 34:13A-5.3 is now a part. The Court also carefully differentiated the rights of collective bargaining and collective negotiations. The Court stated the following:

> "*** The New Jersey Legislature was aware of the possible implications of an authorization of 'collective bargaining' in the statute it was about to enact. The Commission Report had scrupulously avoided using the term in making its recommendations. Instead it suggested that public employees be endowed with the right of collective 'negotiation,' and it made no recommendation that the right to strike be given or recognized. Thus when the lawmakers authorized 'collective negotiation' the choice of term was conscious and deliberate. In doing so, they clearly intended to avoid the problem experienced by the California Legislature when 'collective bargaining' was authorized and thereafter construed by the Supreme Court

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to confer the right to strike.[6] See *Los Angeles Metro. Transit Authority v. Brotherhood of R.R. Trainmen, supra;* Note, 'Collective Bargaining and the California Public Teacher,' 21 *Stan. L. Rev.* 340, 350 (1969).

The Court went on to say:

"*** Obviously it was a Legislature fully aware of the absence of the right to strike in the public employment sector that adopted *L.* 1968, *c.* 303. It did not grant the right expressly and every reasonable inference from the four corners of the Act demonstrates that it did not do so by implication. See *Board of Ed., Borough of Union Beach v. N.J.E.A., supra,* 53 *N.J.,* at 46-48; *Delaware River & Bay Auth. v. International Org., etc. supra,* 45 *N.J.* at 147-148. Thus we see no substance to plaintiffs' claim that the broad scope of the 1968 Act envisions collective bargaining with all the implications the terms carries in the private employment sector, including the right to strike.***" (at p. 439)

The Court further defined the distinction between collective bargaining and collective negotiations as follows:

"*** It is crystal clear that in using the term 'collective negotiations' the Legislature intended to recognize inherent limitations on the bargaining power of public employer and employee. The reservation in section 7 of the Civil Service rights of the individual employee is a specific indication of that fact. The lawmakers were sensitive that Civil Service statutes in many areas provide for competitive employment examinations, eligible lists, fixed salary lists, for promotion, transfer, reinstatement and removal, and require all employees to be dealt with on the same basis. *And undoubtedly they were conscious also that public agencies, departments, etc., cannot abdicate or bargain away their continuing legislative or executive obligations or discretion.* Consequently, absent some further changes in pertinent statutes public employers may not be able to make binding contractual commitments relating to certain subjects. *** In our judgment, therefore, the authorization for 'collective negotiations' in the 1968 Act was designed to make known that there are salient differences between public and private employment relations which necessarily affect the characteristics of collective bargaining in the public sector. *Finally, it signified an effort to make public employers and employees realize that the process of collective bargaining as understood in the private employment sector cannot be transplanted into the public service.****" (at p. 440) *(Emphasis ours.)*

In view of the above-stated words of the Court, the reliance by both parties on the terminology "collective bargaining" is clearly in error.

In the judgment of the Commissioner, the Board erred in paying the junior

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[6]Subsequently enacted statutes substituted 'meet and confer' for 'collective bargaining.' Note, *supra,* 21 *Stan. L. Rev.* at 352.***" (at pp. 438-439)

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and senior high school teaching staff members for March 28, 1972, the day of the illegal strike. It can be safely stated without fear of serious contradiction that these two schools were closed because of the strike, and for no other reason. If the Commissioner were to sanction the payment of the junior and senior high school teaching staff members for March 28, 1972 in this instance, it would logically follow that any time an association of teaching staff members gave notice of a strike for the following day, and thus forced a local board of education to close one, several, or all of its public schools, those teachers assigned to the closed schools would be paid. Thus, a board forced to close some schools because of a pre-announced impending strike, would be forced to pay some teachers for an illegal act. Such a tactic would create an evil wholly contrary to the public policy of this State. Therefore, the Commissioner cannot make a determination which would permit teaching staff members to force the closing of public schools by means of a strike, without suffering any financial penalty for such an illegal act. For the reasons stated, the Board's payment of wages to the junior and senior high school teaching staff members for March 28, 1972, was an improper action, and the Commissioner so holds. The Board was also wrong in paying the elementary school teaching staff members for their absence on March 28, 1972. The fact that many of these teachers reported for one extra day of duty on June 26, 1972, is of no moment, because the Board has no authority to pay wages to its employees for such illegal absence. The Board's concept of "making up" an illegal absence is without merit and has no authority of law. *Union Beach, supra; Greenberg, supra; Borshadel, supra; Goldman, supra; Highton, supra* Unfortunately, at this point in time, it would be impractical at best and perhaps impossible for the Board to attempt to recoup the total sum which it paid in wages to teaching staff members for their illegal strike on March 28, 1972.

The argument by the teachers that, had they known that some of the public schools would be open on March 28, 1972, they would have reported for duty, is not at all convincing. All of the teaching staff members were aware of the Association meeting called for 9:00 a.m. on March 28, 1972. Each elementary school teaching staff member was required to report to his school prior to 9:00 a.m., and each one could have very simply reported to his assigned school at the regular time to see whether the school was open, prior to going to the Association meeting.

The Commissioner is constrained to point out that, as a result of the strike in the instant matter, the total pupil enrollment of the junior and senior high schools in the district suffered a loss of one day of instruction. This represents a substantial total loss of educational opportunity for these pupils, when considered in its total effect. Thus it was these pupils who were the actual victims of the illegal strike, which was purportedly held for the purpose of supporting the Board of Education.

The Commissioner will also consider the Board's action regarding the day of duty scheduled for June 26, 1972 for the elementary teaching staff members. In *Moldovan, supra,* the Commissioner stated the following:

"*** The school calendar is in essence the prescribed time schedule for

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effectuating the instructional plan for the school year. Except as provided for by *N.J.S.A.* 18A:25-3 [that no teaching staff member shall be required to perform his duties on a public holiday], the calendar is binding upon all employees of the school district, but does not limit the particular days or the number of days that the local board of education may require various employees or groups of employees to report for duty. For example, the Commissioner notices that, in many school districts, teachers as well as other employees are required to perform duties and services on days which are designated by the school calendar as vacation days for the pupils.***" (at p. 253)

In *Goldman, supra,* and *Highton, supra,* the Commissioner indicated his approval of the long-established practice in public school districts of holding professional workshops, seminars, and similar meetings on days not designated for attendance by pupils. The Commissioner stated that this type of function is both beneficial and necessary to assist members of the teaching staff to better perform their duties.

In the instant matter, the Board erred in not providing the total number of days of instruction for its pupils as provided for in the school calendar. In the Commissioner's judgment, this Board and every other local board in similar circumstances, may extend the school calendar until June 30 because, as in this instance, the teaching staff members are formally employed by teaching contracts and receive remuneration for the period of time up to and including June 30. *Goldman, supra; Highton, supra*

The Commissioner must once again repeat his statement made in *Goldman, supra,* and *Highton, supra,* that the school calendar, once adopted by official action of a local board of education, should remain the prescribed timetable for effectuating the instructional plan of the school district for the academic year, and it should not be aborted merely because the bare minimum of 180 days of instruction has been reached. The goal should not be a minimum expenditure of time but a maximum effort to provide the fullest educational opportunity for every pupil in this State.

For the reasons stated above, the Commissioner finds and determines that petitioners' contentions are without merit. Accordingly, the Petition is hereby dismissed.

COMMISSIONER OF EDUCATION

March 13, 1974

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Arthur Jones et al.,

Petitioners,

v.

Board of Education of the Borough of Leonia, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Ruhlman and Butrym, (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Parisi, Evers and Greenfield (Irving C. Evers, Esq., of Counsel)

For the Intervenors, Peter A. Buchsbaum, Esq.

Twenty-eight persons, hereinafter "intervenors,", seek to intervene as a party defendant in the above-entitled matter. Included therein are pupils and parents of pupils enrolled in the Leonia Alternative High School and other Leonia public schools, voluntary community resource persons in the Leonia Alternative High School, taxpayers residing in Leonia, and one core teacher in the Leonia Alternative High School. Intervenors aver that such intervention is necessary in order that there be a complete and fair adjudication in the above-entitled matter. To that end, intervenors assert that such fair adjudication cannot occur without their presence as co-respondents with the Board of Education of Leonia, hereinafter "Board."

Oral argument was conducted on the Motion to Intervene before a representative of the Commissioner of Education at the State Department of Education, Trenton, on December 20, 1973. The record in this matter includes the transcript of oral argument, Brief in Support of Motion to Intervene, and a supplement thereto. It is further noted that counsel for the Board chose not to participate in the oral argument and expressed no opposition to the presence of intervenors as a party defendant.

The original Petition herein, brought by twelve residents of Leonia and the Leonia Education Association, was received in the Office of the Division of Controversies and Disputes on May 16, 1973, and was followed by the Answer on Behalf of Respondent on June 7, 1973. Subsequent thereto, on June 29, 1973 at a conference of counsel, there was a discussion and delineation of issues. Thereafter, on September 27, 1973, the Assistant Commissioner of Education in charge of Controversies and Disputes received the Motion to Intervene with supporting Brief and scheduled the aforementioned oral argument on the Motion.

Intervenors argue in support of the Motion to Intervene that, if petitioners

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are successful, the Board will be forced to drastically reduce the subject offerings at the Leonia Alternative High School and that:

> 1. "*** If petitioners succeed in their attempt to bar uncertified personnel from teaching, they will have denied interveners their statutory right to have available at the option of the local school board a tax-supported program of equivalent instruction ***." (Petition for Intervention, at p. 14)
>
> 2. "*** If petitioners succeed *** [it would] force those parents who wish to participate directly in the education of their children or who desire such participation by talented persons in the community to seek out private schools. ***" *(Ibid.,* at p. 15)
>
> 3. "*** Success by the petitioners *** [would deprive] interveners' children of the Alternative High School program which is designed to and does provide a thorough and efficient education to students who are dissatisfied with and therefore receive less education from the standard program of instruction.***" *(Ibid.,* at p. 16)
>
> 4. "*** a complete and fair adjudication of the present controversy cannot occur without their presence as co-respondents with the Board of Education.***" (Brief in Support of Motion to Intervene, at p. 1)
>
> 5. "*** the interveners have an interest sufficiently distinct from that of the Board of Education to warrant their inclusion in the appeal as party-defendants.*** Thus applicants contend that the Board of Education probably will not represent their interests as well as they themselves can, any more than the applicants would fully represent the Board's interest. ***" *(Ibid.,* at p. 3)
>
> 6. "*** a basic personal Fourteenth Amendment right to control over the education of their children *** would be infringed by overly restrictive application of certification statutes and regulations. ***" *(Ibid.,* at p. 5)
>
> 7. "*** intervention provides the only legal recourse for the interveners who otherwise will be deprived of an effective voice in a legal decision of great consequence to them. ***" *(Ibid.,* at p. 6)

Additionally, intervenors make reference to *Winston v. Board of Education of the Borough of South Plainfield,* 125 *N.J. Super.* 131 *(App. Div.* 1973) (now on appeal) and argue that:

> "*** Given the presence of the teachers association in this lawsuit, [*Winston, supra*] fairness demands that a group consisting mainly of teachers and students in the alternative school be allowed in. If the regular teachers are being allowed to press their claims against the alternative school, the alternative school teachers should be allowed to present evidence in its defense. The presence of the association on the side of the complaining residents should be offset by the presence of alternative

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school personnel on the side of the Board of Education. ***" (Supplement to Brief in Support of Motion to Intervene, at p. 2)

Finally, intervenors contend that rules for intervention be given liberal interpretation as in *United States v. Reserve Mining Co.*, 56 *F.R.D.* 408 *(D. Minn.* 1972) wherein it is said:

"*** It need *not* be shown *positively* that representation will be inadequate. It is sufficient if it is shown that it *may* be inadequate.***" (at p. 414) (*Emphasis supplied.*)

Counsel for petitioners opposes the request for intervention and argues that:

1. Limited and strict interpretation of the rules for intervention should be applied.

2. Interveners who are aides and volunteers have no legally recognizable interests in the issues that arise herein.

3. Constitutional issues as set forth by interveners are irrelevant to those which stem from the Petition.

4. The certified core teacher has no rights as an intervener, but his rights are limited to those which are stated in his contract. These pertain to employment in the district, rather than to a particular school, and, as such, are not threatened.

5. The Board is the only proper party to defend on the issue of whether it is acting in consonance with the law. The issue is not quality of education but compliance with the law.

6. If there be no need for certificates for those who teach in the Alternative High School, then there is no need for certification.

7. If intervention is allowed, it should be limited in scope as in *United States v. Reserve Mining Co., supra.*

It has been well recognized that permission to intervene may be granted or disallowed at the discretion of the tribunal. *Tessyman v. Fisher,* 231 *F. 2d* 583 Direction is provided in the matter of the intervention by *N.J.A.C.* 6:24-1.6 which reads as follows:

"The Commissioner may allow any person upon a showing that he may be substantially and specifically affected by the proceeding, to intervene as a party in the whole or any portion of the proceeding, and may allow any other interested person to participate by presentation of argument, orally or in writing, or for any other limited purpose, as the Commissioner may order."

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Additional and more explicit direction in such matters is set forth in Rule 4:33-1, 2 of *Rules Governing the Courts of the State of New Jersey,* 1973, as follows:

> "Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, *unless the applicant's interest is adequately represented by existing parties. (Emphasis ours.)*
>
> "*** In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." (at p. 308)

The Commissioner finds in the matter, *sub judice,* that intervenors have made timely application to intervene and that they meet the further criteria of being substantially and specifically affected by the proceedings in that they include a teacher, pupils and parents of pupils, and voluntary community resource persons, enrolled or serving in the Leonia Alternative High School. It is further apparent that the disposition of the action *may or could conceivably* impair or impede their ability to protect their interests in the Leonia Alternative High School. However, the Commissioner must address himself to the remaining issue of whether intervenors are adequately represented by the existing parties.

In this regard, the Commissioner notes that intervenors desire to be allowed in as a party defendant with the Board. A Board of education in New Jersey is statutorily constituted as a corporate body with general mandatory powers and duties requiring that it shall:

> "*** Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district."*N.J.S.A.* 18A:11-1

In that a board of education is required to perform all acts and do all things consistent with law, it naturally follows that the Board is required to defend in the action herein. *N.J.S.A.* 18A:11-2 The words of the statutes are explicit and clear allowing for no other interpretation than that the Board must act as defendant in such action.

In a similar intermediate decision promulgated on February 17, 1972, the application of a group of Brick Township citizens to submit a Brief as intervenors was denied by the Commissioner *In the Matter of the Tenure Hearing of Kathleen M. Pietrunti, School District of the Township of Brick, Ocean County,* wherein he said:

> "*** The statutes are replete with evidence that the Legislature intended the local board of education to be truly representative of the needs of all the people of the State's respective communities.*** How then, can there

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be logic in an argument that some or many members of a given community have interests separate and apart from those of their elected representatives?

"In the Commissioner's view, such an argument is wholly divisive of the authority granted to the board and is clearly *ultra vires* when, as herein propounded, a group seeks to channel a charge and the 'evidence' in support of it directly to the Commissioner independent of the required 'determination' by the Board of Education.

"Such a holding would create a precedent which, in other times and in other circumstances, could clearly result in a multiplicity of partisan groups, all seeking intervention directly to protect interests differing in degree from those thought compelling by the local board. Such interventions could only complicate proceedings already complex and could lead, over a period of time, to an anarchy of presentation ***." (Decision on Request to Intervene, unp)

In the instant matter, there is no convincing evidence that interests of intervenors are sufficiently distinct from those of the Board to warrant their inclusion as a party defendant. An assumption that the Board's defense would fail to guarantee basic personal Fourteenth Amendment rights or a thorough and efficient education to intervenors' children is without merit. Such rights to a thorough and efficient education and personal freedoms are constitutionally guaranteed.

Intervenors argue that the inclusion of the teachers' association in *Winston, supra,* demands that, in fairness, the teachers of the Leonia Alternative High School should be allowed to defend herein. The Commissioner likewise finds this argument without merit. *Winston* is clearly distinguishable in that the teachers' association was in no way represented by the petitioner, Winston, but in the opinion of the Court, could have been so affected by the outcome that intervention was ordered on remand. In the instant matter, however, interveners are, *indeed must be,* by statutory requirement represented by the Board.

The matter, *sub judice,* is not a frontal attack on either the Leonia Alternative School or alternative education *per se.* The issues that arise herein are more concerned with the legal requirements statutorily or otherwise required by the State of persons serving in the Leonia Alternative School. It does not logically follow that an adverse finding against the Board would result in the demise of alternative education or the Leonia Alternative School. Therefore, the Commissioner cannot conclude that the constitutionally guaranteed personal freedoms of intervenors are so threatened as to require their inclusion as party defendant.

For all reasons hereinbefore set forth, the Commissioner determines that the Board by statutory requirement represents all citizens of Leonia for educational purposes in the matter, *sub judice,* as the defendant. The Motion to Intervene is denied.

COMMISSIONER OF EDUCATION

March 14, 1974

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Alan Alda et al.,

Intervenors,

v.

Arthur Jones et al.,

Petitioners,

v.

Board of Education of the Borough of Leonia, Bergen County,

Respondent.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 14, 1974

For the Intervenors, Peter A. Buchsbaum, Esq.

For the Petitioners, Ruhlman and Butrym (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

The Motion for Stay of the proceedings before the Commissioner of Education shall be treated as a Motion to Intervene and the Motion shall be granted.

The decision of the Commissioner of Education is reversed.

June 26, 1974

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James McCabe

Petitioner,

v.

Board of Education of the Township of Brick, Ocean County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Joseph N. Dempsey, Esq.

For the Respondent, Anton and Ward (Donald H. Ward, Esq., of Counsel)

Petitioner, a citizen and taxpayer residing within the Township of Brick and employed as a teaching staff member by the Board of Education of the Township of Brick, hereinafter "Board," did on November 2, 1972, file charges of unbecoming conduct against the tenured Superintendent of Schools of the district with the Secretary of the Board pursuant to *N.J.S.A.* 18A:6-10 *et seq.*

Petitioner specifically alleges in the instant matter that the Board acted improperly by adopting a resolution at its regular meeting held December 13, 1972, wherein it declined to certify petitioner's charges of unbecoming conduct against the Superintendent to the Commissioner of Education in accordance with the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 *et seq.*

The Board denies that its action adopting the resolution of December 13, 1972, was improper and asserts that its actions in this matter were in all ways legal and proper.

Petitioner prays for relief in the form of an Order of the Commissioner directing the Board to certify the charges, *ante,* to the Commissioner for plenary hearing under the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 *et seq.*

The Board now moves for dismissal of the Petition of Appeal on the dual grounds that (1) the Commissioner has no authority to usurp from the Board the sole and absolute discretion vested in it by statute, *N.J.S.A.* 18A:6-11, to determine whether or not charges against a tenured employee should be certified to the Commissioner, and (2) the Board's action has a presumption of correctness and, therefore, absent a showing that such action was arbitrary, capricious, or unreasonable, the Commissioner cannot substitute his judgment for that of the Board.

The resolution adopted by the Board at the regular meeting held December 13, 1972, has been marked in evidence. (Exhibit R-1) Both parties have agreed to submit their arguments in the form of Briefs for determination by the Commissioner. The relevant facts material to the narrow issue herein controverted are not in dispute.

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The Superintendent against whom petitioner filed charges of unbecoming conduct enjoys a tenure status in his position and therefore cannot be dismissed nor reduced in compensation except as provided by the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 *et seq.*

The specific statute which is pertinent to the instant matter is *N.J.S.A.* 18A:6-11. This statute reads in its entirety as follows:

> "If written charge is made against any employee of a board of education under tenure during good behavior and efficiency, it shall be filed with the secretary of the board and the board shall determine by majority vote of its full membership whether or not such charge and the evidence in support of such charge would be sufficient, if true in fact, to warrant a dismissal or a reduction in salary, in which event it shall forward such written charge to the commissioner, together with certificate of such determination."

Once such charges are filed, the Board has a limited time to act upon them. The applicable statute, *N.J.S.A.* 18A:6-13, reads as follows:

> "If the board does not make such a determination within 45 days after receipt of the written charge, or within 45 days after the expiration of the time for correction of the inefficiency, if the charge is of inefficiency, the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon."

In this instance, the Petition of Appeal was filed prior to the expiration of the forty-five day period provided by *N.J.S.A.* 18A:6-13. However, the Board's resolution regarding the charges (Exhibit R-1) was adopted on December 13, 1972, which was within the forty-five day period. Therefore, petitioner's original allegation that the Board might permit the forty-five day period to expire, thereby precluding any further proceedings on the charges, is moot at this point and requires no consideration by the Commissioner.

The Board's Brief in support of the Motion to Dismiss and its resolution (Exhibit R-1) cite decisions of the Commissioner and the courts and will be considered next.

In *Faye Bullock v. Board of Education of Princeton Regional School District, Mercer County,* 1971 *S.L.D.* 37, petitioner alleged that the board's refusal to certify a single charge of corporal punishment to the Commissioner against her son's fourth grade teacher was improper. The Commissioner held that the board had an obligation to make a determination as to the gravity of the charge because charges against teaching staff members are to be certified only when of such nature as to warrant, if true in fact, the serious penalties of dismissal or reduction in salary. In *Bullock, supra,* the Commissioner found that the board had heard petitioner's view of the incident between the teacher and the child, and the views from its school administrators. The board concluded in *Bullock, supra,* that the complaint was of too minor an order of significance to

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justify an assumption that the severe penalties of dismissal or reduction in salary might reasonably be imposed, and refused to certify the charge to the Commissioner. The Commissioner held in *Bullock, supra,* that the board's refusal was a proper exercise of its discretion, consistent with the mandate of *N.J.S.A.* 18A:6-11. The Commissioner stated that when a board properly exercises its discretion in such matters, the Commissioner will not intervene.

Since the decision in *Bullock, supra,* was rendered, the Commissioner has not departed from the conclusion expressed therein. Local boards of education must bear in mind that teaching staff members, because of their constant close association with numbers of pupils, are exposed to allegations and charges by pupils and their parents. Also, both allegations by and testimony of children must be carefully considered, because there would be no way to prove certain charges except by the propounding of such charges by parents on behalf of their children and by subsequent testimony of children. The point is that teaching staff members should not be subjected to wholly fanciful charges, nor should pupils be at the mercy of the teacher for lack of opportunity to present and offer proof of charges. *Palmer v. Board of Education of Audubon,* 1939-49 *S.L.D.* 183, 188; *In the Matter of the Tenure Hearing of Pauline Nickerson, Peapack-Gladstone School District, Somerset County,* 1965 *S.L.D.* 130, 132; *In the Matter of the Tenure Hearing of Mary Louise Connolly, School District of the Borough of Glen Rock, Bergen County,* 1971 *S.L.D.* 305; *In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick, Middlesex County,* 1971 *S.L.D.* 566, 574, affirmed State Board of Education, February 7, 1973, affirmed Superior Court, Appellate Division, November 28, 1973. Although the basic issue as to whether or not a local board of education abused its discretion is similar in *Bullock, supra,* and the instant matter, the Commissioner's conclusion in *Bullock, supra,* cannot be applied in this case because of the differences in facts and circumstances.

The Board also cites *Thomas and Marilyn Cambria v. Board of Education of the Borough of Cliffside Park, Bergen County,* 1968 *S.L.D.* 248, affirmed State Board of Education, 1970 *S.L.D.* 449, and *Roger and Aida Sheffmaker v. Board of Education of the Borough of Runnemede, Camden County,* 1963 *S.L.D.* 116.

In *Sheffmaker, supra,* petitioners charged that the principal of one of respondent's schools inflicted corporal punishment upon their son. Petitioners filed a complaint in the Municipal Court charging the principal with simple assault which resulted in a verdict that she was not guilty. Thereafter, petitioners requested the board to certify the charges of corporal punishment to the Commissioner, and the board, without notification or invitation to the petitioners, held a special meeting at which it determined not to certify the charges. The Commissioner held that the board's action was procedurally defective because it failed to examine petitioners' evidence, thus denying them a right to be heard. The board also denied the accused principal a right to have her situation determined with respect to the evidence against her. The Commissioner remanded the matter to the board of education for a determination consistent with proper procedural requirements. The Commissioner pointed out that the function of the board under *N.J.S.A.* 18A:6-11 "*** does not require that the

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board examine the evidence which the person preferring the charges has to offer.***" The Commissioner also stated that "*** [t]he function of the board in such cases has been likened to that of a grand jury.***" This latter statement will be considered in more detail, *post.*

In the case of *Cambria, supra,* petitioners filed charges against a seventh grade teacher in whose class their son was enrolled during the school year. Also, petitioners brought a civil action against the teacher and the board, as co-defendants, as a result of the incident which formed the basis of the charges filed against the teacher. Petitioners requested that the board notify them regarding the date and time when the board would consider the charges. The board did not so notify petitioners, but adopted a resolution by which it determined not to certify the charges against the teacher. The board admitted to this procedural error. Petitioners alleged that the board could not properly consider the charges because of its co-defendant status with the teacher in the civil action, and they requested that the Commissioner assume direct and full jurisdiction over the charges.

The Commissioner held in *Cambria, supra,* that the board could consider the charges against the teacher, and he directed the board to give such consideration to the charges in accordance with *N.J.S.A.* 18A:6-11, within forty-five days from the date of his decision. The Commissioner also held that absent a clear showing of bias, prejudice, or abuse of discretion on the part of the board, no reason existed to warrant his intervention. The Commissioner stated that "*** [a]ppropriate remedies are available to petitioners should such bias, prejudice or abuse of discretion in fact appear.***"

The primary feature which distinguishes *Cambria, supra,* from the instant matter is that the board's second action in *Cambria* which presumedly was procedurally correct in accordance with the Commissioner's order, was not challenged on the grounds that it constituted an abuse of discretion by the board. In the instant matter, the Board's action is challenged as constituting an abuse of discretion.

In its resolution (Exhibit R-1) the Board included statements describing its function under *N.J.S.A.* 18A:6-11, to review written charges against one of its employees. The pertinent portion of the resolution (Exhibit R-1) reads as follows:

> "*** WHEREAS, the Board of Education of the Township of Brick, County of Ocean, and State of New Jersey, has performed its function in examining all of the evidence and which function has been likened to that of a Grand Jury; and
>
> "WHEREAS, the Board of Education of the Township of Brick, County of Ocean, and State of New Jersey, in exercising its function which has been likened to that of a Grand Jury, pursuant to *State vs. Chandler* (236 A 2d 632); *State vs. Price* (260 A 2d 877); *State vs. Emberton* (109 N.J. Super. 211); *State vs. Williams* (272 A 2d 294); *State vs. Tucker* (244 A 2d 353);

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"NOW, THEREFORE, BE IT RESOLVED as follows:

"1. After examination of all of the charges and in performance of its duties in making a preliminary finding similar to that of a Grand Jury in the manner and method hereinabove outlined, and also taking into consideration the fact that the statements set forth in the charges were made in private conversations and not at public meetings or in the presence of the students, the Board of Education of the Township of Brick, County of Ocean, and the State of New Jersey, determines with respect to the gravity of all the charges that, if, true in fact, they would not merit the penalty of dismissal or of the reduction in salary under all the circumstances as more fully set forth hereinabove.

"2. The Board of Education *** hereby concludes and determines pursuant to its discretionary mandate under NJSA 18A:6-11, not to certify the charges to the Commissioner of Education of the State of New Jersey.

"3. The charges are dismissed.***" (at pp. 2-3)

The Board's argument that the Commissioner has jurisdiction in matters arising under *N.J.S.A.* 18A:6-11, only if the Board certifies the charges to him for a hearing (*N.J.S.A.* 18A:6-16), is presumedly based on the Board's statement that its function is "likened to that of a Grand Jury" and the cases cited in the resolution, *ante.* This point will be considered next.

There are distinct differences between the function of an elected or appointed board of education considering charges filed against one of its employees under *N.J.S.A.* 18A:6-11, and the function of a grand jury. Therefore, the Commissioner's statement in *Sheffmaker, supra,* at p. 118 that "*** [t]he function of the board in such cases [arising under *N.J.S.A.* 18A:6-11] has been likened to that of a grand jury ***" requires more detailed clarification for purposes of the instant matter.

A grand jury is comprised of an array of legally qualified jurors. When evidence is presented to a grand jury, only the prosecuting attorney, the clerk of the grand jury, the witness under examination, interpreters when needed, and a stenographer are permitted to be present. No person other than the jurors, the clerk, and the prosecuting attorney may be present while the grand jury is deliberating, and the grand jury may request either the clerk or the prosecuring attorney to leave the jury room during its deliberations. *R.* 3:6-6 The proceedings of a grand jury are secret, and all persons other than witnesses are required to take an oath of secrecy before admission to the grand jury session, including the stenographer or typist making transcripts of testimony before the grand jury. *R.* 3:6-7 A grand jury's determination of No Bill of indictment is not subject to appeal, and a defendant must be forthwith released if no indictment is found against him. *R.* 3:6-8(b)

There are more significant differences than similarities between the

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function of a grand jury and the function of a local board of education considering charges against one of its employees pursuant to *N.J.S.A.* 18A:6-11; therefore, the analogy should not be used.

In *State v. Chandler,* 98 *N.J. Super.* 241 (*Essex Cty. Ct.* 1967), cert. to Appellate Division denied 55 *N.J.* 309 (1970), a case of prosecution for murder, a motion for dismissal of the indictment for murder was granted because the sole witness who testified before the grand jury was neither an eyewitness to the crime nor in possession of relevant information concerning the alleged crime. The Court held that the procedure was not such as countenanced by *State v. Dayton,* 23 *N.J.L.* 49 (*Sup. Ct.* 1850), and quoted Judge Learned Hand, later Justice Hand, writing for the Second Circuit Court of Appeals in *United States v. Costello,* 221 *F.2d* 668 (*2d Cir.* 1955) as follows:

> "*** We should be the first to agree that, if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated. ***" (221 *F.2d,* at p. 677)

The case of *State v. Tucker,* 101 *N.J. Super.* 380 (*Law Div.* 1968) involved the application for bail by a defendant indicted for murder. The application was denied. The Court found that the presumption was great that the defendant would be convicted of murder, based upon defendant's statement. The defendant argued for a full hearing to determine whether his statement was admissible as having been given under the requirements and warnings of *Miranda v. Arizona,* 384 *U.S.* 436, 86 *S. Ct.* 1602 16 *L.Ed.2d* 694 (1966). The Court held that:

> "*** At this stage of the proceedings the court does not sit to try the merits of the case or enter into any nice inquiry as to the precise weight that ought to be given the evidence ***." 101 *N.J. Super.* at 383

The Court cited *State v. Konigsberg,* 33 *N.J.* 367 (1960) wherein the Supreme Court stated:

> "*** It is essential that the proceeding be kept in proper perspective as a *preliminary one;* one which cannot and should not be allowed in any way to bear upon or influence the ultimate outcome of the plenary trial or the evaluation of the resulting verdict. (*Emphasis ours.*) (at p. 378)

In the judgment of the Commissioner, the above-cited case is analagous to the Board's function under *N.J.S.A.* 18A:6-11 only in that the Board's certification of charges to the Commissioner is purely a preliminary proceeding which is not intended to influence the outcome of a subsequent plenary hearing.

The Board also cites *State v. Price,* 108 *N.J. Super.* 272 (*Law Div.* 1970) in its resolution. (Exhibit R-1) This case was concerned with a motion to dismiss a murder indictment, which was denied, and a motion to suppress certain evidence which was granted.

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The case of *State v. Emberton*, 109 *N.J. Super.* 211 (*App. Div.* 1970) was an appeal from an order of the Director of the Division of Motor Vehicles suspending the defendant's driver's license for refusal to submit to a chemical breath test. The Commissioner can find no applicable feature of *Emberton* to the instant matter.

The last case cited in the Board's resolution is *State v. Williams*, 112 *N.J. Super.* 563 (*App. Div.* 1970). In that case the defendant's conviction of the offense of false swearing was reversed by the Superior Court, Appellate Division, on the finding that the defendant was not advised of his right to assistance of counsel at a special hearing, nor was he advised that his testimony might incriminate him.

The Commissioner finds the above cases cited by the Board inapposite the instant matter.

Petitioner's contention that the Board's function pursuant to *N.J.S.A.* 18A:6-11 is more analagous to a probable cause hearing in the local magistrate's court, and in some instances, the county district court, than it is to a grand jury proceeding, will be examined next.

The procedure for a hearing as to a probable cause is described in *R.* 3:4-3. This rule provides that, if a defendant does not waive a hearing as to probable cause of a charged offense for which no indictment has been returned, the court shall hear the evidence offered by the State and the defendant may cross-examine witnesses against him. The rule then provides, *inter alia,* as follows:

> "*** If, from the evidence, it appears to the court that there is probable cause to believe that an offense has been committed and the defendant has committed it, the court shall forthwith bind him over to await final determination of the cause, otherwise, the court shall discharge him ***."

Although both a probable cause hearing and a grand jury proceeding are concerned solely with criminal law, and therefore, differ basically from charges against a tenured school district employee, which is entirely a civil action pursuant to *N.J.S.A.* 18A:6-10 *et seq.*, the Commissioner agrees that there is a greater analogy between a probable cause hearing under *R.* 3:4-3 and a local board of education's procedure under *N.J.S.A.* 18A:6-11. In the Commissioner's judgment, the probable cause hearing permits a greater degree of discretion by the court and provides a broader proceeding than the Legislature intended for local boards of education under *N.J.S.A.* 18A:6-11.

In the instant matter, the Board challenges the Commissioner's jurisdiction to decide the controversy on the grounds that (1) the Commissioner has no authority to usurp from the Board the sole and absolute discretion, vested in it by *N.J.S.A.* 18A:6-11, to determine whether or not charges against a tenured employee should be certified to the Commissioner, and (2) the Board's action has the presumption of correctness and, therefore, absent a showing that such

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action was arbitrary, capricious, or unreasonable, the Commissioner cannot substitute his judgment for that of the Board.

The statutory enactment which gives the Commissioner jurisdiction over controverted matters arising under the school laws is *N.J.S.A.* 18A:6-9, which states that:

> "The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws *** or under the rules of the state board or of the commissioner."

It is proper to consider next the role of local school district boards of education. In the legal sense, local school districts governed by boards of education are agencies of the State, created by the Legislature to carry out the State educational program determined by the Legislature. Since the school districts of New Jersey are under the control and jurisdiction of the State and its executive officers, their authority must be conferred by enactments of the Legislature. *N.J.S.A.* 18A:11-1 sets forth the primary enabling authority conferred upon these local agencies as follows:

> "The board shall –
>
> a. Adopt an official seal;
>
> b. Enforce the rules of the state board;
>
> c. *Make, amend and repeal rules,* not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and *for the government and management of the public schools* and public school property of the district and for the employment, regulation of conduct and discharge of its employees *** and
>
> d. *Perform all acts and do all things, consistent with law* and the rules of the state board, *necessary for the lawful proper conduct, equipment and maintenance of the public schools of the district."* (*Emphasis ours.*)

The courts of this State have, in several instances, commented upon the authority and jurisdiction of the Commissioner of Education. In *Kopera v. West Orange Board of Education,* 60 *N.J. Super.* 288 (*App. Div.* 1960), the Court described the general classification of three types of cases reviewed by the Commissioner as set forth in the *Borough of Fanwood v. Rocco and Division of Alcoholic Beverage Control,* 59 *N.J. Super.* 306 (*App. Div.* 1960). The "first class of cases" mentioned in *Fanwood v. Rocco* are those in which the issue is one of law, and in these cases the Commissioner's "discretion" plays no part. The Court said in *Kopera*:

> "Therefore, when this court reviews his decision upon such a question, we

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reverse if he was mistaken in the law and affirm if he was correct, just as if he were a trial judge." (at p. 315)

Also, in *Kopera,* at p. 296, the Court, in stating that the "second class of cases" decided by the Commissioner are those in which he is called upon to decide disputed questions of fact, and in these also the Commissioner's discretion is not involved, said: "If the evidence is not there, no amount of 'discretion' can supply the deficiency." See also *Fanwood v. Rocco, supra,* at p. 317. The Court further stated, at p. 216, that *In re Masiello,* 25 *N.J.* 590 (1958) falls into this "second class of cases," and in *Masiello,* at p. 607, that the Commissioner must determine whether the action under review is violative of the law and, if it is, "the proper discharge of his duty requires corrective action." In *Kopera* it was held that the matter at bar is in the "third class of cases" described in *Fanwood v. Rocco,* at p. 317, which are cases wherein the appeal to the Commissioner "is from action taken by the local agency which involved the local agency's discretion." Thus, in these cases, it was determined that the scope of the Commissioner's review is not to substitute his judgment for that of the local board's, but to determine whether its conclusions had a reasonable basis.

It is well established that the Commissioner will not substitute his judgment for that of the elected or appointed representatives of the citizens of the school district who comprise the local board of education. *Fitch v. Board of Education of South Amboy,* 1938 *S.L.D.* 292, affirmed State Board of Education 293 (1914); *Cook v. Board of Education of Plainfield,* 1939-49 *S.L.D.* 177; affirmed State Board of Education 180 (1939); *Palmer v. Board of Education of Audubon,* 1939-49 *S.L.D.* 183, affirmed State Board of Education 189 1946); *Mackler v. Board of Education of Camden,* 1953-54 *S.L.D.* 53, affirmed State Board of Education 66, 16 *N.J.* 362 (1954); *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, affirmed State Board of Education 15, 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E. & A.* 1947); *Tolliver et al. v. Board of Education of Metuchen,* 1970 *S.L.D.* 415

In *Boult and Harris, supra,* the Commissioner held that:

> "*** it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly) or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions ***." (at p. 13)

The Commissioner has in numerous instances been called upon, in his quasi-judicial capacity, to make determinations regarding the reasonableness of the actions of local boards of education. The Commissioner will, in determining controversies under the school laws, inquire into the reasonableness of the adoption of policies, resolutions, or bylaws, or other acts of local boards of

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education in the exercise of their discretionary powers, but will not invalidate such acts unless unreasonableness clearly appears. See 62 *C.J.S., Municipal Corporations* § 203. *Cf. Kopera v. West Orange Board of Education, supra.*

In *Cullum v. Board of Education of the Township of North Bergen,* 15 *N.J.* 285 (1954), the Court reviewed and affirmed a decision of the Superior Court, Appellate Division, 27 *N.J. Super.* 243, affirming a determination of the State Board of Education, affirming a decision by the Commissioner. The Court found that in the board of education's action adopting a resolution for the appointment of a superintendent of schools, there was "a lack of exercise of discretion and an arbitrary determination." See *Grogan V. De Sapio,* 11 *N.J.* 308, 325 (1953).

In *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1964) the Court reviewed and affirmed a determination of the State Board of Education, affirming a decision of the Commissioner, which held that the action of the local board of education in appointing a superintendent of schools "was shown to be an abuse of discretion, arbitrary and contrary to public policy." The language of the Court in that case is directly to the point of the instant matter. The Court stated at p. 332:

> "*** We are here concerned with a determination made by an administrative agency duly created and empowered by legislative fiat. When such a body acts within its authority, its decision 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.*** *Quinlan v. Board of Education of North Bergen,* 73 *N.J. Super.* 40 (*App. Div.* 1962) ***"

In numerous decisions, the Commissioner has reiterated his position regarding challenges to discretionary actions taken by local boards of education. In *Hoey v. Lakewood Board of Education,* 1938 *S.L.D.* 678, the Commissioner reversed the action of the board, which suspended a pupil for almost an entire school year, on the grounds that such action was unreasonable. In *Pasko v. Board of Education of Dunellen,* 1962 *S.L.D.* 188, the Commissioner determined that the action of the board of education in expelling a pupil for an entire school year was unreasonable, and accordingly the board's action was reversed and modified. The Commissioner stated that boards of education cannot exercise authority in ways that are arbitrary, capricious and unreasonable. In that case, reasonable was defined as "conformable to reason; such as is rational, fitting or proper, sensible." Further, reasonable "imports that there is a rational and substantial relationship to some legitimate purpose." *Id.,* at p. 190 See also *Pelletreau v. Board of Education of the Borough of New Milford,* 1967 *S.L.D.* 35, reversed by State Board of Education 45.

In *Seamans et al. v. Board of Education of the Township of Woodbridge,* 1968 *S.L.D.* 1, the Commissioner reversed the action of the board, which denied the use of a school facility to an outside organization, on the grounds that the action was unreasonable. The Commissioner stated, at p. 6, that such action "was wholly without valid reason, must be deemed arbitrary, and must therefore

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be set aside." In *Ruch v. Board of Education of Greater Egg Harbor Regional High School District,* 1968 *S.L.D.* 7, dismissed by the State Board of Education 11, affirmed by the New Jersey Superior Court, Appellate Division, March 24, 1969, the Commissioner stated at p. 9:

> "*** A board of education's discretionary authority is not unlimited, however, and it may not act in ways which are arbitrary, unreasonable, capricious or otherwise improper ***."

In *Peters et al. v. Board of Education of the Township of Washington,* 1968 *S.L.D.* 42, the Commissioner upheld the action of the Board, finding "*** no evidence of an arbitrary, capricious, or unreasonable determination ***." See also *Wassmer et al. v. Board of Education of the Borough of Wharton,* 1967 *S.L.D.* 125, 127.

In *Mears et al. v. Board of Education of the Town of Boonton,* 1968 *S.L.D.* 108, the following quotation appears at p. 111:

> " 'The Commissioner therefore conceives it his responsibility to examine not only the reasonableness of a board's regulations adopted pursuant to *R.S.* 18:5-22 [now *N.J.S.A.* 18A:20-34] but also the proper use of the board's discretion in the application of such regulations.' "

The Commissioner reversed the action of the Board "because of the absence of any indication that there is a reasonable basis for the exercise of its discretion."

In *Bramwell et al. v. Board of Education of the Township of Franklin,* 1970 *S.L.D.* 331, affirmed 1971 *S.L.D.* 662, the Commissioner set aside a rule made by a school employee as being "unreasonable and arbitrary."

In *Hudak v. Board of Education of the Township of East Brunswick,* 1971 *S.L.D.* 493, the Commissioner held that the board's action authorizing an exchange of lands under *N.J.S.A.* 18A:20-8 was hasty, improvident and imprudent, failed to meet the requirements of the statute, and was therefore *ultra vires.*

In *Singer v. Board of Education of the Borough of Collingswood,* 1971 *S.L.D.* 594, the Commissioner determined that the board's regulations for a pupil dress code were reasonable with the single exception of a total prohibition against the wearing of slacks by female pupils. Accordingly, the Commissioner remanded the regulation to the board for modification.

The whole of these parts have clearly established that the Commissioner must, when called upon, examine the actions of local boards of education and determine whether such actions were taken in good faith and not irresponsibly, and as said above, to further examine the application of any and all regulations, rules, and policies deriving therefrom.

In *Board of Education of East Brunswick Township v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966), the Supreme Court thoroughly outlined

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and canvassed the New Jersey constitutional and legislative plan to provide and administer public education, and the role of the Commissioner therein. Justice Jacobs, writing for the Court, described the origin and scope of the reviewing powers of the Commissioner. In 1846 the Legislature provided for a State Superintendent of Public Schools, who was charged with the duty of obtaining faithful execution of the school laws. *L.* 1846, *p.* 168; *L.* 1845, *p.* 242 By 1851 the State Superintendent had been empowered to decide any controversies and disputes arising with respect to the true construction of the laws relating to schools. *L.* 1851, *p.* 271 In 1867, "An act to establish a system of Public Instruction" was adopted by the Legislature which vested the general supervision and control of public instruction in a State Board of Education broadly empowering that body to adopt all rules and regulations necessary to carry out the State school laws. This act also empowered the State Board to decide appeals from the State Superintendent and provided that the Superintendent shall decide all controversies and disputes arising under the school laws or rules and regulations of the State Board. *L.* 1867, *c.* 179, *p.* 362 In 1911, the office of the Commissioner of Education replaced the office of Superintendent. *L.* 1911, *c.* 231, *p.* 508 As the Court in *East Brunswick, supra,* stated at p. 101:

> "*** *at no time was the comprehensive statutory responsibility for hearing all controversies and disputes under the school laws or the State Board's regulations ever withdrawn or narrowed.* See 4 *Comp. Stat.* 1709-1910, pp. 4727-28 ***." (*Emphasis ours.*)

Regarding the Commissioner's scope of reviewing authority, the Court also said the following:

> "*** Our courts have long recognized the sweep of the Commissioner's reviewing powers under *R.S.* 18:3-14 [now *N.J.S.A.* 18A:6-9 *et seq.*] and its predecessors***." *Id.* at p. 101

> "*** We subscribe fully to the holding below that the Commissioner had jurisdiction to decide the controversy on review under *R.S.* 18:3-14 [now *N.J.S.A.* 18A:6-9 *et seq.*] and come now to the scope of his reviewing power ***." *Id.*, at p. 103

> "*** Beyond physical facilities, the State Board and the Commissioner have been appropriately vested with wide regulatory responsibilities bearing on the educational process ***." *Id.*, at p. 104

> "*** We agree with the Appellate Division that the function of the Commissioner under *R.S.* 18:3-14 [now *N.J.S.A.* 18A:6-9 *et seq.*] is not to sit as an original budget-making body, as he would if the governing body had failed to make any certification. See *R.S.* 18:7-83 [now *N.J.S.A.* 18A:22-38]; 91 *N.J. Super.*, at p. 26. His function is admittedly to sit as a reviewing body which, however, is charged with the overriding responsibility of seeing to it that the mandate for a thorough and efficient system of free public schools is being carried out. See *Laba v. Newark Board of Education, supra,* 23 *N.J.*, at pp. 381-382; *In re Masiello, supra,* 25 *N.J.*, at p. 606; *Booker v. Board of Education, Plainfield, supra,* 45 *N.J.* at p. 177 ***." *Id.*, at p. 106

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"In *Laba,* which involved schoolteachers' appeals under *R.S.* 18:3-14 [now *N.J.S.A.* 18A:6-9 *et seq.*], we had occasion to point out that while the Commissioner must give due weight to lower findings, 'his primary responsibility is to make certain that the terms and policies of the School Laws are being faithfully effectuated.' 23 *N.J.,* at p. 382. In *Masiello,* we rejected the contention that the Commissioner's function on reviewal of the Board of Examiners is simply to see whether its action was 'arbitrary or capricious'; we reiterated what was said in *Laba* and noted that the Commissioner's responsibility was to make independent determinations giving due weight, of course, to the lower findings and the measures of discretion vested below. 25 *N.J.,* at p. 606. In *Booker* we recently reaffirmed *Laba* and *Masiello* and held that the Commissioner's obligation in a segregation dispute before him under *R.S.* 18:3-14 [now *N.J.S.A.* 18A:6-9 *et seq.*] was to determine affirmatively whether the reasonably feasible steps towards desegregation were being taken 'in proper fulfillment of State policy'; if not he could remand the matter to the local board for further action or 'prescribe a plan of his own.' 45 *N.J.,* at p. 178

"As in *Booker,* the Commissioner in deciding the budget dispute here before him will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled ***." *Id.,* at pp. 106-107

In *Jenkins, et al. v. Township of Morris School District and Board of Education et al.,* 50 *N.J.* 483 (1971) the New Jersey Supreme Court disagreed with the Commissioner's determination that he lacked legal authority to take steps, although highly desirable, which would have granted the relief requested by petitioners. The Court stated the following:

"*** The Commissioner's flat disavowal of power despite the compelling circumstances may be sharply contrasted with the sweep of our pertinent constitutional and statutory provisions and the tenor of our earlier judicial holdings. See *N.J. Const.,* art. 1, pars. 5; art. 8, sec. 4, para. 1 (1947); *N.J.S.A.* 18A:4-23, 24; *N.J.S.A.* 18A:6-9; *Bd. of Ed. of Elizabeth v. City Coun. of Elizabeth,* 55 *N.J.* 501 (1970); *Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick,* 48 *N.J.* 94 (1966); *Booker v. Board of Education, Plainfield,* 45 *N.J.* 161 (1965); *Morean v. Bd. of Ed., of Montclair,* 42 *N.J.* 237 (1964); *see also In re Masiello,* 25 *N.J.* 590 (1958); *Laba v. Newark Board of Education,* 23 *N.J.* 364 (1957); *Schults v. Bd. of Ed. of Teaneck,* 86 *N.J. Super.* 29 (*App. Div.* 1964), *aff'd,* 45 *N.J.* 2 (1965).

"Our Constitution contains an explicit mandate for legislative 'maintenance and support of a thorough and efficient system of free public schools.' Art. 8, sec. 4, para. 1. In fulfillment of the mandate the Legislature has adopted comprehensive enactments which, *inter alia,* delegate the 'general supervision and control of public education' in the State to the State Board of Education in the Department of Education. *N.J.S.A.* 18A:4-10. As the chief executive and administrative officer of the Department, the State Commissioner of Education is vested with broad

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> powers including the 'supervision of all schools of the state receiving support or aid from state appropriations' and the envorcement of 'all rules prescribed by the state board.' *N.J.S.A.* 18A:4-23. The Commissioner is authorized to 'inquire into and ascertain the thoroughness and efficiency of operation of any of the schools of the public school system of the state' (*N.J.S.A.* 18A:4-24), is directed to instruct county superintendents and superintendents of schools as to 'the performance of their duties, the conduct of the schools and the construction and furnishing of schoolhouses' (*N.J.S.A.* 18A:4-29), and is empowered to hear and determine 'all controversies and disputes' arising under the school laws or under the rules of the State Board or the Commissioner. *N.J.S.A.* 18A:6-9.***" (58 *N.J.*, at pp. 493-494)

The Court then proceeded to review its previous decisions concerning the legal authority of the Commissioner as set forth in *Laba, supra, Masiello, supra,* and *East Brunswick, supra,* calling attention also to *Board of Education of Elizabeth v. City Council of the City of Elizabeth,* 55 *N.J.* 501 (1970), which involved the appeal by the board of education of a Type I or city school district of a reduction in its school budget by the local board of school estimate and city council.

Most recently, in the case of *Dunellen Board of Education and Commissioner of Education v. Dunellen Education Association et al.,* 64 *N.J.* 17 (1973) the Supreme Court once again briefly reviewed this State's public policy regarding the maintenance and support of a "thorough and efficient" system of free public schools and the supervisory control afforded by the Legislature to the State Board of Education in the State Department of Education and to the Commissioner as chief executive and administrative officer, to effectuate this policy. The Court stated that:

> "*** The Commissioner was expressly empowered to hear and determine all controversies arising under the school laws or under the rules of the State Board of the Commissioner (*N.J.S.A.* 18A:6-9) and in a series of decisions this Court reaffirmed the great breadth of the Commissioner's powers. See *Jenkins, et al. v. Tp. of Morris School Dist. and Bd. of Ed.,* 58 *N.J.* 483, 492 (1971); *Bd. of Ed. of Elizabeth v. City Coun. of Elizabeth, 55 N.J.* 501, 505 (1970); *Booker v. Board of Education, Plainfield,* 45 *N.J.* 161, 173 (1965); *In re Masiello,* 25 *N.J.* 590, 601 (1958).***"
>
> (64 *N.J.*, at p. 23)

In the instant matter, the Board has exercised its discretion pursuant to *N.J.S.A.* 18A:6-11, and its action is attacked essentially as an alleged abuse of its discretion. Therefore, on its face, this controversy is clearly within the cognizance, expertise, and authority of the Commissioner.

In order to determine whether the Board's action did in fact constitute an abuse of its discretion pursuant to *N.J.S.A.* 18A:6-11, the Commissioner must examine this statute.

In ascertaining the meaning of a statute, the intention is to be found

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within the four corners of the document itself. The language employed by the adoption should be given its ordinary and common significance. *Lane v. Holderman,* 23 *N.J.* 304 (1957) Where the wording is clear and explicit on its face, the statute must speak for itself and be construed according to its own terms. *Duke Power Company, Inc. v. Edward J. Patten, Secretary of State et al.,* 20 *N.J.* 42, 49 (1955); *Zietko v. New Jersey Manufacturers Casualty Ins. Co.,* 132 *N.J.L.* 206, 211 (*E. & A.* 1944); *Bass v. Allen Home Improvement Co.,* 8 *N.J.* 219, 226 (1951); *Sperry & Hutchinson Co. v. Margetts,* 15 *N.J.* 203, 209 (1954); 2 *Sutherland, Statutes and Statutory Construction* (3*rd ed.* 1943), *section* 4502

The statute, *N.J.S.A.* 18A:6-11, bears repeating as follows:

> "If written charge is made against any employee of a board of education under tenure during good behavior and efficiency, it shall be filed with the secretary of the board and *the board shall determine* by majority vote of its full membership *whether or not such charge and the evidence in support of such charge would be sufficient, if true in fact, to warrant a dismissal or a reduction in salary,* in which event it shall forward such written charge to the commissioner, together with certificate of such determination." (*Emphasis ours.*)

The Appellate Division of the Superior Court of New Jersey thoroughly reviewed and clarified the Tenure Employees Hearing Law in the case of *In the Matter of the Tenure Hearing of David Fulcomer, Holland Township, Hunterdon County,* 93 *N.J. Super.* 404 (*App. Div.* 1965). Judge Carton, writing for the Court, stated that:

> "*** The Legislative intent that the Commissioner shall hear and decide the entire controversy clearly appears from a brief review of its provisions and an examination of its historical background.*** (at p. 410)

> "*** The Tenure Employees Hearing Act *** establishes an entirely new and comprehensive procedure for the resolution of all controversies involving charges against *all* tenure employees not subject to Civil Service under Title 18.*** (*Id.*, at p. 411)

> "*** Formerly all phases of the hearing and decision making function were performed by the local boards. The Commissioner reviewed such determinations on appeal pursuant to the general power conferred upon him to 'decide *** all controversies and disputes arising under the school laws.' (*R.S.* 18:3-14) [now *N.J.S.A.* 18A:6-9] (*Id.*, at p. 411)

> "Now the Commissioner conducts the initial hearing and makes the decision.*** (at p. 411)

> "There is nothing in the new act which suggests the local boards were intended to retain any part of the jurisdiction which they formerly exercised in such controversies other than preliminary review of the charge and the required certification to the Commissioner. Their participation in

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such proceedings is specifically confined to the limited function. Thus the Legislature has transferred from the local boards to the Commissioner, the duty of conducting the hearing and rendering a decision on the charge in the first instance. His jurisdiction in all such cases is no longer appellate but primary.***" (*Id.*, at p. 412)

Judge Carton also stated the purpose of this legislation as follows:

"*** The main purposes of that law [*L.* 1960, *c.* 136] were two-fold. The first was to eliminate the vice which inhered in the former practice of the board's being at one and the same time investigator, prosecutor and judge.*** (at p. 413)

"*** The second and no less important purpose was to remove the trial of such cases from the publicity attendant on the local hearing which 'tears the community apart' and 'disrupts the orderly conduct of local school affairs.'***" (*Id.*, at p. 414)

The "limited function" of "*** preliminary review of the charge and the required certification to the Commissioner**," in the words of the Court, strictly delimits the breadth of the Board's discretionary authority. The statute, *N.J.S.A.* 18A:6-11, requires a local board of education to view such charge as being true. The description of the charge as being "true in fact," prohibits a local board from exercising judgment regarding the truthfulness of the charge. A local board of education, assuming the truth of the written charge and having examined the evidence, exercises discretion solely by determining whether the charge would "*** warrant a dismissal or a reduction in salary ***." In *Bullock, supra,* the Commissioner upheld the Board's determination that the charge, although presumed true, would not warrant dismissal or a reduction in salary.

Since the charges in this instance have not been certified to the Commissioner by the Board, but are included in full detail in the record before the Commissioner, he will not recite them. It will suffice to say that, in the Commissioner's judgment, the charges are sufficient, if found true as the result of a plenary hearing, to warrant the penalties of dismissal or reduction in salary.

The Board's resolution (Exhibit R-1) states that the Board deposed all persons named in the charges. These named persons are teaching staff members who purportedly were in the presence of the Superintendent at various times when the alleged incidents took place. The charges themselves were verified only by petitioner. Since the depositions of these persons have not been submitted to the Commissioner by the Board as part of the record in this matter, the Commissioner must assume that these depositions support the charges.

The Commissioner finds and determines that the Board's action adopting the resolution of December 13, 1972, wherein it determined not to certify petitioner's written charges against the Superintendent to the Commissioner, pursuant to *N.J.S.A.* 18A:6-11, was unreasonable and constitutes an abuse of its discretion.

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The Commissioner, therefore, remands these charges to the Board of Education of the Township of Brick, and directs the Board to certify the said charges to the Commissioner of Education within forty-five days of the date of this decision.

COMMISSIONER OF EDUCATION

March 15, 1974

James McCabe,

Petitioner-Appellee,

v.

Board of Education of the Township of Brick, Ocean County,

Respondent-Appellant.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 15, 1974

For the Petitioner-Appellee, Joseph N. Dempsey, Esq.

For the Respondent-Appellant, Anton and Ward (Donald H. Ward, Esq., of Counsel)

Respondent-Appellant's request to file an additional Brief is hereby denied. The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

June 26, 1974

Pending before Superior Court of New Jersey

You are viewing an archived copy from the New Jersey State Library.

Gregory Cordano,

Petitioner,

v.

Board of Education of the City of Weehawken, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, LeRoy D. Safro, Esq.

Petitioner, a tenured teacher in the employ of the Board of Education of the City of Weehawken, hereinafter "Board," alleges that certain actions of a disciplinary nature have been taken against him by the Board and that such actions are improper and illegal in the circumstances. The Board denies the allegations and maintains that its treatment of petitioner has been both proper and legally correct.

A hearing in this matter was conducted on November 28, 1973 by a hearing examiner appointed by the Commissioner of Education at the office of the Hudson County Superintendent of Schools, Jersey City. A total of five exhibits were accepted into evidence on that occasion. The report of the hearing examiner is as follows:

Petitioner is a teacher of industrial arts who was assigned to a position at the high school level for five years prior to June 1973. In addition to his basic teaching assignment, he has also served as advisor to the high school's color guard organization, and this service has often necessitated his presence in the high school building during evening hours. One such occasion was the evening of March 22, 1973.

On the following day petitioner received the following letter signed by two assistant principals, with a notation indicating a copy was sent to the Superintendent of Schools:

> "It was observed on Thursday evening, March 22, by members of the administrative staff that on two distinct occasions the main door was left in a position where the door was not completely closed, thus permitting for the possibility of unauthorized people to enter the school plant.
>
> "Your cooperation in seeing that this condition ceases immediately will be greatly appreciated as it is obvious that such procedure may lead to all sorts of problems and vandalism." (P-1)

Thereafter, on March 26, 1973, petitioner addressed the following letter in

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reply and, as a postscript, he requested that a copy be placed in his "personal file."

> "This letter is in response to your letter dated March 23, 1973, dealing with the subject of potential vandalism that would occur as a result of the main door being left open during night practice sessions of the various squads.
>
> "I would like to go on record as being very security conscious. I do not take my position as Color Guard Advisor very lightly, and I realize that when I am with the squad at night, the security of the building is part of my duties.
>
> "I have always made it a point to secure the front door in question.
>
> "The main door is equipped with a self-closing, self-locking device. The purpose of this hardware is to secure the opening automatically after it has been used.
>
> "If the door in question was not in a fully locked position, then the fault lies in one of the hardware components, and not with any negligence on the part of any person in the building at the time.
>
> "Maybe the hardware of the building should be examined by a competent locksmith.
>
> "The vandalism that occurs during the day, far outweighs any vandalism that might possibly occur when the various squads are using the school facilities at night.
>
> "During the period between 7:00 and 9:00 PM, the school building is well lighted and there are many people on duty at the time.
>
> "I would sincerely hope that in the future, a thorough investigation will be carried on before any blame or suggestion of blame is placed on any group or individual that might be in the vicinity of the incident at the time.
>
> "We are all professionals and as professionals we are capable of assuming the responsibilities related to our assigned duties." (P-2)

While this letter, *ante,* was addressed to an assistant principal of petitioner's school, it is clear that the Superintendent also received a copy on March 26, 1973, and evidently "***requested and then ordered***" (P-3) petitioner to appear in his office for a consultation. Whereupon petitioner did so appear.

However, the appearance was short-lived and presented no opportunity for an exchange of views since petitioner wished to be accompanied by a representative of his own choosing, and the Superintendent evidently regarded such desired representation as "*** a very serious act of insubordination and

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unprofessional conduct***." (P-3) In any event, the Superintendent, in annoyance and with a loud voice, ordered petitioner to leave, and he did so leave. (Tr. 55, 72)

Thereafter, on March 29, 1973, the Superintendent addressed the following letter to petitioner:

> "On Monday, March 26, 1973, I first requested and then ordered you to appear in my office for a consultation. You refused on the grounds that you wanted a witness present. I have taken this to be a very serious act of insubordination and unprofessional conduct on your part in dealing with someone in authority.
>
> "Any repetition of similar conduct will be given serious consideration and further action may be warranted by the administration. You are to know that this letter will be made a part of, and will be included in, your personal file." (P-3)

After receipt of the letter, *ante,* petitioner addressed an answering letter to the Superintendent and requested "***a meeting with you with a representative of my choosing present." (P-4) However, no such meeting was ever held and the instant Petition was forwarded to the Commissioner on August 15, 1973. The primary prayer of petitioner is that the letter (P-3) be removed from his personal file, together with all other correspondence pertinent to this matter which was recited, *ante.*

However, at the conference of counsel held on October 2, 1973, the Petition was amended to include an allegation that petitioner had been illegally transferred from his tenured position as a penalty for the events heretofore recited. The prayer in this respect is that the transfer be held to be invalid.

The transfer of reference was an administrative action which was unsupported by Board resolution. Notice of it was received by petitioner on April 6, 1973 in a letter from the Superintendent which stated:

> "This letter is to inform you that you will be transferred from the high school to teach Industrial Arts on the elementary level. This will take effect in September 1973.
>
> You will be informed of your schedule at a later date and you have our best wishes in this assignment.***" (P-5)

It is noted here that petitioner began such work in his new position "in September 1973," and that the Petition of Appeal was not amended until October 2, 1973. It is further noted that, although the transfer was initially an administrative action without formal Board approval, the Board did retroactively approve the transfer on December 18, 1973. A copy of the Board resolution in this regard was forwarded to the hearing examiner by counsel for petitioner on December 18, 1973, and reads as follows:

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"WHEREAS, the Secaucus School District and the Weehawken School District have agreed to terminate the sending-receiving relationship which had existed between them by a phase-out of the Secaucus students commencing with the 1973-74 school year; and

WHEREAS, the student enrollment in the Weehawken High School has decreased as a direct result of the first year of that phase-out by approximately 150 students; and

WHEREAS, as a direct result of that enrollment decrease, 21 probationary non-tenured teachers previously employed by the Weehawken School System were not rehired for the 1973-74 school year; and

WHEREAS, only one (1) Industrial Arts teacher will be required in the Weehawken High School commencing with the 1973-74 school year; and

WHEREAS, the Weehawken School District had employed two (2) Industrial Arts teachers in its High School prior to the 1973-74 school year; and

WHEREAS, an elementary school Industrial Arts teacher with the least seniority was not rehired as aforesaid. He was one (1) of two (2) elementary school Industrial Arts teachers.

NOW, THEREFORE, BE IT RESOLVED on this twelfth day of December, 1972, that GREGORY CORDANO, one of the two (2) Industrial Arts teachers in the Weehawken High School be, and he hereby is, transferred from the Weehawken High School to teach in any or all of the elementary schools in the District, to which he shall be assigned by the Superintendent of Schools.

BE IT FURTHER RESOLVED, that the action of the Superintendent of Schools in administratively transferring the said GREGORY CORDANO from the Weehawken High School to the Weehawken Elementary Schools commencing with the first day of the 1973-74 school year be and the same hereby is expressly approved and ratified for the reasons hereinbefore stated."

This concludes a recital of the facts and circumstances necessary for an adjudication of the issues which were set forth at the conference of counsel; namely,

(a) Were the actions taken against petitioner herein such as to constitute punishment contrary to the prescription of the statutes in this regard?

(b) Is the letter of the Superintendent to petitioner with respect to certain events alleged herein a letter of censure?

(c) If it is, is it appropriate to place the letter in petitioner's personal file?

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(d) How does petitioner's letter of March 26, 1973 to the Superintendent affect the judgment to be made herein?

It is noted that such complex issues rest for adjudication on a simple fact; namely, someone left a door open on March 22, 1973 in Weehawken High School. However, the subsequent narrative in written form is evidence that the written word can often be as troublesome as oral conversation in human relationships and particularly where, as here, there is pyramidal overreaction.

On the one hand there appears to be an overreaction by school officials to the open door. This housekeeping problem was clearly an internal matter more amenable to oral query and discussion, rather than to written, almost implied, blame (with a carbon copy sent to the Superintendent of Schools). There is no convincing evidence herein that petitioner was, in fact, to blame for the carelessness, and any implied inference that he was is clearly unjustified on the basis of known facts. Petitioner's testimony was that other teachers were also in the building on the evening of March 22, 1973, and this testimony was nowhere refuted at the hearing.

However, in the judgment of the hearing examiner and considering the known facts, *ante*, petitioner's reaction to the letter (P-1) was also in excess of the action required. The situation, at that juncture, still called for reasoned oral conversation and an effort to establish a remedy, not to place blame. The desired result was to get the school door closed, not to get a letter in the file.

It became too late though for such efforts when the Superintendent received petitioner's letter (P-2) and thereafter "requested," then "ordered," petitioner to appear before him. Such appearance was followed by the third – of what the hearing examiner characterizes as – overreaction. The Superintendent refused to let petitioner be accompanied in the meeting by a representative of his own choosing. When petitioner then insisted on such choice, he was directed in a loud voice by the Superintendent to leave the office. (Tr. 72) An unlikely controversy had turned full circle to unreasoned dispute.

Having reviewed such facts, the hearing examiner is left in a quandary with regard to the motivation of the parties which caused such overreaction. There is no record herein that petitioner had a prior record of carelessness. On the night of March 22, 1973, he was performing a service to the school. Neither is there a record affording reason for the umbrage subsequently expressed by petitioner and the Superintendent of Schools, successively.

Nevertheless, certain facts are clear from the record, and they may be stated succinctly for emphasis as follows:

1. A door was left open on March 22, 1973 in Weehawken High School.

2. There is no evidence that petitioner left it open.

Therefore, the hearing examiner concludes that there were two requirements which reason required, prior to the time when any form of

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suspicion was directed at anyone. These requirements were (1) an investigation and (2) a minimum of oral dialogue. In the alternative, school administrators might have published a general memorandum on the subject of building security which could not conceivably have been held to pinpoint the blame.

However, such reasonable steps were apparently not taken herein, and in this respect the hearing examiner finds for petitioner. He also finds that because petitioner was "ordered" by the Superintendent to appear before him on March 29, 1973, there was a causation for the petitioner to believe his employment status was in doubt and thus his request to be accompanied to the meeting by a representative of his choosing was required to be honored.

This latter finding is grounded in the provisions of the statute *N.J.S.A.* 18A:25-7 which provides:

> "Whenever any teaching staff member is *required* to appear before the board of education or any committee or *member* thereof concerning any matter which could adversely affect the continuation of that teaching staff member in his office, position or employment or the salary or any increments pertaining thereto, then he shall be given prior written notice of the reasons for such meeting or interview and shall be entitled to have *a person of his own choosing present* to advise and represent him during such meeting or interview." (*Emphasis supplied.*)

Accordingly, for the foregoing reason, and even though petitioner is not held blameless in the development of events controverted herein, the hearing examiner believes that the record of such events should be striken entirely from petitioner's personal file. He so recommends.

Finally the hearing examiner finds no merit in the claim, advanced in October 1973, that the petitioner's transfer to a new position for school year 1973-74 was caused by, or attributed to, his difficulties with the Superintendent in March, absent further proof that such transfer was not in good faith for the reasons outlined in the Board's resolution dated December 12, 1973.

Such claim was not directly advanced at the time of the original Petition filing in August 1973, and the apparent genuineness of the Board's specific reasons for a staff restructuring and staff reduction were not questioned then, nor are they questioned now. What is questioned, and correctly so, is that the Board, as a corporate body, did not initially transfer petitioner by Board resolution pursuant to the statutory mandate in this regard. *N.J.S.A.* 18A:25-1 However, the Board, in effect, corrected this procedural deficiency in December 1973 by its resolution recited, *ante;* and the stated reasons in support of its action are sufficient in law. *N.J.S.A.* 18A:28-9 *et seq.; Downs v. Board of Education of Hoboken,* 12 *N.J. Misc.* 345, affirmed *Flechtner v. Board of Education of Hoboken District* 113 *N.J.L.* 401 (1934); *Emil F. Tomecek v. Board of Education of the Borough of Verona, Essex County,* 1969 *S.L.D.* 174, appeal dismissed State Board of Education 1970 *S.L.D.* 462

In summation the hearing examiner recommends that:

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1. All correspondence which is pertinent either directly or indirectly to the incident of March 22, 1973, be ordered stricken from the file of petitioner.

2. Petitioner's transfer to a position comparable to the one he held for a five-year period prior to June 1973, be allowed to stand.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record of the matter herein controverted and notes that no exceptions were filed to the report of the hearing examiner within the time provided for such by *N.J.A.C.* 6:24-1.16.

The Commissioner takes note of the inconsequential nature of the dispute regarding the "open door." Absent a clear showing that the Superintendent acted with due regard to petitioner's rights as set forth in *N.J.S.A.* 18A:25-7, the Commissioner without prejudice directs the Board of Education of the City of Weehawken to expunge from petitioner's personnel file all reference to the incident which gave rise to that which is aptly described by the hearing examiner as pyramidal overreaction.

There being found here no convincing proof that the Board or its agents acted in improper or illegal manner in reassigning petitioner to a comparable teaching position, the Commissioner holds that such reassignment was legal, pursuant to *N.J.S.A.* 18A:11-1 *et seq.*, and properly within the authority of the Board of Education of the City of Weehawken.

COMMISSIONER OF EDUCATION

March 18, 1974

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Gregory Cordano,

Petitioner-Cross Appellant,

v.

Board of Education of the City of Weehawken, Hudson County,

Respondent-Appellant.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 18, 1974

For the Petitioner-Cross Appellant, Saul R. Alexander, Esq.

For the Respondent-Appellant, Le Roy D. Safro, Esq.

Respondent-Appellant appealed to the State Board of Education, from the decision of the Commissioner of Education, by Notice of Appeal filed April 10, 1974. The appeal was not perfected. A letter of inquiry was sent on August 13, 1974, and a dismissal warning letter was sent on October 17, 1974.

We find the appeal has not been perfected and is out of time. Since Petitioner-Cross Appellant has no objection, we dismiss for lack of prosecution.

December 4, 1974

In the Matter of the Tenure Hearing of Mary E. Cummings, R.N., School District of the Camden County Vocational and Technical High School, Camden County

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board of Education, Hyland, Davis & Reberkenny (William C. Davis, Esq., of Counsel)

For the Respondent, Henry Bender, Esq.

Charges of insubordination against respondent, a teaching staff member with a tenure status employed as a school nurse by the Camden County Vocational Board of Education, hereinafter "Board" were certified to the Commissioner of Education by Board resolution dated April 19, 1973 at which time respondent was suspended from her employment pending a determination of those charges.

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Hearings in this matter were conducted on August 14 and 17, 1973 at the office of the Camden County Superintendent of Schools, Pennsauken, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Respondent, a nurse for thirty years, has been employed by the Board for fifteen years. The Superintendent of Schools presented the charges, *sub judice,* to the Board. He averred that, by respondent's failure to comply with her assigned duties, as set forth in "DUTIES OF THE SCHOOL NURSE" (J-1), a four-page policy statement regarding the responsibilities of school nurses in the district, she was "*** insubordinate to the Board of Education and to her immediate superiors by failing to maintain the student health records at the Pennsauken Campus of said Board of Education so that they maintain the current statistics of said students.***" (Specification of Charges, at p. 2)

The Camden County Vocational and Technical School, hereinafter "Vocational School," has two high schools, each of which has a regularly assigned nurse. One of the high schools is located at Pennsauken where respondent was assigned, while the other high school is located in Gloucester Township where the Superintendent's office is located.

The policy (J-1), which delineates respondent's responsibilities and which she allegedly did not follow, is of recent vintage. The Superintendent, who was first employed as a school principal by the Board in 1960, explained that in his years of experience in the district, the actual functions of school nurses were never set forth in a written policy statement. In fact, he testified that during the early years of his employment in the district the former superintendent verbally explained to him the responsibilities of school nurses (Tr. I-101), although nothing in that regard had been committed to written form.

Notwithstanding this lack of formal, written policy, the Superintendent testified that he knew with specificity the functions of school nurses. (Tr. I-90, 92, 101-103) From the testimony of respondent, the hearing examiner finds that she too had fixed in her mind what her responsibilities were during her fifteen years of employment with the Board.

At some time during the early summer of 1973, the Superintendent requested the principals of the two high schools in the district to develop a job description for the position of school nurse which would be equally applicable at both high schools, and which would be adopted as policy for that position. In performing this task, the two principals considered the existing duties of school nurses at both high schools. The principal of the Pennsauken Campus (who is presently Superintendent of Schools) testified that he and the principal of the other high school had several personal and telephone conversations as part of their efforts to formulate a recommended job description for school nurses. Respondent, who was one of two regular school nurses on the Board's staff during that time, was not consulted regarding the proposed job description. (Tr. I-45)

The two principals submitted four drafts of their recommended policy,

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and on November 10, 1972, the Superintendent determined that the fourth draft would be adopted, subject to future additions or deletions as such became necessary. (Tr. I-91)

On November 16, 1972, the principal of the Pennsauken school transmitted a copy of the adopted policy to respondent with a covering memo (R-1) stating that the policy was effective immediately. In this memo, the principal indicated that there would be further discussions of the policy during a staff meeting he had scheduled for November 21, 1972. Respondent asserted she did not actually read the policy (J-1) until November 20, 1972, because she had been ill and absent from her duties. She testified that upon her return to duty on November 19, 1972, she had a great deal of paper work to complete, so she did not read the policy (J-1) until November 20, 1972.

Prior to the 1972-73 school year, respondent had been assigned the responsibility for the daily completion of the central school register, pursuant to *N.J.A.C.* 6:20-1.1, for the total enrollment of approximately 950 pupils at the Pennsauken school. (Tr. II-12) Respondent testified that early in September 1972, she had requested that the principal relieve her of the school register responsibility so that she could more properly care for pupil health records. The principal testified that the central school register responsibility was taken from respondent and assigned to a clerk in the principal's office during January 1973. (Tr. I-20)

At the time of the staff meeting held November 21, 1972, however, respondent still had the responsibility for maintaining the central school register. During the staff meeting, she advised the principal that it would be very difficult for her to maintain the school register and at the same time adhere to the new policy (J-1) regarding her duties as a school nurse. (Tr. II-13) The principal did testify, however, that respondent never refused to follow directives and was never arrogant or disrespectful to her superiors. (Tr. I-55, 57-58; Tr. II-29)

On December 19, 1972, a conference was held between the principal and respondent to further clarify her functions as outlined in the policy. (J-1) At this juncture, a recitation of the pertinent segments of the policy is in order:

"DUTIES OF THE SCHOOL NURSE

"DAILY

***

"5. The school nurse will keep accurate health records on all students enrolled in the day school program. These records will be completed for all incoming students no later than the last official day of school in September of each school year. (To be checked by the Guidance department against the master class lists.)

"6. The school nurse will check all health records and will be responsible to see that the required immunization program and medical regulations are carried out. (To be reported to the school principal.)

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"7. Specifically the school nurse will be responsible to see that information and records are received from sending districts and to verify that all students have received booster shots for polio, diphtheria and tetanus. The names of students whose records are incomplete or who have not complied with the required immunization policy should be submitted to the principal no later than October 1 of each school year.

***

"11. The school nurse will be responsible to see that all health records are sent to receiving schools for students leaving this school and transferring to another one. (To be confirmed by the Guidance Director.)

***

"13. At the discretion of the principal the school nurse will be responsible for all attendance including the maintenance of registers.

***

"MONTHLY

***

"1. The school nurse will submit to the principal at the end of each month a monthly medical statistical report.

"2. The school nurse will submit to the principal at the end of each month a monthly accident report indicating the shop areas where students were hurt during the previous month. This report will also include the physical education program. The nurse will investigate all high incident accident areas and report the findings to the principal each month.

"SEMI-ANNUALLY

***

"2. The school nurse will provide for and perform physical examinations for all incoming and for all students classified as freshmen and juniors. Examinations will also be performed at least once a year for all students enrolled in Commercial Foods programs. These examinations will include at least the following as permitted under Title 18A.

"a. eyes
"b. ears
"c. weight/height
"d. blood pressure
"e. heart

***

"YEARLY

***

"5. The school nurse will file all health records of graduates with permanent records.***"

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During this December 19, 1973 conference, respondent had a copy of the policy (J-1) and throughout the conference she made marginal notations in regard to the understandings reached between her and the principal. This document is a copy of the policy (J-1) but contains respondent's notations and the principal's handwritten initials. (R-3) An examination of this document (R-3) discloses that, under "Daily" duties, *ante,* numbers five and seven which applied to newly-enrolled pupils for the fall term of 1972, were to be effective as of January 1973, when respondent was to be relieved of the school register responsibility. (Tr. II-13) Item number six was to become applicable beginning with the incoming ninth grade pupils for September 1973. (Tr. II-40) After item number eleven, respondent had written the innocuous statement "Return to Guidance." After item thirteen, respondent noted that her responsibility for the school registers would be discontinued as of January 1973, when that responsibility would go to the principal's office. (Tr. II-14)

Under "Semi-Annually," *ante,* respondent noted in item two that physical examinations for all incoming and for all students classified as freshmen and juniors were to begin in January 1973, when the registers were taken from her. (Tr. II-15) Furthermore, respondent asserted that she did, in fact, begin pupil examinations during January 1973.

In a memo to the principal (P-2), respondent stated that the average time required for the daily posting in the school registers was about sixty-five minutes, and at the end of each month approximately two hours and ten minutes was necessary. She also estimated that the preparation of the yearly summary required six to eight hours. Therefore, respondent asserted, because of the amount of time she was devoting to the school registers, it was impossible for her to complete all other tasks expected of her. (Tr. II-12)

The hearing examiner finds respondent's time estimates for maintaining the central school register to be quite conservative. Respondent based her estimates on the assumption that she would not be interrupted by telephone calls and/or pupil visits (Tr. II-23, 32, 34) which, she testified, simply did not occur. (Tr. II-34)

Both the Superintendent and the principal attested that, during all of their respective years of employment within the district, they had believed that all of the duties enumerated in the policy (J-1) were being performed by school nurses. Respondent testified that during January 1973, after being relieved of responsibility for the central school register, she began the physical examinations of ninth grade pupils. (Tr. II-15) At the conclusion of each month, respondent routinely filed a "Medical Department Monthly Statistical Report" (R-4, R-5, R-6; P-5, P-6, P-7, P-8) with the principal which reflected, *inter alia,* the numbers and kinds of first-aid treatments required, the numbers of accidents, and the numbers and kinds of examinations administered for that period of time. The reports filed for the months of September, October, November, and December 1972 (P-5, 6, 7, and 8) disclosed that no preliminary physical examinations were conducted by respondent during those months, although "routine physical examinations" performed by the school medical officer had been occurring.

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Exhibits R-5 and 6 indicated that preliminary physical examinations were conducted and completed by respondent. (Tr. II-48-49)

The record disclosed that the status of pupil physical examinations of those pupils attending the Pennsauken school at the time the Board determined to certify the instant charges stood as follows: (Board's Specification of Charges)

Pupil Status	Total Pupil Enrollment	Examinations Completed	Examinations Not Completed
Freshmen	294	270	24
Sophomores	197	5	192
Juniors	131	13	118
Seniors	120	0	120
Totals	742	288	454

Respondent, however, testified that between February 1973 and April 19, 1973 (the date of her suspension), she completed all of the physical examinations of pupils as required of her by the policy (J-1) except for two pupils who had been suspended from school. (Tr. II-28-29)

The Superintendent testified that during an unscheduled visit to the Pennsauken school on March 6, 1973, he specifically conferred with respondent because of complaints he had been receiving in regard to incomplete health records. Although he admitted that he used a small portable tape recorder during this conference, he averred it was for his own personal recollection. (Tr. I-83)

After requesting health records on two pupils at random and finding those records unavailable, he testified he then directed that an immediate survey be taken of all health records for pupils enrolled at the Pennsauken school. This survey resulted in the data previously set forth in the Table. (P-3) Subsequent to the receipt of the survey results (P-3), the Superintendent drew up the charges against respondent.

After a careful review of the record before him, the hearing examiner believes that the disagreement between the Superintendent of Schools and respondent herein is a classic example of the kind of dispute that is more effectively handled between two parties without formal litigation. In the first instance, after fifteen years of employment with the district, respondent is now charged with insubordination founded on an allegation that health records of pupils attending the school for at least three years are incomplete. This finding by the administrators was not ascertained until the second week of March 1973, after which formal charges of insubordination were referred to the Board. On April 19, 1973, the Board adopted its resolution to certify such charges to the Commissioner.

The hearing examiner fully understands the importance of pupil health records; however, he also understands the need for communication between and among people. If the administrators and the Board placed high priority on the

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completion of pupil health records, why was respondent not called to task in earlier years? The hearing examiner does not find the answer to this question in the earlier testimony where the administrators assumed the responsibilities of the school nurse were being completed.

Secondly, insubordination, as defined in *Black's Law Dictionary* 942 (rev. 4th ed. 1968) is a

> "State of being insubordinate; disobedience to constituted authority. *** Refusal to obey some order which a superior officer is entitled to give and have obeyed.***"

The record in this matter does not support the contention that respondent ever refused "to obey some order." To the contrary, the administrators testified that respondent never refused to obey an order.

Even if, more properly, charges of inefficiency pursuant to the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 *et seq.*, had been preferred by the Board on the grounds that respondent was failing to maintain pupil health records in a proper state, sufficient time should have been granted to correct such alleged inefficiency. The fact that pupil health records were completed by April 19, 1973, in itself, corrects the alleged inefficiency charge.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter, the hearing examiner's report, and the exceptions thereto filed pursuant to *N.J.A.C.* 6:24-1.16 by counsel for the Board.

Webster's Third New International Dictionary, characterizes an insubordinate person variously as mutinous, rebellious, seditious, contumacious, intransigent, persistent, willful, defiant, and unwilling to submit to authority. The Commissioner finds in the entire record no convincing proof that respondent acted within the parameters of this definition as an insubordinate person. Absent such finding, the Commissioner will neither reduce the salary of nor dismiss respondent from her tenured employment.

In the absence of charges of inefficiency presented by the Board pursuant to *N.J.S.A.* 18A:6-12, the Commissioner finds it necessary to determine whether respondent was performing in an inefficient manner. However, the decision herein is in no way prejudicial to subsequent action by the Board pursuant to *N.J.S.A.* 18A:29-14 or *N.J.S.A.* 18A:6-12. See *In the Matter of the Tenure Hearing of Anna Simmons, School District of the Borough of Eatontown, Monmouth County,* 1973 *S.L.D.* 712; *In the Matter of the Tenure Hearing of Alfred E. Jakucs, School District of the City of Linden, Union County,* 1968 *S.L.D.* 189; *J. Michael Fitzpatrick v. Board of Education of the Borough of Montvale, Bergen County,* 1969 *S.L.D.* 4. The Petition is dismissed.

COMMISSIONER OF EDUCATION

March 18, 1974

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Board of Education of the Town of Montclair,

Petitioner,

v.

Mayor and Commissioners of the Town of Montclair, Essex County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Charles R. L. Hemmersley, Esq.

For the Respondents, Robert P. Shepard, Jr., Esq.

Petitioner, hereinafter "Board," appeals from an action of the Mayor and Commissioners of the Town of Montclair, hereinafter "Town," certifying to the Essex County Board of Taxation a lesser amount of appropriations for school purposes for the 1973-74 school year than the amount certified as necessary by the Board. The facts of the matter were educed at a hearing before a representative of the Commissioner of Education, at the State Department of Education, Trenton, on December 12, 1973. Subsequent to the hearing, certain additional documents were submitted in evidence and case submission was essentially complete as of December 21, 1973. The report of the Commissioner's representative is as follows:

On January 30, 1973, the Board adopted a proposed budget for the 1973-74 school year which called for a local tax levy of $10,042,111. (P-12) The budget was then delivered to the Board of School Estimate which, on February 15, 1973, fixed the amount to be raised at $9,922,111 (P-2), a reduction of $150,000 from the amount which had been determined by the Board as appropriate and necessary. Thereafter, a certification of the lesser sum was submitted by the Board of School Estimate to the Town, and the Town approved such sum for certification to the Essex County Board of Taxation on March 6, 1973. The instant Appeal by the Board then ensued.

The Board contends that the Town's reduction of $150,000 will make it impossible for the Board to operate a thorough and efficient school system in Montclair for the school year 1973-74 and, therefore, it requests the Commissioner to order a restoration of this total amount. In support of this contention, the Board's Petition of Appeal sets forth five causes of action. However, at this juncture, only the first two of the five causes need be considered since, by previous Decision on Motion dated November 9, 1973, the Commissioner determined that:

> "*** the third, fourth and fifth causes of action set forth in the Board's Petition of Appeal are not necessary for the determination of the Board's 1973-74 budget. Therefore, the Commissioner hereby dismisses the third, fourth and fifth causes of action, without prejudice ***." (at p. 43)

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The first two causes of action which remain for adjudication herein are listed as follows:

1. "Proceedings by Respondents in Reducing School Budget Are Invalid." (Petition of Appeal, at p. 21)

2. "Respondents Have Provided Insufficient Funds for a Thorough and Efficient School System." (Petition of Appeal, at p. 26)

The Town denies that the proceedings which led to its final determination of the 1973-74 school budget were invalid and has listed a total of five budget accounts from which it believes the total reduction of $150,000 can be effected without harm to the school system. These accounts and the proposed reductions are itemized as follows:

Account Number	Item	Board's Budget	Town's Suggestion	Amount of Reduction
100	Adm. costs	$ 412,150	$ 372,150	$ 40,000
212	Sal.–Evaluators	37,333	17,333	20,000
212	Sal.–Coordinators	90,297	75,297	15,000
213	Sal.–Teachers	5,740,954	5,715,954	25,000
520	Contr. Servs.	356,500	306,500	50,000
Total		$6,637,234	$6,487,234	$150,000

These reductions will be considered *seriatim* by the Commissioner's representative at a later point in this report. However, it is first necessary to set forth certain broad principles which will establish the context of law for such consideration.

These principles have been established by a number of prior decisions of the Commissioner and the courts. *Board of Education of the Township of East Brunswick v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966); *Board of Education of the City of Elizabeth v. City Council of Elizabeth,* 55 *N.J.* 489 (1970); *Board of Education of Trenton v. City Council of Trenton,* 1967 *S.L.D.* 172; *Board of Education of Haledon v. Mayor and Council of Haledon, Passaic County,* 1970 *S.L.D.* 70, aff'd State Board of Education, 1970 *S.L.D.* 75

Perhaps the most inclusive discussion of such principles is contained in the unanimous opinion of the New Jersey Supreme Court in *East Brunswick, supra,* which said:

"*** All in all, it is evident that, when preparing the budget which it ultimately determines to be necessary and appropriate in view of the nature of the local community, its educational needs and financial abilities, the local board must have clearly in mind the educational mandate in our Constitution and the State's statutory and administrative requirements. It, of course, retains a considerable measure of discretion, particularly when dealing with matters which the State's supervisory agencies have recommended rather than directed; but in no event may it disregard the general standard in the Constitution or the specific standards

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which have been announced legislatively or administratively. *In the course of its endeavors, the local board affords suitable hearing to the local citizenry* (*N.J.S.A.* 18:7-77.1) *and soundly brings together its intimate knowledge of local conditions and needs and the wide educational expertise of its members and professional staff.*

"Though the law enables voter rejection, it does not stop there but turns the matter over to the local governing body. That body is not set adrift without guidance, for the statute specifically provides that it shall consult with the local board of education and shall thereafter fix an amount which it determines to be necessary to fulfill the standard of providing a thorough and efficient system of schools. Here, as in the original preparation of the budget, elements of discretion play a proper part. The governing body may, of course, seek to effect savings which will not impair the educational process. But *its determinations must be independent ones properly related to educational considerations rather than voter reactions.* In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and *its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community.* Where its action entails a significant *aggregate reduction* in the budget and a resulting appealable dispute with the local board of education, *it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons.* This is particularly important since, on the board of education's appeal under *R.S.* 18:3-14, the Commissioner will undoubtedly want to know quickly what individual items in the budget the governing body found could properly be eliminated or curbed and on what basis it so found. *Cf. Davis, supra* § 16.05.***" (*Emphasis supplied.*) (at pp. 105-106)

and further;

"*** As in *Booker,* the Commissioner in deciding the budget dispute here before him, will be called upon to *determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled.* Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the govening body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R.S.* 18:7-83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness.***" (*Emphasis supplied.*) (at p. 107)

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In *Board of Education of the City of Elizabeth, supra,* the Supreme Court further extended the principles of *East Brunswick, supra,* to Type I school districts when it said:

> "*** The local and supervisory obligation must apply to type I as well as to all other types of districts and there is utterly no legislative indication to the contrary. Otherwise there can be no assurance that the constitutional mandate will be fulfilled in type I districts (which are primarily city school systems). *The type I local governing body, when it is brought into the fund raising process, must perform its function under no less a standard than applies in any other case.****" *(Emphasis supplied.)*
> (at p. 506)

Further, in *Board of Education of the Borough of Haledon, supra,* the Commissioner, in restoring budget reductions, pointed out that Council's determinations must be independent ones properly related to educational considerations rather than voter reactions. Otherwise, its determinations would be considered arbitrary and the reductions therefore restored. In affirming the Commissioner's decision, the State Board of Education on December 2, 1970 held:

> "*** The decision is affirmed in each and every other respect, based on the fact that the Respondent-Appellant, Mayor and Council of the Borough of Haledon, Passaic County, have, despite their opportunity to do so, failed 'to submit either to Petitioner, or later for the guidance and consideration of the Commissioner in the appeal herein, a 'detailed statement setting forth the governing body's underlying determinations and supporting reasons' (*East Brunswick Board of Education v. East Brunswick Council,* 48 *N.J.* 94 (1966), (at Page 106)),' which would justify their action.' (at p. 76)

Such principles establish the parameters for decision with respect to the instant controversy. However, some review of the Board's total budgetary posture is also in order as a necessary prerequisite to any discussion of its first stated cause of action or the five specific reductions, *ante,* suggested by the Town. Such reductions totaling $150,000 would appear at first glance to be relatively insignificant in a total budget calling for expenditures in excess of $12,000,000. The Town argues that this is so and a cursory glance gives credence to the argument.

However, a more detailed review of the budget produces a contrary impression; namely, that the Board has presented herein a budget which is already so trimmed and tailored as to provide little flexibility in the apportionment of funds; *i.e.,*

> 1. Total current expense expenditures were originally programmed by the Board to rise from $11,581,852 for the 1972-73 school year to $12,003,460 in school year 1973-74. In the face of a rapid escalation of costs generally, such an increase of $421,638 (approx. 3.6%) is as remarkable as it is unexpected. Furthermore, despite the small increase in

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planned budget expenditures, the tax levy for school purposes was to decrease by $3,434.

2. Appropriations for capital outlay expenditures in the 1973-74 school year were reduced by the Board to $14,299 from the $88,998 programmed by the Board in school year 1972-73.

3. Free appropriation balances in current expense available to the Board on June 30, 1972, totaled $273,434.53 of which $50,000 was appropriated by the Board as a source of revenue for the school year 1972-73. While the current expense unappropriated balance expanded to a total of $478,751.82 as of the audit of June 30, 1973, $209,114 was appropriated as a current expense source of revenue and $14,299 was appropriated for capital outlay for the school year 1973-74. It now appears that such balances are more illusory than real. This is so because unplanned contingencies have necessitated the apportionment of another $213,240 (P-1-12) of the remaining current expense unappropriated free balance of $269,637.82, thus leaving a small sum of approximately $56,000 remaining for further contingencies which may arise in the period January-June 1974. Such a sum is clearly insufficient, on its face, to fund all, or any part, of the $150,000 reduction which is controverted herein. (See Report of Audit for the School Fiscal Year July 1, 1972 to June 30, 1973.) (P-12)

Indeed having reviewed such data and the Board's overall budgetary plan, the Commissioner's representative is led to the conclusion that, if there is error at all in the Board's planning for the school year 1973-74, in terms of the total budget, such error is that of an underfunding rather than an overexpenditure to meet mandated obligations. Thus, the $150,000 herein controverted remains as a significant sum for determination.

Finally, in this preliminary review of principles and data, it is noted that the Board has, by its own action, already eliminated a total of 21.5 positions from its total roster of personnel to be employed in the schools during the school year 1973-74. (P-5) Such elimination, (in the context of a drop in pupil enrollment from 7,315 to 7,072) (P-4) is attestation to the fact that the Board had, prior to action by the Town, recognized a major responsibility to realistically trim its expenditures to need. The Town, while recognizing this fact, indicates that a further elimination of positions is possible.

Prior to any consideration of such specific proposals and arguments, however, it is necessary initially herein to consider the first cause of action advanced by the Board which is, in essence, that the Town's actions herein were procedurally incorrect.

In this regard the Board maintains that "*** the Town Commissioners, including the three Commission members of the Board of School Estimate, without notifying the Board of Education members of the Board of School Estimate, met privately and decided among themselves to reduce the proposed

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school budget by $150,000 without consulting the other two members of the Board of School Estimate as to the effect of such reductions***." (Petition of Appeal, at p. 23) In the Board's view, the alleged private meeting and decision of the majority members of the Board of School Estimate was thus illegal and contrary to the mandate of the statute *N.J.S.A.* 18A:22-14. This statute provides that an amount of money necessary to be appropriated for the public schools in Type I districts shall be fixed and determined "***by official action taken at a *public meeting* of the Board***." (*Emphasis supplied.*) Similarly, the Board avers the Town Commissioners also met in private session and ratified the decision of the Board of School Estimate at a time prior to "*** the public hearing required by N.J.S. 40A:4-7 and scheduled for March 6, 1973, only after which hearing any such action legally could be taken.***" (Petition of Appeal, at p. 24)

The Town, however, denies any impropriety or illegality in the actions of any of its Commission members on the Board of School Estimate and maintains that, subsequent to the decision of the Board of School Estimate, the Town Commissioners properly adopted the school budget controverted herein. (Respondent's Answer to Petition of Appeal, at p. 9) The Town does admit that the school budget was discussed at a "regular conference meeting" of the Town Commissioners held prior to the meeting of February 15, 1973 at which meeting the school budget was to be formally considered by the Board of School Estimate. However, the Town maintains that "*** No official action of any kind was taken at said [conference] meeting***." (Answer to Petition of Appeal, at p. 8) although subsequent to the meeting:

> "*** Mayor Bonastia made known to the Montclair Times the informal views of the Town Commissioners and the Times wrote its own story.***" (Answer to Petition of Appeal, at p. 8)

The Town further admits that, subsequently, on or about February 21, 1973, it was made known that "*** when a vote would be taken they expected to affirm the action of the Board of School Estimate.***" (Answer to Petition of Appeal, at p. 9) The Town did "affirm" such action on March 6, 1973 at which time "*** a public hearing was held as required by [*N.J.S.A.*] 40A:4-7 and all persons present were given an opportunity to speak.***" (Answer to Petition of Appeal, at p. 9)

The Commissioner's representative has considered such arguments with respect to the nature of the Town's decision-making process prior to the meeting of the Board of School Estimate and in advance of the subsequent meeting of the Town Commissioners. However, without more specific testimony concerning the "conference" meeting proceedings, he finds it impossible to find for either the Board or the Town in this regard. The question is whether the decisions of the meetings were "wholly tentative in nature" or represented instead the kind of "private final action" proscribed by the Supreme Court of New Jersey in *Cullum v. Board of Education of the Township of North Bergen,* 15 *N.J.* 285 (1954). The answer to such question cannot be found in avowals alone.

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The Board's Second Cause of Action is that the Town has provided "Insufficient Funds for a Thorough and Efficient School System." (Petition of Appeal, at p. 26) Generally, the reductions controverted herein are concerned with (1) personnel costs and (2) busing costs. For purposes of this report, the Commissioner's representative will consider the reductions in that order.

1. *Reduction of Personnel*

(a)	Administration	$40,000
(b)	Evaluation	20,000
(c)	Public Relations	15,000
(d)	Two Teachers	25,000
	Total Reduction	$100,000

The reductions proposed by the Town herein are both general and specific in nature. Thus, the reduction with respect to (a) Administration is grounded on a general assertion by the Town that the administrative staff of the district is "too large" and that an amount of money of less than 10% can "easily be cut." The Town also asserts that the teaching staff of the district may be further reduced because of a "shrinkage of pupils in the system." In both of these instances the Town suggests an overall reduction and leaves the specific judgment to the Board.

Such general reductions are also set forth by the Town with respect to (b) Evaluation and (c) Public Relations. However, in these two accounts the Board contends that the proposed reductions correspond almost exactly to the specific salaries of a Director of Planning of Evaluation and a Coordinator of Public Information.

Thus, the Town proposes herein to reduce the staff of the Montclair public schools by a total of approximately six additional positions and to add such reduction to the reduction of 21.5 positions already programmed by the Board. The question, then, derives from these variant proposals; namely, which proposal, in the circumstances, is reasonable and, on its merits, most likely to assure a continuation of a thorough and efficient educational system in Montclair in the school year 1973-74?

In this regard, the Commissioner's representative finds for the Board.

This finding is grounded on a review of the total testimony of the Board which substantiates its avowal that the positions are needed and necessary but, additionally, on the juxtaposition of two uncontroverted facts; namely, that:

1. The district's pupil population has declined by approximately 3.3% during the current school year.

2. The Board, in recognition of such decline, had already reduced its staff by 4.5% for the school year 1973-74.

Such reduction is clearly commensurate with the need, and appropriate to an

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exercise of Board discretion with respect to the "government and management" of the public schools in Montclair. *N.J.S.A.* 18A:11-1

Accordingly, the Commissioner's representative recommends that the sum of $400,000 be restored to the Board for the employment of staff personnel.

Summary:	Amount of Reduction	$100,000
	Amount Restored	100,000
	Amount Not Restored	–0–

2. Busing Reductions $50,000

The Board's total budget for pupil transportation during the school year 1973-74 was $400,000, a reduction of $50,000 from the amount budgeted by the Board in the school year 1972-73. (P-2) The Town proposes herein to reduce the expenditure by another $50,000 on the grounds that "*** the extent of busing in Montclair is excessive *** [and] is believed to be non-productive from an educational point of view.***" (Respondent's Answer to Petition of Appeal, at p. 21)

The Board's statement of relevance herein is that the Town proposes to "*** eliminate $50,000 from Petitioner's 1973-74 transportation budget, and more particularly from the budget with respect to transportation in grades 1 through 4.***" (Petition of Appeal, at p. 32) However, the Board also avers that all pupils who are transported to school in grade levels two through four are "*** transported pursuant to the Plan of Action.***" (Petition of Appeal, at p. 32) The Town does not dispute this contention. (Answer to Petition of Appeal, at p. 13)

The referenced "Plan of Action" is a Plan approved by the Commissioner of Education by letter of April 24, 1972 (P-14), as a proposal which "*** clearly reflects a progress toward true [racial] integration.***" In his letter the Commissioner also said, with respect to the "Plan of Action":

> "*** We believe that your efforts toward this end clearly indicate good faith and as such can be supported.
>
> "Approval is hereby given to the 'Plan of Action' for the Montclair Public School District for implementation September, 1972. This office will continue to maintain jurisdiction.***" (P-14)

While the Commissioner has continued "jurisdiction" over attempts to foster "true integration" there has been no essential change approved with respect to the Plan since 1972. Thus, the Plan remains today as the only approved Plan with the purpose of insuring a meaningful educational program in a racially integrated environment in Montclair and, as such, in the determination of the hearing examiner, the funds for the Plan's implementation are not subject to deletion or reduction. *East Brunswick, supra* When an educational opportunity is unequal, a local board of education is legally obligated to seek a proper solution. *Patricia Rice et al. v. Board of Education of the Town of Montclair, County of Essex,* 1967 *S.L.D.* 312

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Accordingly, the Commissioner's representative recommends that the $50,000 reduction determined by the Town as appropriate herein also be restored.

In summary, the Commissioner's representative has determined that the Board's total request for tax funds to operate its schools in a thorough and efficient manner during the school year 1973-74 must be granted. Accordingly, he recommends that the sum of $150,000 be added forthwith to the sum of $9,922,111 previously certified by the Town to the Essex County Board of Taxation so that the aggregate of such funds shall be $10,072,111.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the record and the report of the hearing examiner in the instant matter and notes that no exceptions were filed pursuant to *N.J.A.C.* 6:24-1.16 within the time period designated for such filing.

An inadvertent clerical error in the introduction of the hearing examiner's report is noted wherein the Board's proposed total tax levy is erroneously listed as $10,042,111 rather than $10,072,111, the correct amount which appears at the end of the report. In all other points the Commissioner concurs with the recommendations and total determination as found in the hearing examiner's report and finds that the Board has prepared a budget with all due consideration to possible economies which will insure the continuation of a thorough and efficient education in the Town of Montclair. Such a budget must not be excised. The Commissioner so holds.

Accordingly, the Commissioner directs the Mayor and Commissioners of the Town of Montclair to certify to the Essex County Board of Taxation the additional total amount of $150,000 to be raised by local taxation for current expenses of the School District of the Town of Montclair for the 1973-74 school year, so that the total amount of the tax levy for school purposes shall be $10,072,111.

COMMISSIONER OF EDUCATION

March 18, 1974

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In the Matter of the Annual School Election Held in the School District of the Township of New Milford, Bergen County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting at the annual school election held February 13, 1974 in the School District of the Borough of New Milford, Bergen County, for three members of the Board of Education for full terms of three years each were as follows:

	At Polls	Absentee	Total
Alfred J. Mitchell	568	35	603
Joan Paul	482	55	537
Philip J. Marshall	498	17	515
Edward Pagani	479	36	515
Jack Hoffman	412	44	456
Melvin Ross	357	34	391
Eugene Finno	0	1	1

Pursuant to a letter request from Philip J. Marshall, the Commissioner of Education directed his authorized representative to conduct a recheck of the voting machines used in this election. The recheck was made at the warehouse of the Bergen County Board of Elections in Hackensack on March 5, 1974.

The Commissioner's representative reports that the announced tally as set forth above was confirmed.

* * * *

The Commissioner finds and determines that Joan Paul and Alfred J. Mitchell were elected at the annual school election on February 13, 1974 in the Borough of New Milford, Bergen County, for full terms of three years each, but that there was a failure to elect a third candidate to a full three-year term of office. Accordingly, the Bergen County Superintendent of Schools is directed to appoint a qualified citizen to such office in conformity with the provisions of *N.J.S.A.* 18A:12-15 to serve until the organization meeting following the next regular school election in February 1975.

COMMISSIONER OF EDUCATION

March 18, 1974

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In the Matter of the Annual School Election Held in the School District of the Borough of Palisades Park, Bergen County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting at the annual school election held February 13, 1974 in the School District of the Borough of Palisades Park, Bergen County, for three members of the Board of Education for full terms of three years each were as follows:

	At Polls	Absentee	Total
Yolanda Iacobino	768	29	797
Donald Celidonio	840	32	872
Albert Albanese	1,005	33	1,038
Basil C. Delis	744	42	786
Daniel Binetti	953	50	1,003
Martin Rooney	830	45	875

Pursuant to a letter request from Donald W. Celidonio, dated February 14, 1974, the Commissioner of Education directed his authorized representative to conduct a recheck of the totals on the voting machines used in this election. The recheck was made at the warehouse of the Bergen County Board of Elections, Hackensack, March 5, 1974. It was agreed that the recount of the votes cast would be limited to candidates Donald Celidonio and Martin Rooney.

The Commissioner's representative reports that the announced tally for each candidate as set forth above was confirmed.

* * * *

The Commissioner finds and determines that Albert Albanese, Donald Binetti and Martin Rooney were elected to full terms of three years each on the Borough of Palisades Park Board of Education at the annual school election held on February 13, 1974.

COMMISSIONER OF EDUCATION

March 22, 1974

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In the Matter of the Annual School Election Held in the Pascack Valley Regional School District, Bergen County

COMMISSIONER OF EDUCATION

DECISION

The announced results of the voting at the annual school election on February 5, 1974 in the Township of River Vale, Bergen County, for one seat for a full three-year term on the Board of Education of the Pascack Valley Regional School District, Bergen County, were as follows:

	At Polls	Absentee	Total
Harry A. Meisel	469	4	473
Paul J. Kern	404	0	404
Lawrence J. Leiser	102	1	103
Richard P. Kamenitzer	39	0	39

Pursuant to a Petition of Appeal from Candidate Kern, dated February 14, 1974, the Commissioner of Education directed that the ballots cast for a Board member from River Vale be recounted. Such a recount was conducted on March 14, 1974 by an authorized representative of the Commissioner.

At the conclusion of the tally the practical result was unchanged although Candidate Meisel's total vote was recorded as 468 rather than the 469 total which had been reported in the Statement of Result of School Election and announced at the polls on the day of the election.

Accordingly, the Commissioner finds that Candidate Harry A. Meisel was elected from the Township of River Vale on February 5, 1974 to the Pascack Valley Regional Board of Education for a full term of three years.

COMMISSIONER OF EDUCATION

March 28, 1974

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In the Matter of the Annual School Election Held in the School District of Ridgewood, Bergen County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting at the annual school election held February 13, 1974 in the School District of the Township of Ridgewood, Bergen County, for two members of the Board of Education for full terms of three years each were as follows:

	At Polls	Absentee	Total
Frank L. Smith	2591	150	2741
Gene Sullivan	1968	80	2048
Harold W. Smith	1931	111	2042
Margaret S. Roukema	1875	116	1998
Joseph P. McManemin	1017	25	1042
Edward Butler	589	10	599
Robert P. Sinclair	271	12	283

Pursuant to a letter request from Harold W. Smith, dated February 14, 1974, the Commissioner of Education directed his authorized representative to conduct a recheck of the totals on the voting machines used in this election. The recheck was made at the warehouse of the Bergen County Board of Elections in Hackensack, March 5, 1974.

In addition, the Commissioner's representative reviewed the number of signatures appearing on the poll lists of several voting districts selected at random. These totals were found to be in agreement with the number of persons registered as voting on the public counters of the voting machines assigned to the respective polling places.

At this juncture, the Commissioner's representative notes that the announced total vote for Candidate Margaret S. Roukema should reflect the figure of 1991 not 1998 based on the "At Polls" and "Absentee" vote subtotals as set forth above.

At the conclusion of the recount of the ballots cast, the tally of the vote is as follows:

	At Polls	Absentee	Total
Frank L. Smith	2590	150	2740
Gene Sullivan	1968	80	2048
Harold W. Smith	1931	111	2042
Margaret S. Roukema	1882	116	1998
Joseph P. McManemin	1017	25	1042
Edward Butler	589	10	599
Robert P. Sinclair	271	12	283

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While the total vote for Candidate Roukema and Candidate Frank L. Smith was revised as a result of the recount, such revision is not sufficiently significant to effect the outcome of the election.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has carefully reviewed the report of his representative and he finds and determines that Frank L. Smith and Gene Sullivan were elected to full terms of three years each on the Ridgewood Board of Education at the annual school election held February 13, 1974.

COMMISSIONER OF EDUCATION

March 28, 1974

David A. Muir,

Petitioner,

v.

Board of Education of Passaic County Regional High School District, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, David A. Muir, *Pro Se*

For the Respondent, Francis R. Giardiello, Esq.

This matter having been opened before the Commissioner of Education by formal Petition of Appeal and Answer, and a hearing held at the office of the Passaic County Superintendent of Schools, Paterson, on Monday, December 18, 1972; and

It appearing that counsel for petitioner, Anthony P. Spirito, Esq., requested in writing under date of February 21, 1973, that he be relieved as counsel in this matter upon advice of the office of Attorney General of this State by virtue of the fact that said counsel is a hearing officer for the Civil Service Commission of this State; and

It appearing that counsel for petitioner was relieved in this matter by letter under date of March 6, 1973, and petitioner was advised by same letter that his request for a sixty-day extension of time was granted because he desired to secure substitution of counsel rather than continue this matter *pro se;* and

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It appearing that counsel for respondent requested an Order of Dismissal under date of May 15, 1973, and petitioner's former counsel requested a further extension of time by letter dated May 21, 1973, because of petitioner's desire to secure substitution of counsel; and

It appearing that petitioner was granted an additional thirty-day extension by letter dated May 29, 1973; and

It appearing that petitioner was advised by letter dated August 1, 1973, that he would be required on or about fifteen days from August 1, 1973, to show cause why the instant matter should not be dismissed due to lack of prosecution; and

It appearing that petitioner was directed by communication mailed and dated August 31, 1973 at 10:00 a.m. to show cause why this matter should not be dismissed for lack of prosecution; and

It appearing that petitioner was informed by telephone communication on Tuesday, September 4, 1973, regarding the Order to Show Cause on Thursday, September 6, 1973 at 10:00 a.m.; and

It appearing that petitioner failed to appear at the aforementioned time, date and place to answer the Order to Show Cause; and

It appearing that petitioner did telephone the Division of Controversies and Disputes between the hours of 11:00 a.m. and 12:00 a.m. on September 6, 1973, and requested that additional extension of time be given to him; and

It appearing that petitioner received a total of 184 days between March 6, 1973, and September 6, 1973, the return date of the Order to Show Cause, within which time to either secure substitution of counsel or proceed *pro se* in the instant matter; therefore

IT IS HEREBY ORDERED ON THIS 29th day of March 1974, that the instant matter is dismissed with prejudice for lack of prosecution by petitioner.

COMMISSIONER OF EDUCATION

March 29, 1974

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In the Matter of the Annual School Election Held in the School District of the Township of Washington, Gloucester County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting at the annual school election held February 13, 1974 in the School District of the Township of Washington, Gloucester County, for three members of the Board of Education for full terms of three years each were as follows:

	At Polls	Absentee	Total
Robert J. Weir	458	2	460
John W. Rhine	388	0	388
Dr. Irvin Suisman	286	1	287
Robert Hilliker	284	2	286
Anthony Viglianese	232	1	233

Write-in votes were also cast for five other candidates.

Pursuant to a letter request from Robert Hilliker, dated February 19, 1974, the Commissioner of Education directed his authorized representative to conduct a recount of the ballots cast. The recount, which was confined to the votes cast for Candidates Robert Hilliker, Anthony Viglianese and Dr. Irvin Suisman, was conducted on March 8, 1974 at the office of the Gloucester County Superintendent of Schools.

At the conclusion of the recount of the uncontested ballots the tally for the three above-named candidates stood as follows:

	Uncontested	Absentee	Total
Dr. Irvin Suisman	289	1	290
Robert Hilliker	286	2	288
Anthony Viglianese	234	1	235

Two ballots contained in two Exhibits were reserved for the Commissioner's determination. This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his representative and has examined the two ballots referred to him for final determination.

He notes that the ballot marked Exhibit A does not contain a vote cast for Robert Hilliker and, having so found, he concludes that there is no need to consider Exhibit B since the result of the election could not be altered by it.

Accordingly, the Commissioner finds that Robert J. Weir, Dr. Irvin

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Suisman, and John W. Rhine were elected to full terms of three years each on the Board of Education of the Washington Township School District at the annual school election held February 13, 1974.

COMMISSIONER OF EDUCATION

April 2, 1974

"S.V.," by her parents and guardian ad litem,

Petitioner,

v.

Board of Education of the Borough of Sea Girt and William J. Pentony, Monmouth County,

Respondents.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Barbara Voorhees, *Pro Se*

For the Respondents, Gilbert H. Van Note, Jr., Esq.

This matter having been brought before the Commissioner of Education by formal Petition of Appeal and Answer thereto, with a conference of counsel being held on March 26, 1974, and oral argument and sworn testimony from the parties being heard on April 3, 1974 in regard to whether a temporary restraining order should be entered against the Board of Education of the Borough of Sea Girt, hereinafter "Board"; and it appearing that the Board has adopted a policy regarding pupil dress (C-1) which provides as follows:

"PUPIL DRESS EXPECTATIONS

"All boys and girls attending the Sea Girt Elementary School will be expected to dress in a manner appropriate for acceptable school attire.

"All elementary school pupils, and particularly those at the pre-high school learning team level, will want to manifest high personal standards of dress, commensurate to their status as young ladies and young gentlemen in a proud new school.

"The Administrative Principal will inform parents and students of any temporary deviation in school dress prior to ecological field trips to wooded areas, etc." (at p. 8)

and it appearing that on September 10, 1973, petitioner in this case, hereinafter "S.V.," a first grade pupil enrolled at the Sea Girt Elementary School attended

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school during the morning session attired in slacks; and it appearing that such attire caused no disruption to the school program; and it appearing that the principal of the Sea Girt Elementary School determined that the dress policy as set forth in "Pupil Dress Expectations," *ante,* prohibited the wearing of slacks by female pupils during class attendance; and it appearing that S.V. was caused to change her mode of attire to continue school attendance the latter half of the school day, September 10, 1973; and it appearing that the Board approves the prohibition of the wearing of slacks by female pupils during class attendance at its school; and it appearing that the prohibition of female pupils from wearing slacks during class attendance is contrary to an earlier decision of the Commissioner of Education in *Ruth Ann Singer et al. v. Board of Education of the Borough of Collingswood, Camden County et al.,* 1971 *S.L.D.* 594; now therefore

IT IS ORDERED on this 5th day of April 1974, that the Board of Education of the Borough of Sea Girt, Monmouth County, is hereby temporarily enjoined from interpreting the aforementioned policy or implementing any pupil dress code and/or policy which prohibits any of its enrolled pupils from wearing slacks during school attendance which attire does not cause disruption to the school program.

IT IS FURTHER ORDERED THAT on the 23rd day of April 1974, the Sea Girt Board of Education appear before the Commissioner of Education, or representative thereof, to show cause why this Order should not be made permanent.

COMMISSIONER OF EDUCATION

Case closed April 17, 1974

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Paterson Education Association et al.,

Petitioners,

v.

Board of Education of the City of Paterson, Board of School Estimate, Board of Finance, and Governing Body of the City of Paterson, Passaic County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Petitioners, Leo Kahn, Esq.

For the Respondents, Adolph A. Romei, Esq.

For the Respondents, Robert B. Schwartz, Esq.

Petitioners, corporate representative of persons who serve as employees of the Board of Education of the City of Paterson, hereinafter "Board of Education," and of certain other community organizations and individuals established or resident in the City of Paterson, demand judgment that the budgetary certification deemed appropriate for school purposes in the City of Paterson for school year 1974-75 by the Board of School Estimate, Board of Finance and governing body of the City of Paterson, is in fact deficient, and will not provide a thorough and efficient system of education in the City as required by constitutional mandate. They request the Commissioner of Education to join their Petition, herein, with a similar petition filed by the Board of Education and to reject "out of hand" any request by such Board of Education to dismiss its independent petition. Respondents, the aforementioned Board of School Estimate and Board of Finance, and the governing body, oppose petitioners' requests and avowals, and have moved by an Application for Dismissal to dismiss the Petition.

An oral argument, limited in scope to respondents' Application for Dismissal, was conducted on March 18, 1974 by a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton. At this juncture, the views advanced at the oral argument, and the pleadings, have been presented directly to the Commissioner for decision with respect to respondents' Application for Dismissal.

The Commissioner has reviewed such argument and the views of the parties and opines that these arguments and views may be concisely stated.

On the one hand, respondents argue that it is the Board of Education, and such Board alone, that is charged by law with the responsibility for the education of pupils enrolled in the Paterson schools, and that no other group has standing to present an appeal such as that herein controverted. In respondents' view:

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***

"1. The petitioners are not proper parties to the appeal.

"2. The State Commissioner has not allowed petitioners to intervene pursuant to Rule 6:24-1.6.

"3. Petitioners have no legal right to appeal from the terms of the Governing Body of the City of Paterson.***" (Application of Respondent for Dismissal of Petition, at p. 2)

Respondents also aver that if the instant Appeal is to be considered by the Commissioner, other similar appeals must also be moved and considered viable. Additionally, respondents oppose any suggestion that petitioners be allowed to be joined as intervenors.

Petitioners recognize the fact that the Board of Education has already filed an Appeal with the Commissioner of Education and that this Appeal is similar to the one they have filed which is herein controverted. However, they are concerned that a "*** change in composition of the Board ***" (Petition of Appeal, at p. 7) may occur which might result in a withdrawal by the Board of Education of its Petition of Appeal with what petitioners allege may be great harm to the school system. Accordingly, in petitioners' view, they have standing herein to present such an appeal to the Commissioner of Education, and the Commissioner has jurisdiction to entertain it as a controversy under the school laws. (*N.J.S.A.* 18A:6-9)

In general terms, petitioners' avowal that they have standing to present their Petition herein, and that the Commissioner has jurisdiction to consider it, is founded on certain court decisions and the constitutional provision that every school pupil in the State of New Jersey must be afforded a "thorough and efficient" education. *Board of Education of the Township of East Brunswick et als. v. Township Council of the Township of East Brunswick,* 48 *N.J.* 94 (1966); *Board of Education of the City of Elizabeth v. City Council of the City of Elizabeth, Union County,* 55 *N.J.* 501 (1970); *Board of Education of the Borough of Haledon v. Mayor and Council of the Borough of Haledon,* 1970 *S.L.D.* 70; *State Board of Education et als. v. Board of Education of Netcong et als.,* 108 *N.J. Super.* 564 (*Chan. Div.* 1970); and *Marilyn Winston et al. v. Board of Education of the Borough of South Plainfield,* 125 *N.J. Super.* 131 (*App. Div.* 1973) While not demanding to usurp or assume the prerogatives of the Board of Education, petitioners assert, in effect, that in the event such prerogatives are not exercised, and if there is reason to believe that serious harm may be inflicted on this school district, the Commissioner must assume jurisdiction and determine the amount of money which is necessary and required to operate the school system in the ensuing 1974-75 school year.

The Board of Education was also represented at the oral argument of March 18, 1974, and was asked to state its views with respect to the Petition, *sub judice,* and its own Petition. Of most importance, in this regard, the Board of Education avowed that there is nothing on the record before the

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Commissioner at this juncture to justify an assumption that it will abandon its Appeal and that, in fact, it is prepared to go to an early hearing.

The Commissioner has reviewed these contentions of the parties and the various representations set forth in oral argument and determines that:

1. The instant Petition will be held in abeyance.

2. A hearing of inquiry for the purpose of reviewing the budgeted appropriations of the City of Paterson for the school year 1974-75 shall be set down for April 5, 1974, and shall be limited to that one day, if possible.

3. In the interim between the date of this decision and March 27, 1974, the Board of Education, as original petitioner, will be required to furnish all necessary supporting data with reference to its Petition of Appeal as required by the Division of Controversies and Disputes and/or the hearing examiner.

4. In the interim between the date of March 27, 1974, and April 5, 1974, the governing body may, if it so chooses, supplement its Answer to the Board's Petition of Appeal.

The Commissioner further directs that, pursuant to *N.J.S.A.* 18A:6-24, all pertinent testimony with reference to this controversy is to be submitted in written form in advance and that cross-examination on such testimony at the hearing of April 5, 1974, is to be equally apportioned as time will permit.

Finally, the Commissioner directs that petitioners in the instant matter be permitted to submit a written memorandum and/or Brief in summary of their views at a time immediately subsequent to the hearing of April 5, 1974.

COMMISSIONER OF EDUCATION

April 5, 1974

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Board of Education of the City of Paterson,

Petitioner,

v.

Board of School Estimate of the City of Paterson and Board of Finance, Passaic County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Robert P. Swartz, Esq.

For the Respondent, Adolph A. Romei, Esq.

The Board of Education of the City of Paterson, by Petition of Appeal dated February 21, 1974, avers that the appropriation of money deemed sufficient for school purposes during school year 1974-75 by the Board of School Estimate, and later by the Board of Finance of the City of Paterson, hereinafter identified as the "Governing Body," is, in fact, insufficient for such purposes and will not allow the Board of Education to provide a thorough and efficient system of education as mandated by the Constitution of the State of New Jersey and the applicable statutes thereunder. It demands judgment by the Commissioner of Education in support of this avowal.

The Governing Body maintains that its certification of tax money is sufficient for all of the basic needs of the Paterson schools and it sets forth sixteen defenses in opposition to the avowals and proposals of the Board of Education.

Upon receipt of the Petition of Appeal herein by the Commissioner and the Division of Controversies and Disputes, a conference of the parties with a representative of the State Department of Education was set down and held.

Subsequently, in the absence of any reconciliation of the substantive issues dividing the parties, the Division of Controversies and Disputes proceeded to move the matter expeditiously to a hearing on the merits of the Petition of Appeal and, in fact, a hearing was set down for April 5, 1974. (Prior thereto, on or about March 19, 1974, the parties herein were furnished instructions with respect to the submission of required data and other testimony in written form.)

In effect, this scheduled hearing was to be a second review of the same basic budgetary appropriations of the Board since, pursuant to law (*N.J.S.A.* 18A:58-5), the Acting Commissioner of Education had had occasion to review the Paterson school budget in February 1974 and, in a letter of February 13, 1974 to the Paterson Board he had stated:

"This budget is considered a minimal one and our reaction is one of

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> concern as to your ability to operate the educational program within the appropriations. The per pupil expenditure projected for 1974-75 is approximately $1,100 which is well below the state average."

However, at this juncture the governing body challenges the jurisdiction of the Commissioner to consider a matter wherein a judgment has already been rendered by him, as reported, *ante,* and further moves for delay of the hearing on other grounds.

The Acting Commissioner has considered such arguments in the total context of this dispute. However, it is determined that the time allowed the parties for the presentation of proofs has been sufficient for such purposes and that extensive continuing delay would not be in the best interests of the pupils of Paterson or make possible a thorough and efficient operation of its school system in the 1974-75 school year. Staff members must be notified by the Board of Education with respect to their employment status on or before April 30, 1974. (*N.J.S.A.* 18A:27-10) Contracts must be awarded by the Board of Education. (*N.J.S.A.* 18A:27-5) Tax rates must be set that are adequate to guarantee a "thorough and efficient" school system.

Accordingly, the Acting Commissioner holds it is in the public interest to reiterate his prior determination of February 13, 1974 in this matter unless by the date of April 11, 1974, the Governing Body has presented evidence to cause the Acting Commissioner to believe that the prior determination, *ante,* was in error in whole or in part.

In this regard the Commissioner observes that the prior determination of reference was one he was required by law to make since the statute, *N.J.S.A.* 18A:58-5, mandates a "review" of all school budgets whenever the State's "*** incentive equalization aid plus the minimum support shall be greater than the local tax requirement ***" and since the Board of Education's budget was so categorized in December 1973. The whole of the statute of reference (*N.J.S.A.* 18A:58-5, as amended by *Chapter* 234, *Laws* of 1970) is set forth as follows:

> "a. Minimum support aid shall be paid annually to each school district.
> b. Incentive equalization aid shall be paid annually in accordance with the following calculations:
> (1) A guaranteed valuation for each school district shall be determined and compared with the equalized valuations of the district. If the guaranteed valuations are less than the equalized valuations for the district, no incentive equalization aid shall be paid.
> (2) If the guaranteed valuations are greater than the equalized valuations of the district, incentive equalization aid shall be determined as follows:
> (a) Divide the amount of the net operating budget by the guaranteed valuations to establish a rate to be applicable to local tax requirements and incentive equalization aid.
> (b) Multiply said rate by the equalized valuations of the district to obtain the local tax requirement.
> (c) Multiply said rate by the excess of the guaranteed valuations over the equalized valuations to obtain the incentive equalization aid.

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If such incentive equalization aid plus the minimum support shall be greater than the local tax requirement, the commissioner shall review each item of appropriation within the budget of the district."

Furthermore, the Commissioner determines that the procedure herein has been consistent with, and pursuant to, the decision of the Supreme Court of New Jersey in *Board of Education of East Brunswick Township v. Township Council of East Brunswick Township,* 48 *N.J.* 94 wherein it was held that when the Commissioner finds that the school budget fixed by a local governing body is insufficient to satisfy education requirements he may direct local corrective action or fix the budget "on his own." (at p. 107) Nevertheless, the Acting Commissioner maintains an open mind on the matter herein controverted and may be persuaded by additional evidence which may now be advanced.

Accordingly, the Acting Commissioner requests the Governing Body to produce relevant evidence it deems appropriate in written form on or before the date of April 10, 1974, and in oral form on April 11, 1974 in order that the Commissioner may consider such evidence in the context of his previous determination. He further states that unless such evidence is produced in this manner he will reiterate the aforementioned determination.

COMMISSIONER OF EDUCATION

April 5, 1974

Board of Education of the City of Paterson

Petitioner,

v.

Board of School Estimate of the City of Paterson and Board of Finance, Passaic County,

Respondents.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Robert P. Swartz, Esq.

For the Respondents, Adolph A. Romei, Esq.

In the month of January 1974, the Board of Education of the City of Paterson forwarded its budget proposals for school year 1974-75 to the Board of School Estimate of the City. Such proposals were that a total of $31,024,510 be expended for school purposes during the year, and that $13,461,260 of this amount be raised in local taxes. (State aid funds were programmed at $17,407,750.) However, on February 14, 1974, by action of the Board of

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School Estimate, the net amount to be raised in local taxes was reduced to a sum of $9,928,682, and this sum was later certified by the Board of Finance and the Governing Body of the City of Paterson.

Thereafter, the Board of Education appealed the reduction to the office of the Commissioner of Education and on or about the date of March 19, 1974, the date of April 5, 1974, was set down for a plenary hearing on the merits of the dispute. Thus, a period of approximately two and one-half weeks was allowed for the preparation of materials and evidence to be educed at the hearing. However, on March 29, 1974, the Governing Body applied in oral and written form for a postponement of the scheduled hearing to a date sometime after April 22, 1974, and the Acting Commissioner of Education did consider such request.

Thereafter, in his decision of April 5, 1974, the Acting Commissioner, in effect, refused the request for reasons set forth in his decision, and determined that such extensive continuing delay as requested by the Governing Body would "*** not be in the best interests of the pupils of Paterson or make possible a thorough and efficient operation of its school system in the 1974-75 school year." The Acting Commissioner did, however, grant the Governing Body an additional period of time until April 11, 1974, to produce relevant evidence it deemed appropriate which might persuade the Acting Commissioner that a previous review of the instant budget by him (pursuant to *N.J.S.A.* 18A:58-5, as amended by *Chapter* 234, *Laws* of 1970), and a resulting determination that it was a "minimal" budget, was in error, or that the determination should be altered in whole or in part to conform to the action of the Governing Body. However,

It appearing that the Governing Body did not come forward on April 11, 1974 with any evidence in written form or with any testimony concerned with the merits of the dispute, *sub judice,* which would cause the Acting Commissioner to temper or change the determination that he made and announced on February 13, 1974, that the proposed budget of the Board of Education herein controverted is a minimal budget; and

It appearing that the Board of Education has been in a position of financial difficulty for an extended period of time and remains in this position to the present day; and

It appearing that the extent of this difficulty is clearly evident in audited statements available to the State Department of Education with respect to school year 1972-73, which show that on June 30, 1973, the Paterson School System had completed its operational year with a deficit of $799,377.30 in its current expense account (contrary to *N.J.S.A.* 2A:135-1); and

It appearing that in the 1973-74 school year this deficit position continues without conclusive relief, as a direct consequence of the fact that revenues correctly anticipated by the Board of Education have not in fact been realized in full in past years or in the present year; and

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It appearing that the cash deficit, as expressed in the 1972-73 audit report, and other reports which comprise an expression of the financial position of the Board of Education, appear to be contrary to law (*N.J.S.A.* 54:4-75) and must not be allowed to continue or occur again, and

It appearing that prior budgets of the Board of Education have anticipated State aid funds which did not materialize because of a reduction in the amount of local money required for the support of the school system, thereby adding to the difficulty; and

It appearing that the budget for school year 1974-75 will be similarly affected if the budget deemed appropriate by the Governing Body for the year is allowed to go into effect; and

It appearing that the Paterson School System is entitled to expect a continuing sustenance of support in the interest of an efficient, planned educational endeavor; and

It appearing that the State of New Jersey has already contributed significantly to this support and, among other recent expenditures, has committed a total sum of $5,382,000 pursuant to *Chapter* 10, *Laws* of 1971, for projected construction costs in two buildings of the school district which are scheduled to open in September 1974; and

It appearing that the Governing Body by specific ordinance has already agreed to such building programs and construction costs; and

It appearing that the school budget deemed appropriate by the Governing Body for school year 1974-75 would, for all practical purposes, negate and contradict its already expressed commitment, and that of the State with respect to the operation of these two school buildings; and

It appearing that this operational reduction proposed by the Governing Body herein would reduce still further a budget proposed by the Board of Education which provides a sum of only approximately $1,100 per pupil enrolled, as compared to a Statewide average of approximately $1,400 in school year 1974-75; and

It appearing that the State Department of Education has had an obligation to the Legislature and to the taxpayers of the State to carefully scrutinize and review all school budgets of the State wherein, as here, the State effort, with respect to total funding, is in excess of that provided by the local district; and

It appearing that such scrutiny and review has already been accomplished pursuant to law (*N.J.S.A.* 18A:58-5) with respect to the budget of the Paterson Board of Education for school year 1974-75; and

It appearing that there is no evidence before the Acting Commissioner to temper the judgment he made on February 13, 1974 as the result of such

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scrutiny and review that the proposed budget of the Board of Education is a minimal one; therefore

It is decided, and reiterated, that the sum of $13,461,260 is deemed necessary and required for the thorough and efficient operation of the Paterson School System in the 1974-75 school year and, accordingly, the Acting Commissioner of Education directs the Passaic County Board of Taxation to raise this amount in local taxes for the support of the Paterson schools during the school year 1974-75.

ORDERED this 15th day of April 1974.

COMMISSIONER OF EDUCATION

Board of Education of the City of Paterson

Petitioner-Appellee,

v.

Board of School Estimate of the City of Paterson and Board of Finance, Passaic County,

Respondents-Appellants.

STATE BOARD OF EDUCATION

DECISION

Decision on Motion of the Commissioner of Education, April 5, 1974

Decision of the Commissioner of Education, April 5, 1974

Order of the Commissioner of Education, April 15, 1974

For the Petitioner-Appellee, Robert P. Swartz, Esq.

For the Respondents-Appellants, Adolph A. Romei, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

Mr. Jack Slater abstained.
June 26, 1974

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In the Matter of the School Election Held in the School District of the Township of Passaic, Morris County.

COMMISSIONER OF EDUCATION

DECISION

At the annual school election held on February 13, 1974, the announced results of the balloting for candidates for three seats for full terms of three years each and one seat for a full term of one year on the Township of Passaic Board of Education, Morris County, were as follows:

For Three-Year Term	At Polls	Absentee	Total
Robert E. Kurtz	271	4	275
David Atkinson	80		80
Sharon White	77		77
John Lott	58		58
Peter Azarelo	48	2	50

Sixteen additional persons were listed as having received a collective total of thirty-seven votes. No one of them received more than a total of six votes. It is unnecessary, therefore, that they be listed here.

For One-Year Term	At Polls	Absentee	Total
Frances Ierubino	260	4	264

Nine additional persons were listed as having received a collective total of twenty-one votes. No one of them received more than five votes. It is therefore unnecessary that they be listed here.

Pursuant to a letter request from John H. Lott, dated February 14, 1974, the Commissioner of Education directed his representative to conduct a recheck of the totals on the voting machines used and of the write-in votes in this election. This recheck was conducted at the warehouse of the Morris County Board of Elections, Morris Plains, on March 1, 1974.

The school election ballot listed only the name of Robert E. Kurtz for the full three-year term but specified that votes should be cast for three candidates. A recheck of the three voting machines confirmed that the tally of machine votes cast for Robert E. Kurtz was properly reported as being 271. Since this number represents a majority of the total votes cast by machine (377) and by absentee ballot (4), it is clear that Robert E. Kurtz was elected to a three-year term. It therefore remains to determine who was elected to the two remaining three-year terms from among the numerous write-in candidates. The Commissioner's representative has verified that the following votes are identifiable with those candidates previously shown to be the only four possible contenders for the two remaining three-year terms:

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	Clearly Admissible Votes		Identifiable for Tally	Grand Total
David Atkinson	47	Dr. Atkinson	3	
David J. Atkinson	1	Dr. Atkins	4	
Dave J. Atkinson	1	Dr. Atkin	1	
Dr. David J. Atkinson	1	Dave Aikson	1	
Dave Atkinson	4	Atkinson	3	
D. Atkinson	4	Attkinson	3	
Dr. Dave Atkinson	2	Akinson	1	
D. Alkinson	1	Atkin	1	
Subtotal	61	Subtotal	17	78

Note: Six other exhibits in paragraph form with some relationship to the name David Atkinson were recorded at the time of tally. Assuming, *arguendo*, that these exhibits could be added to the tally above, the grand total would be *84*.

Sharon White	63	Sharon	1	
Shron White	1	Mrs. White	2	
Mrs. S. White	1	White	2	
Ms. Sharon White	1	Karen White	1	
S. White	1	Carol White	1	
S.S. White	1			
Subtotal	68		7	75

Note: Exhibits, similar to those, *ante*, totaled three in number. If added to the tally, the grand total would be *78*.

John Lott	46	Patt Lott	1	
Jahn Lott	1	Lott	6	
		Mr. Lott	1	
Subtotal	47	Subtotal	8	55

Note: Exhibits, similar to those, *ante*, totaled four in number. If added to the tally, the grand total would be *59*.

Peter Azarelo	13	Azzarillo	1	
Peter Azorelo	3	Azarelo	5	
Peter Azarillo	2	Mr. Azzarello	1	
Peter Azarella	3	Azarela	1	
Pete Azarela	1	Azarilo	1	
Pete Azzarella	1	Azorello	1	
Pete Azerello	1	Azzarelo	1	
Peter Azarlelo	1	Alzoris	1	
Peter Azorela	1	Azzarello	1	
Pete Azerilla	1			
P. Azarelo	3			
P. Azurelo	1			
P. Azalelo	1			
Subtotal	32	Subtotal	13	45

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Note: Exhibits, similar to those, *ante,* totaled four in number. If added to the tally, the grand total should be *49.*

Summarized, the tally may be set forth as follows:

Name	I Clearly Adm. Votes	II Identifiable For Tally	III Exhibits for Consideration	IV Grand Total Possible
David Atkinson	61	17	6	84
Sharon White	68	7	3	78
John Lott	47	8	4	59
Peter Azarelo	32	13	4	49

Having reviewed such tallies, the Commissioner's representative concludes that David Atkinson and Sharon White were clearly elected to three-year terms on the Board of Education of the Township of Passaic. It is not necessary to set forth reasons why votes included in Columns II or III, *ante,* may or may not be legally added to the tally (IV). This conclusion is grounded in the fact that any combination of votes counted for either John Lott or Peter Azarelo cannot equal or exceed the 61 votes clearly cast for David Atkinson, or for the various spellings of that name which are explicitly definitive. (See *Joseph Flack, In re Madison Borough Annual School Election,* 1938 *S.L.D.* 176.)

Additionally, it is unnecessary to list or describe the twenty write-in votes cast for those persons who received votes for the single one-year term, *ante.* No one of the named persons received more than four write-in votes, and thus cannot exceed the total of 264 machine and absentee votes cast for Frances Ierubino.

* * * *

The Commissioner finds and determines that Robert E. Kurtz, Sharon White, and David J. Atkinson were elected at the annual school election in the Township of Passaic, Morris County, for full terms of three years each, and that in the same election Frances Ierubino was elected to a one-year term on the Passaic Township Board of Education.

COMMISSIONER OF EDUCATION

April 8, 1974

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Nicoletta Biancardi

Petitioner,

v.

Board of Education of the Borough of Waldwick, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Goldberg & Simon (Theodore M. Simon, Esq., of Counsel)

For the Respondent, Honig and Honig (Steven M. Honig, Esq., of Counsel)

Petitioner, a teaching staff member in the employ of the Board of Education of the Borough of Waldwick, hereinafter "Board," avers that she had an entitlement as a tenured employee to continue in her employment for the school year 1973-74 but was denied this entitlement by action of the Board. She demands judgment to this effect and restoration to her position forthwith. The Board denies that petitioner has accrued a tenured status as an employee of the Board and maintains that her services were legally terminated at the end of the 1972-73 school year.

A hearing in this matter was conducted on October 18, 1973 at the office of the Bergen County Superintendent of Schools, Wood-Ridge, by a hearing examiner appointed by the Commissioner of Education. At the hearing a total of eighteen documents were received in evidence and subsequent thereto Memoranda were submitted by counsel. The report of the hearing examiner is as follows:

Petitioner is a fully certified teacher and possesses a "Permanent Teacher's Certificate." (P-1) The Certificate states she is authorized to teach in the public schools of the State in grades kindergarten through eight, and, in conformity with such authorization, she has performed teaching duties in the Board's employ from April 27, 1970 through June 1973.

Her employment during that period of time is categorized by the Board as that of a substitute teacher for the period April 27, 1970 through June 1970, and as a regular teacher employed by standard contract for the period September 1, 1970 through June 30, 1973. (See contracts R-8, P-5, R-10.) Petitioner avers, however, that such categorization is in error and that the service she has rendered as a teacher in the Board's employ must all be categorized as that of a regular teacher, and that it entitles her to the protection which the statutes afford to tenured employees. The principal statute of reference herein is *N.J.S.A.* 18A:28-5 which reads, in pertinent part:

"The services of all teaching staff members including all teachers***and

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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***after employment in such district or by such board for:***

"(c) the equivalent of more than three academic years within a period of any four consecutive academic years***."

Thus it is clear that the decision required herein must be grounded on an appraisal of petitioner's service during the period April 27 through June 30, 1970, since there is no question that her service subsequent to that time comprised a full three-year period, and that this latter service is countable towards a tenure accrual. However, the hearing examiner believes that the designation of "substitute" used by the Board to categorize petitioner's initial service is not definitive as a descriptive word standing alone unless it is supported by the facts which have been educed.

In this regard the hearing examiner notes that both Memoranda of counsel submitted subsequent to the hearing cite the case of *Juanita Zielenski v. Board of Education of the Town of Guttenberg, Hudson County,* 1970 *S.L.D.* 202; reversed State Board of Education, 1971 *S.L.D.* 664; aff'd *Sup. Ct.,* February 1972, Docket No. A-1357-70 in support of their respective views. It is also noted that the basic factual details of *Zielenski,* particularly with respect to length of service, are similar to the matter, *sub judice,* and the same kind of ultimate determination is required herein as in *Zielenski*. Thus it is of importance to note that the State Board of Education said in the course of its opinion, which reversed the decision of the Commissioner in *Zielenski,* that:

> *"***Schulz v. State Board of Education,* 132 *N.J.L.* 345 (*E. & A.*, 1945) held that substitute teachers were not included in the phrase 'all teaching staff members including all teachers' as used in the tenure statute. Nevertheless, other cases make it clear that whether an employment is as a regular teacher or substitute teacher is not to be determined by the designation given the employment by an employing board, but by an examination of the factual picture presented. *Downs v. Board of Education of Hoboken,* 13 *N.J. Misc.* 853 (1935); *Board of Education of Jersey City v. Wall et al.,* 119 *N.J.L.* 308 (*Sup. Ct.* 1938) The testimony was polaristic as to whether the five-month employment of petitioner was as a regular teacher or as a substitute. We *must,* therefore, *turn* our *attention* to the evidence concerning the *nature of that employment* and a review of pertinent statutes and judicial decisions to determine the character of that employment.***" (*Emphasis supplied.*) (at p. 665)

Similarly in the instant matter, as noted, *ante,* petitioner's initial period of employment must be classified either as that of a regular teacher or that of a substitute. What was the "nature" of that employment?

Initially in this regard the hearing examiner finds that the employment of petitioner during the period April 27, 1970 through the end of that school year must be classified as "regular" in the sense that it was a continuing assignment in

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the same position on each day of the period. (The position had been created by a mid-term resignation and was otherwise vacant.) This finding is grounded on the resolution of the Board (P-3) which was unanimously adopted by the Board on May 11, 1970, and attests to the continuous nature of the service of petitioner. The resolution is set forth as follows:

> "***BE IT RESOLVED, that the employment of Nicolette (sic) Biancardi, as substitute teacher, retroactive to April 27th, *for the balance of the school year,* at a per diem rate of $40.00, be and it is hereby ratified.***" (*Emphasis supplied.*)

From such language it is clear that the Board not only knew that petitioner had been serving in its schools during the period April 27 through May 11, 1970, but also sanctioned a continuation of such service "for the balance of the school year." Such Board action was lacking in *Zielenski, supra,* but the State Board said in its opinion, which reversed the decision of the Commissioner, that it had concluded the statutes were not intended "***to deny tenure to a teacher, otherwise eligible, who taught continuously and performed all the duties of a regular teacher because the formality of a roll call vote may not have been undertaken***." (at p. 668)

Thus with respect to the "nature" of petitioner's initial employment, it may be said that she was continuously and regularly employed during the period April 27 through June 1970 by an action of the Board.

It may also be said that the salary established by the Board for such service ($40.00 a day) was not that which petitioner would have earned as a teacher on the Board's salary guide (11,385) (P-2), but neither was it the salary of a substitute called on a day-to-day basis ($20 per day). (R-4) It was a salary instead, according to testimony of the Superintendent of Schools, which had been recommended administratively to the Board by school officials pursuant to a policy of custom which recognized the need for flexibility in establishing the salary to be paid "substitutes" engaged for a continuing assignment.

In other respects, however, it is clear that petitioner's initial service as a teacher in the Board's employ was not rewarded by the usual emoluments afforded regular teachers. During that period she received no sick leave for two days that she was absent because of illness and was not enrolled in the Teachers' Pension and Annuity Fund or afforded hospitalization coverage.

Nevertheless, according to petitioner, she performed all the duties of a regular first grade teacher during that period and her testimony in this regard is not contradicted. These duties included:

1. preparation of lesson plans
2. preparation of report cards
3. correction of written assignments
4. participation in a Back to School Night
5. conferences with parents
6. all other usual and customary teaching duties.

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Furthermore, such duties in the same type of first grade assignment continued essentially unchanged during all of the period which comprised school years 1970-71 and 1971-72. During the 1972-73 school year petitioner's assignment was that of a kindergarten teacher.

This concludes a discussion of the "nature" of petitioner's service in her employment by the Board during the period April 27 through June 1970. In petitioner's view the facts justify a conclusion that such service must be added to the service of three subsequent years and, thus, that she is entitled to the tenure protection which the statutes afford. According to petitioner, she:

> "*** was not hired as a substitute teacher on a casual basis; anticipated further employment; contracted to perform the identical duties for three full terms following the close of the 1969-1970 school year; did not perform the duties of a normal substitute teacher; was in fact paid at least twice as much as a normal substitute teacher; was required to have her contract for the 1969-1970 school year approved by the Board of Education; was not filling in for someone temporarily absent; and was led along the path of expectancy and the reality of continued employment for the consecutive period of three years and two months.***"
> (Memorandum of Petitioner, unp)

On the other hand, the Board avers:

> "*** The Board's actions in hiring the petitioner as a substitute teacher from April to June, 1970, were in accord with its long established hiring policy. Petitioner had notice and has admitted that she was hired as a substitute teacher for the initial employment period. The rights and privileges extended to her by the Board were not inconsistent with the Board's designation and her position as a substitute teacher. Her salary was computed on a per diem basis and was reasonably arrived at by the respondent in light of her expertise and the Board's needs. That salary was less than that of a full time teacher with the petitioner's experience and in the position she was to fill.***" (Brief of Respondent, at pp. 9-10)

In short, the Board argues that petitioner was a "substitute teacher" rather than a "teacher" for purposes of evaluating tenure accrual and that such service as she rendered does not qualify toward the accrual in this instance. In support of this view the Board cites *Schulz v. State Board of Education, supra; Zielenski, supra; Zimmerman v. Board of Education of the City of Newark,* 38 *N.J.* 65 (1962); *Wall v. Board of Education of Jersey City, Hudson County,* 1938 *S.L.D.* 614 (1936), reversed and remanded State Board of Education 618, affirmed 119 *N.J.L.* 308 (*Sup. Ct.* 1938).

The hearing examiner has reviewed the factual matter recited, *ante,* and considered the arguments advanced by counsel herein. However, he finds certain words of the State Board of Education in *Wall, supra,* to be especially compelling in the instant matter since in *Wall* the petitioner had also been employed by a direct resolution of the Jersey City Board of Education to be a

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"substitute" teacher but was assigned to duties which were those of a regular teaching staff member. In considering the "notice" of this employment for purposes of tenure entitlement, the State Board said:

> "*** It is a misnomer to apply the name 'substitute' to teachers who are steadily employed. We agree with the following statement in the Commissioner's opinion:
>
> " 'The word 'substitute' does not describe adequately the type of employment of petitioner***. It denotes one put in the place of another, or one acting for or taking the place of another. The petitioner and other so-called substitutes were not acting in place of teachers who were absent, but were assigned to positions in practically the same manner as teachers under tenure in the school system.***' (at p. 619)
>
> "*** The statute is silent as to the rate or method of payment. It simply requires 'employment' for the period stated. The appellant was certainly 'employed' during the period of her teaching in Jersey City. She taught the same classes in the high schools through the years of her employment. That she was paid at a per diem rate instead of by the month or the year does not change the fact that she had regular, continuous employment.*** (at p. 621)
>
> "*** the *statute* provides a certain probationary period during which boards of education may determine whether the work of the teacher is of a character to *induce* it to employ her beyond that period.
>
> "They cannot *** 'legally evade' the statute *** by providing for a further probationary period.*** (at p. 622)
>
> "*** though the appellant was termed a 'substitute,' her regular continuous teaching of the same classes in the same schools for over three years made her in fact a regular steadily employed teacher regardless of the terms used to describe her position. It is the actual realities of the situation which count, not the words used to describe them.***" (at pp. 622-623)

Additionally, however, the hearing examiner believes that the decision of the State Board of Education in *Zielenski, supra,* is a reinforcement of the view expressed in *Wall, supra,* that those who perform continuously in the duties of a regular teacher are entitled, on the basis of such performance, to add the time of the performance to the total period required for tenure. In this regard the State Board said in *Zielenski* that:

> "*** These statutes [*N.J.S.A.* 18A:27-1 and *N.J.S.A.* 18A:28-4] lead us to conclude that it was not intended to deny tenure to a teacher, otherwise eligible, who taught continuously and performed all the duties of a regular teacher***." (at p. 668)

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And further, in the Supreme Court affirmation of *Wall, supra*:

> "*** The device adopted cannot defeat the purpose of the act, which was designed to give a measure of security to those who served as teachers three consecutive academic years. A mere occasional absence of a teacher by reason of illness or excuse could not disturb this right, and the local board of education cannot evade the statute, notwithstanding the alleged employment by the day if a teacher actually serves for the requisite period of years.***" (at p. 309)

Applying the principles set forth in these decisions to the instant matter, the hearing examiner finds that petitioner has indeed earned the "measure of security" which tenure affords to those who meet the precise conditions which are necessary for its accrual. *Ahrensfield v. State Board of Education,* 126 *N.J.L.* 543 (*E.&A.*), 19 *A.2d* 656 (1941) Such finding is buttressed by other decisions of the Commissioner and the courts that hold that a wide range should be given to the applicability of the tenure law to confer a tenure status on the basis of duties performed, *Barnes et al. v. Board of Education of the City of Jersey City, Hudson County,* 1961-62 *S.L.D.* 122; *Quinlan v. Board of Education of the Township of North Bergen, Hudson County,* 1959-60 *S.L.D.* 113; *Giannino v. Board of Education of Paterson, Passaic County,* 1968 *S.L.D.* 160; *Brunner v. Board of Education of Camden, Camden County,* 1959-60 *S.L.D.* 155; *Sullivan v. McOsker,* 84 *N.J.L.* 380 (*E.&A.* 1913), and there can be no question herein about the duties performed by petitioner during all of the period April 27, 1970 through June 1973. They were clearly the duties of a regular teaching staff member employed by the Board, and this clear fact is not tarnished in any way by the Board's nomenclature for the work or the rewards it offered when the work was performed.

Thus, having completed an employment "*** of more than three academic years within a period of four academic years***" (*N.J.S.A.* 18A:28-5), petitioner has complied with the statutory prescription and is "under tenure."

Finally, it is noted from petitioner's Memorandum of Law that the Board apparently has also contended in the instant matter that petitioner's position of employment was lawfully abolished in the period prior to the start of the 1973-74 school year. If true and standing alone, such abolishment would, of course, render the instant finding, *ante,* of tenure accrual as a finding of no practical effect unless, by seniority, petitioner was otherwise entitled to remain in the Board's employ.

However, it is clear from a review of the Board's answers to interrogatory questions contained in Exhibit P-5 that petitioner does possess seniority rights herein, in addition to a tenure entitlement, and accordingly, that position abolishment has no practical effect. (See *N.J.A.C.* 6:3.)

In summary, the hearing examiner finds that all the facts of the instant matter lead to a conclusion that petitioner has a tenure entitlement as a teaching staff member in the Board's employ and that by virtue of such entitlement, and

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by seniority, she is also entitled to resume her former employment at this juncture. Accordingly, the hearing examiner recommends that the Commissioner restore her to such employment forthwith retroactive to September 1973 and that she be afforded all the emoluments pertinent to such restoration.

* * * *

The Commissioner has reviewed the record in the instant matter, the report of the hearing examiner and the exceptions thereto as filed by counsel in accord with *N.J.A.C.* 6:24-1.16.

The Commissioner is in agreement in all points with the findings of the hearing examiner and holds them as his own. Most important are the findings that petitioner, although designated by Board resolution as a substitute teacher (P-3), did in all respects perform the work of a regular teacher from April 27, 1970 through June 1970. Her continued employment thereafter, for an uninterrupted period of three academic years, establishes that she performed the duties of a regular teacher uninterruptedly for the equivalent of more than three academic years within a period of four consecutive academic years. *N.J.S.A.* 18A:28-5

The Commissioner observes that the Legislature in its wisdom was not totally reliant upon nomenclature but was purposefully comprehensive regarding who should be clothed with the benefits of tenure wherein it included in *N.J.S.A.* 18A:28-5:

> "*** such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners***."

It is clear that a certificate was required for petitioner to teach as either a substitute or as a teacher. Since the Board first agreed to employ her for an uninterrupted period from April 27, 1970 through June 1970, it follows that a certificate issued by the State Board of Examiners was required, since she could serve interruptedly for no more than twenty days on a substitute certificate issued by the County Superintendent of Schools. Such finding alone, however, is not totally dispositive of the matter.

The Commissioner has consistently construed the tenure statutes not to include substitute teachers employed to do particular substitute work for absent teachers. Herein, there was no absent teacher, however, and no evidence that the Board sought to replace petitioner from April 27, 1970 through June 19, 1970. Rather, the evidence leads to the conclusion that the Board properly evaluated her teaching performance during the controverted period and on June 8, 1970, offered her a contract for the subsequent school year. (P-4)

The recognized purpose of the probationary period prior to acquisition of tenure is to afford the employing board an opportunity to properly evaluate its employee. As was said by the Court in *Schulz v. State Board of Education et al.*, 132 *N.J.L.* 345 (*E. & A.* 1945):

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> "*** The three year period which is, unless shortened by the employing board, a necessary antecedent to the acquisition of tenure, gives, if served under conditions of regular employment, an opportunity for demonstration of character, teaching qualities and ultimate influence upon the personality and mentality of the student *which is not afforded by the exigencies and distractions of substitute teaching****." (*Emphasis supplied.*) (at p. 354)

In the instant matter, the Commissioner, having weighed the evidence herein presented, concludes that the necessary probationary period in excess of three academic years within a four-year period was served by petitioner as a regular teacher. Nomenclature chosen at the convenience of the Board, attendant emoluments connected with employment, or the lack thereof, may in no way deprive petitioner of the statutory cloak of protection provided by tenure resulting from her years of service.

The Board could easily have avoided the acquisition of tenure by petitioner, had it so chosen, by the termination of her employment at any time prior to April 27, 1973. As was said by the Court in *Canfield v. Board of Education of the Borough of Pine Hill,* 97 *N.J. Super.* 483 (*App. Div.*, 1967), reversed 51 *N.J.* 400 (1968):

> "*** tenure is statutory and arises only by passage of the time fixed by the statute, and the discharge of an employee before the passage of the required time bars tenure***." (at p. 490)

It was likewise stated by the Commissioner in *Cornelius T. McGlynn v. Board of Education of the Township of Lumberton,* 1972 *S.L.D.* 28 that:

> "*** where service of a teaching staff member has been rendered for the complete period required by statute a tenure status is accrued at the precise moment when the requisite period has expired. From that time forward, in the Commissioner's view, the teaching staff member has tenure.***" (at p. 33)

The Commissioner determines that petitioner is a tenured employee of the Waldwick Board of Education. He finds no evidence that the Board fraudulently sought to deprive her of her employment, but did, through nescience, improperly terminate her employment. It is ordered that the Board of Education of the Borough of Waldwick return her to her position of employment forthwith, with such salary and other benefits consistent with the Board's policies. It is further ordered that petitioner be paid the salary to which she is entitled for the period from September 1973 to the time of her reinstatement, mitigated only by the amount of her earnings, if any, during that period.

COMMISSIONER OF EDUCATION

April 9, 1974

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Nicoletta Biancardi,

Petitioner-Appellee,

v.

Board of Education of the Borough of Waldwick, Bergen County,

Respondent-Appellant.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 9, 1974

For the Petitioner-Appellee, Goldberg and Simon (Theodore M. Simon, Esq., of Counsel)

For the Respondent-Appellant, Honig and Honig (Steven M. Honig, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

Mrs. Ruth Mancuso and Mr. Calvin J. Hurd dissented in this matter.

Mr. Jack Slater abstained.

November 6, 1974
Pending before Superior Court of New Jersey

Nicoletta Biancardi,

Petitioner-Appellee,

v.

Board of Education of the Borough of Waldwick, Bergen County,

Respondent-Appellant.

STATE BOARD OF EDUCATION

MINORITY OPINION

Decided by the Commissioner of Education, April 9, 1974

For the Petitioner-Appellee, Goldberg and Simon (Theodore M. Simon, Esq., of Counsel)

For the Respondent-Appellant, Honig and Honig (Steven M. Honig, Esq., of Counsel)

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This matter, decided by the Commissioner of Education of the State of New Jersey on April 9, 1974, involves the question of whether petitioner, who served undisputedly as a regular teacher in respondent district for three consecutive academic years (1970-71, 1971-72, 1972-73), may "tack on" a period of service immediately prior during which she was employed as a substitute teacher from April 27 to June 30, 1970, so as to give her tenure. The local Board's resolution of May 11, 1970, authorizing that employment of petitioner reads:

> "*** BE IT RESOLVED, that the employment of Nicolette (sic) Biancardi, as a substitute teacher, retroactive to April 27th, for the balance of the school year, at a per diem rate of $40.00, be and it is hereby ratified.***"

The salary guide in effect at the time provided for payment to day-to-day substitutes of $20.00 per day. The salary of a regular teacher under the guide was approximately $56.00 per day.[1]

The tenure statute in question, *N.J.S.A.* 18A:28-5, is available only to "teaching staff members":

> "The services of all teaching staff members including all teachers *** 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 *** after employment in such district or by such board for:
>
> * * *
>
> "(c) the equivalent of more than three academic years within a period of any four consecutive academic years***."

As was pointed out in the decision of the New Jersey State Board of Education in *Juanita Zielenski v. Board of Education of the Town of Guttenberg, Hudson County,* 1970 *S.L.D.* 202, reversed State Board of Education, 1971 *S.L.D.* 664, affirmed Superior Court of New Jersey, Appellate Division, February 16, 1972, Docket No. A-1357-70, the primary question to be answered is whether petitioner, during the two-month period, was a teaching staff member as envisioned by the statute, in view of the holding of *Schulz v. State Board of Education,* 132 *N.J.L.* 345 (*E. & A.* 1944). *Schultz* held that substitute teachers were not included in the phrase "all teaching staff members." Two other cases, *Downs v. Board of Education of Hoboken,* 13 *N.J. Misc.* 853 (1935) and *Board of Education of Jersey City v. Wall,* 119 *N.J.L.* 308 (*Sup. Ct.* 1938) indicated that the mere designation, "substitute," could not be dispositive of the character of service if the proofs were clear that the teacher was serving as a regular teacher, and the substitute label was merely a device to avoid the tenure implications of service as a regular teacher. Thus, when we considered the

[1]It is readily apparent that petitioner was not paid the salary of a regular teacher.

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case of *Zielenski* against the background of the cases above cited, we did so on clear factual distinctions.

First, in *Zielenski* the evidence was conflicting as to whether she was employed for a questioned five-month period as a substitute or as a regular teacher. The evidence there showed that on separate days she had served as a day-to-day substitute and thereafter, according to her, was told that she was being employed for the subsequent five-month period as a regular teacher, whereas the Superintendent testified that she was being engaged as a substitute teacher.

On that evidence, and in line with the cases of *Wall* and *Downs*, we inquired into the nature of Zielenski's service and duties, and the benefits afforded her, as compared with regular teachers. Here, however, there was no dispute that petitioner knew and understood her employment to be that of a substitute to fill the two-month vacancy caused by the death of the regular teacher. There is no evidence that the Board used this device to avoid tenure entitlements. The resolution cited above made it clear that the employment was as a *substitute* which petitioner readily conceded.

Second, Zielenski, during the questioned five-month period, received the salary of a regular teacher; and she received benefits accorded only to regular teachers including sick leave, paid holidays, paid vacation periods, and paid absences for teachers' conventions. None of these benefits was accorded to Petitioner Biancardi. They were significant to us in reaching our determination in *Zielenski.* In short, the evidence in *Zielenski* showed that the only thing "substitute" about Zielenski's employment was the name applied by the Board to characterize the questioned five-month period of her service, but that otherwise there was no distinction between Zielenski and regular teachers. In the case under review, however, there were several elements of critical distinction.

The Commissioner in his opinion pointed out that Petitioner Biancardi performed duties under her assignment which were incidents of a regular teacher's employment.[2] However a review of these items indicates that these duties were no different from those which would be performed by a substitute teacher who was engaged to serve at the time the need to perform those duties arose, and where the substitute was capable of performing them. *N.J.S.A.* 18A:29-16 very clearly recognizes the right of a local board to engage substitute teachers. *N.J.S.A.* 18A:28-5 and 18A:1-1 set forth very clearly the time of service which may count for tenure and the persons who may claim it. As respondent local Board has urged, holding that the two-months' service of

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[2]The Commissioner, at p. 6 of his decision, enumerated them as follows:
"1. preparation of lesson plans
2. preparation of report cards
3. correction of written assignments
4. participation in a Back to School Night
5. conferences with parents
6. all other usual and customary teaching duties."

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petitioner in this case is countable toward tenure would eliminate the category of substitute teaching service unless it were on a one-day, "one-shot" basis. Such a holding would not permit the school authorities to discharge their full obligation in providing the best education for children in the district in unusual situations where a vacancy is created toward the end of a term by the death of a regular teacher. Certainly continuity was desirable in the educational process through the services of petitioner on a continuing substitute basis. It appears clear that the local board took every step that it could to provide that kind of education to the classroom pupils involved, and at the same time made it ever so clear in all respects that it was engaging a teacher for substitute service.

Full effect must be given to the statute prescribing tenure; and where a board is given an expressed period of time within which to terminate the services of a probationary teacher before the tenure statutes become operative, we ought not to foreshorten that period unless there is significant evidence dictating a contrary conclusion. Such was the case in *Zielenski,* and the State Board did not hesitate to find unanimously that tenure had been acquired by Zielenski. However in this case, the facts relating to the employment and the evidence presented to not support the majority's finding.

The Commissioner in his decision set forth the following:

> "*** It is clear that a certificate was required for petitioner to teach as either a substitute or as a teacher. Since the Board first agreed to employ her for an uninterrupted period from April 27, 1970 through June 1970, it follows that a certificate issued by the State Board of Examiners was required, since she could serve uninterruptedly for no more than twenty days on a substitute certificate issued by the County Superintendent of Schools. Such finding alone, however, is not totally dispositive of the matter***."

The thrust of his reasoning is that on a substitute teaching certificate she could serve uninterruptedly for no more than twenty days. It is assumed that this is advanced as some evidence of the Board's intention to treat her as a regular teacher in view of the fact that petitioner had a permanent teacher's certificate during the two-month period, rather than a substitute teacher's certificate.

The Commissioner stated that this aspect of the matter is not "dispositive," and correctly so. To hold otherwise would mean that a local board could never engage one with a permanent teacher's certificate as a substitute on any continuing basis for any period of time without such service being considered as tenure-directed service. There is no statute, no rule, nor other applicable directive that has been cited or found which precludes the holder of a regular teacher's certificate from serving as a substitute.

For all the above reasons, the State Board should have reversed the

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Commissioner and found that petitioner had not acquired tenure.

CALVIN J. HURD
Board Member, Mrs. Ruth Mancuso
joins in this opinion.

November 6, 1974 – Date of Decision
December 4, 1974 – Date of Service

William J. Convery,

Petitioner,

v.

Perth Amboy Board of Education and Anthony V. Ceres, Superintendent of Schools, Middlesex County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Orlando & McGimpsey (Stephen Orlando, Jr., Esq., of Counsel)

For the Respondents, Antonio & Flynn (Alfred D. Antonio, Esq., of Counsel)

Petitioner, an elementary school principal with a tenure status employed by the Board of Education of the City of Perth Amboy, hereinafter "Board," appeals from the determination of the Board which established his salary for the past several years below that paid to all other elementary school principals holding a Master's Degree.

The Board avers that petitioner's placement on the salary guide is correct and in accordance with its adopted salary policy which has been properly applied to him.

This matter has been submitted to the Commissioner of Education on a Stipulation of Facts, exhibits and Briefs.

Petitioner admits that he does not have a Master's Degree; however, he has an earned law degree (LL.B.) conferred by Mercer Beasley Law School (now Rutgers University School of Law) and is properly certified by the State Board of Examiners to serve as an elementary school principal.

Specifically, he avers that the Board's determination to pay him at a ratio applied to the teachers' salary guide in the "Master's Equivalency" column,

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rather than the "Master's Degree" column, is arbitrary and discriminatory. Therefore, petitioner requests the following relief:

That a salary schedule be added to the Board's salary policy for those persons who hold a doctorate degree, including the Doctor of Law degree; that a salary schedule also be added to the salary policy for those who have acquired thirty graduate credits of study beyond a doctorate degree salary schedule; and that petitioner be placed upon a salary schedule for those who possess thirty graduate academic credits beyond a doctorate degree. Petitioner also requests an Order of the Commissioner directing the Perth Amboy Board of Education to compensate him retroactively based upon a salary schedule for persons with thirty graduate credits beyond a doctorate. Finally, petitioner asks that he be awarded reasonable counsel fees for this litigation.

The Stipulation of Facts reads in pertinent part as follows:

Petitioner –

"***

1. In 1930 graduated from Bucknell University, Lewisburg, Pa., receiving an A.B. Degree.

"2. In 1931 was hired by the Perth Amboy Board of Education as a teacher, and assigned to teach at Perth Amboy High School.

"3. In 1933 graduated from Mercer Beasley Law School (now Rutgers Law School), Newark, New Jersey, receiving an LL.B Degree.

"4. In 1933 was assigned to teach the subject of Commercial Law, among other subjects, at the Perth Amboy High School, an assignment which was accepted and performed until July, 1955.

"5. Between 1931 and 1949 was recognized and paid as a teacher with a 'Bachelor's Degree.'

"6. In 1949 became recognized and paid as a teacher with the 'equivalent of the Master's Degree,' as the result of an amendment to the Salary Guide on May 5, 1949. (See Exhibit E)

"7. In July, 1952 received six (6) graduate credits in education from Rutgers University, New Brunswick, New Jersey, said credits being duly approved by the Superintendent (See Exhibit A).

"8. In September, 1952 received six (6) graduate credits in education from Rutgers University, said credits being duly approved by the Superintendent (see Exhibit A).

"9. In February, 1953 received six (6) graduate credits in education from Rutgers University, said credits being duly approved by the Superintendent (see Exhibit A).

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"10. In July, 1953 received six (6) graduate credits in education from Rutgers University, said credits being duly approved by the Superintendent (see Exhibit A).

"11. Between September, 1949 and July, 1955 was recognized and paid as a teacher with the 'equivalent of the Master's Degree.'

"12. In 1955 was appointed Principal of two elementary schools, #4 and #10, in Perth Amboy, and was paid on the same scale as principals with Master's Degrees, there being no economic distinction between the salaries of Master's Degrees and the 'equivalent of the Master's Degree.'

"13. In July, 1956 had completed 25 consecutive years of service in the Perth Amboy School System.

"14. In February, 1960 received eight (8) graduate credits in education from Rutgers University, said credits being duly approved by the Superintendent (see Exhibit A).

"15. As of February, 1960 had attained a total of thirty-two (32) graduate credits in education from Rutgers University, said credits being duly approved by the Superintendent (see Exhibit A).

"16. On December 1, 1970 became eligible for a Juris Doctor Degree from Rutgers University School of Law, as a result of the adoption of a policy by Rutgers to confer a J.D. Degree upon graduates who had previously received an LL.B Degree.

"17. Since September, 1955 has served as an Elementary School Principal for the Perth Amboy Public Schools.

"It is stipulated that the following items are to be annexed hereto and made a part hereof: [Exhibits B through Z]" (at pp. 1-4)

There is no question about either petitioner's tenure status or his certification as an elementary school principal. Therefore, the primary issue to be determined is whether petitioner is eligible, by virtue of his training and the academic degrees he holds, to be paid according to a ratio of 1.375 as applied to the teachers' guide for the category of the Master's Degree plus 30 credits.

Petitioner does not challenge the Board's authority to adopt a salary policy for all employees; however, he avers that the Board recognized him as a teacher with a Master's Degree equivalency on May 5, 1949, when it adopted the resolution dated May 19, 1949, which reads in pertinent part as follows:

"*** The equivalent of the Master's degree as used in the guide shall be 32 hours credit on the graduate level and shall be interpreted to mean graduate credit obtained in liberal arts colleges, universities, teachers colleges, other teacher training institutions, nurses training schools; also *a*

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*law degree obtained from a recognized law school shall be equivalent to a Master's degree.****" (Exhibit F) (*Emphasis supplied.*)

Petitioner was paid as a teacher with a Master's Equivalency between 1949 and 1955 when he was promoted to the position of elementary school principal. Petitioner asserts that the expressed Board policy on April 7, 1955, made no distinction between "Master's" and "Equivalency" and that the recognized salary levels for principals were "Bachelor's Degree" and "Master's Degree." He was paid the same salary as principals having a Master's Degree.

The Commissioner observes the fact that the requirement for a master's Degree as a prerequisite for obtaining a principal's certificate issued by the State Board of Examiners was established in October 1961, pursuant to *N.J.A.C.* 6:11-10.2 There was no subsequent rule or requirement that principals not holding a Master's Degree must obtain one in order to maintain their qualifications for the principal's certificate.

The Commissioner notes that petitioner's permanent elementary school principal's certificate was awarded in August 1960, and at that time a Master's Degree was not a prerequisite for acquiring that certificate. Rule changes made by the State Board of Examiners and approved by the State Board of Education in October 1961, now require that a Master's Degree and certain specific courses are prerequisites for the acquisition of the principal's certificate. The Commissioner determines, therefore, that petitioner did meet all the specific requirements necessary for receiving his elementary school principal's certificate and that his certificate is not diminished because he does not now possess a Master's Degree.

Between 1952 and 1960 petitioner earned an additional 32 graduate credits which were acknowledged and recognized by the Superintendent of Schools as being credits earned beyond the "Master's" status. The Board does not deny that these additional credits were earned and approved.

Petitioner relies also on established Board policy which provided, *inter alia,* that: "*** a law degree *** shall be equivalent to a Master's degree.***" (Exhibit F) This provision, *ante,* was continued by the Board for the years 1968 through 1971, although petitioner's compensation was changed in 1968 to reflect a ratio applied to the teacher's Master's Equivalency guide rather than the Master's Degree guide. The effect of this change, by Board resolution, was that subsequent to 1968, petitioner received a lesser salary than did elementary principals holding a Master's Degree.

A printed salary statement for principals for the school years 1968-69 through 1972-73, contains the names, salaries, highest degree held, and credited years of experience for the Board's principals. Twelve of the thirteen principals indicated thereon have a Master's Degree and two of those twelve have 30 additional credits. The pertinent information concerning petitioner shows "Eq." in the column headed "Degree" and an asterisk beside his name (showing also forty-two years experience). The asterisk indicates the following: "*In the

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Salary Guide a Law Degree is considered the equivalent of a Master's Degree." (Exhibit R)

Although a board clearly has the authority to adopt a salary policy following negotiations and to apply that policy to all employees, simple logic compels the Commissioner to determine that a board cannot hold that a law degree is equivalent to a Master's Degree and hold concurrently that for salary purposes it is equal only to a Master's "equivalency." (Exhibit F)

It is common knowledge, as the Board points out, that many school districts throughout the State have salary policies with columns showing different levels of compensation between employees holding degrees and those having "equivalency" status. However, in most instances, those distinctions provide for additional compensation for the earned degree as opposed to the accumulation of credits that do not meet the earned degree status.

Petitioner is properly certificated, and the Board's salary policy states that an elementary school principal shall be paid a ratio as applied to the maximum salary of teachers with similar training. Since the Board's own policy equates a law degree with a Master's Degree, it follows logically that petitioner must be paid the same salary as other elementary school principals on the Master's Degree scale in accordance with the Board's several salary policies adopted since 1968. (Exhibits M-Q)

In furthering his education, petitioner also acquired 32 graduate credits in school administration and related courses which were approved by the Superintendent. However, the record shows that these credits, which have been accepted and approved by the Superintendent, are not incremental for the purpose of placement on a higher step of the salary guide (*Robert J. Cusack v. Board of Education of the Borough of West Paterson,* 1970 *S.L.D.* 144); rather they reflect the kinds of courses offered by teacher training institutions which would ordinarily lead to the acquisition of a Master's Degree in elementary school administration. *N.J.A.C.* 6:11-10.8 Therefore, they cannot be considered as graduate credits beyond the Master's Degree in this matter, in accordance with the Board's existing salary policy, because petitioner does not hold an earned Master's Degree in the field of education. Thus, in this instance, petitioner cannot apply the course work that ordinarily leads to a Master's Degree in Education, to support his claim for compensation for credits earned beyond the Master's Degree.

From the time of petitioner's appointment as an elementary school principal in 1955 and until 1968, petitioner had been paid at the maximum level for elementary school principals in the district. The record shows that petitioner was entitled to expect a continuation of that level of compensation.

In making these determinations, the Commissioner does not rely on petitioner's argument that the doctrine of estoppel prevents the Board from making a change in its salary policies, even though such policies are of long standing. The Board is vested by statute with the authority to adopt salary

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schedules and salary policies. *N.J.S.A.* 18A:29-4 The determinations herein are based upon an interpretation of the Board's own salary policies, *ante.*

The doctrine of laches does not apply to petitioner in this instance. His appeal is timely, because it was filed when he discovered that his salary was less than that paid to other elementary principals, although this practice extended back to 1968.

In *Cusack, supra,* the Commissioner commented as follows:

> "*** The Commissioner agrees with respondent's contention that a board of education has authority to establish salary guides and policies applicable to all staff members as long as they are not in conflict with the basic statutes. He further agrees that absent such conflict or clear evidence that salary policies were administered in a discriminatory manner, he should not substitute his discretion for that of the board either with regard to the formulation of the policies or their interpretation.***" (at p. 146)

In this specific instance the Board's own salary policies state that "*** a law degree *** shall be equivalent to a Master's degree.***" If the Board meant to impart any other than the plain meaning of these words, it could have done so at any time. Petitioner is entitled to be paid on the basis of the ratio established for principals who hold a Master's Degree, and the Commissioner so holds.

The Commissioner therefore directs that the Board of Education of the City of Perth Amboy compensate petitioner retroactively from 1968 to the present in accordance with its adopted policies. The Board shall calculate petitioner's annual salaries by applying the appropriate ratio for principals who hold a Master's Degree. The difference between these calculations and the amounts actually paid to petitioner since 1968, because of the Board's application of a ratio for principals holding an equivalency status, is to be paid to petitioner at the next regularly scheduled pay period.

There is no authority which demands that the Board establish a salary policy recognizing the Juris Doctor Degree for which petitioner prays for additional compensation.

Finally, with regard to petitioner's prayer for the awarding of counsel fees in the instant matter, the Commissioner can find no statutory provision which permits such relief. The Commissioner stated the following in *Noorigian v. Board of Education of Jersey City,* 1972 *S.L.D.* 266:

> "*** The Commissioner has previously determined that there is no provision in the statutes for payment of interest, costs and legal fees.*** Nor can there be found any precedent or statutory authority for awarding counsel fees as claimed by petitioner.***"

In accord therewith, the Commissioner denies petitioner's prayer for the award of counsel fees.

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These specific requests for relief are denied; however, the Perth Amboy Board of Education is directed to compensate petitioner in accordance with the directive, *ante*.

COMMISSIONER OF EDUCATION

April 9, 1974

In the Matter of the Tenure Hearing of Harvey Francis Rosen, School District of the City of Margate, Atlantic County.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Leonard C. Horn, Esq.

For the Respondent, Perskie and Callinan (Marvin D. Perskie, Esq., of Counsel)

This matter having been brought before the Commissioner of Education (Eric G. Errickson, Assistant Director, Division of Controversies and Disputes), by Marvin D. Perskie, Esq., attorney for the respondent Superintendent of Schools, Harvey Francis Rosen, on a Motion for Relief, *pendente lite,* received April 5, 1974, requesting temporary reinstatement pending adjudication of the charges certified by the Board of Education of the City of Margate against respondent, Leonard D. Horn, Esq., appearing for the aforementioned Board of Education; and

It appearing that on March 2, 1974, the Board voted, pursuant to *N.J.S.A.* 18A:6-10 *et seq.,* unanimously to certify charges before the Commissioner against respondent; and

It appearing that the Board, at that time, took no action to suspend respondent pursuant to *N.J.S.A.* 18A:6-14; and

It appearing that on or about thirty days thereafter the Board acted to suspend respondent without pay; and

It appearing that on April 5, 1974, Judge George B. Francis, Superior Court of New Jersey, Chancery Division, ordered respondent reinstated to his position of employment for good cause shown, such Order effective through April 10, 1974, and such Order requiring action by the Commissioner by the aforesaid date on the matter of interim relief; and

It appearing that the action of the Board in suspending respondent Superintendent thirty days after its certification of charges before the

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Commissioner is contrary to the statutory authorization for such suspension as set forth in *N.J.S.A.* 18A:6-14 which provides:

> "Upon certification of any charge to the Commissioner, the board may suspend the person against whom such charge is made, with or without pay, pending final determination of the same ***," and

It appearing that such suspension by the Board following the elapsed thirty days after certification has no other statutory authorization; and

It appearing that such modification of the options presented to the Board by *N.J.S.A.* 18A:6-14 are likewise contrary to opinions set forth by the Commissioner *In the Matter of the Tenure Hearing of Dale Miller, School District of the Borough of Manville, Somerset County,* 1973 *S.L.D.* 409; and *In the Matter of the Tenure Hearing of Robert H. Beam, School District of the Borough of Sayreville, Middlesex County,* 1973 *S.L.D.* 157; and

The arguments of counsel having been heard regarding the allegation that no statutory basis exists for the Board's untimely suspension of the Superintendent without pay; and

The Commissioner having found that there is reason to believe the Board acted without statutory authorization to suspend the Superintendent thirty days subsequent to the certification of charges, and having determined that within the present record there is no clear showing that such suspension is legal; therefore

IT IS ORDERED that the Board of Education of the School District of the City of Margate restore petitioner to his position of employment as Superintendent with pay, pending a final determination of the charges certified before the Commissioner.

ORDERED this 9th day of April 1974.

COMMISSIONER OF EDUCATION

Case closed April 17, 1974

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Mary Taccone,

Petitioner,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Lordi and Imperial (George Imperial, Esq., of Counsel)

For the Respondent, Barry A. Aisenstock, Esq.

This matter having been opened before the Commissioner of Education by formal Petition of Appeal and Answer thereto, and the Newark Board of Education, hereinafter "Board," having filed a Notice of Motion for Declaratory Judgment in regard to the lack of Board determination on the issues involved herein thereby seeking an order of remand from the Commissioner, and a conference of counsel being held among the parties on April 2, 1974; and

It appearing that petitioner alleges a denial of salary for sick leave between the dates of January 1, 1971 to October 31, 1971; and

It appearing that the determination to deny salary for the above-stated period was promulgated by the Acting Superintendent of Schools; and

It appearing that the Board has not rendered its own intependent determination pursuant to its authority in *N.J.S.A.* 18A:30-1 *et seq.*; and

It appearing that the parties agree that the Board must first render its determination prior to the Petition being continued before the Commissioner; now therefore

IT IS HEREBY ORDERED on this 11th day of April 1974, that the complaints alleged by petitioner herein be in the first instance presented to the Newark Board of Education for determination. Accordingly, the matter is hereby remanded without prejudice.

COMMISSIONER OF EDUCATION

April 11, 1974

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In the Matter of the Annual School Election Held in the School District of the Borough of Rutherford, Bergen County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting at the annual school election held February 13, 1974 in the School District of the Borough of Rutherford, Bergen County, for three members of the Board of Education for full terms of three years each were as follows:

	At Polls	Absentee	Total
Ian McLean	1028	9	1037
Arthur R. Everett, Jr.	1007	23	1030
David Hardin	965	8	973
Ann C. Pickering	941	23	964
Rosemarie Sylvander	953	7	960
Dunn E. Smith	809	21	830

Pursuant to a letter request from Ann C. Pickering, dated February 19, 1974, the Commissioner of Education directed his authorized representative to conduct a recheck of the totals on the voting machines used in this election. The recheck was made at the warehouse of the Bergen County Board of Education in Hackensack on March 5, 1974.

The Commissioner's representative denied a verbal request by Candidate Pickering for a recount of the absentee ballots in conjunction with the recheck of the voting machines in question. The basis for this determination was grounded on the fact that the Commissioner has consistently held in past decisions that he is without authority to make any determination with respect to the results of the counting of absentee ballots. He has held further that the procedures for counting such absentee votes are set forth in Title 19 of the New Jersey Statutes governing elections, and that he must accept the certification of the County Board of Elections which was previously made to the Secretary of the Board of Education and included in the vote totals of a school election as required by *N.J.S.A.* 18A:14-28. *In the Recount of Ballots Cast at the Annual School Election in the Township of Monroe, Gloucester County,* 1957-58 *S.L.D.* 79; *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Borough of Little Ferry, County of Bergen,* 1960-61 *S.L.D.* 203; *In the Matter of the Annual School Election Held in the School District of the Township of Monroe, Gloucester County,* 1973 *S.L.D.* 212.

The Commissioner's representative reports that the announced tally set forth above was confirmed.

* * * *

The Commissioner finds and determines that Arthur R. Everett, Jr., Ian McLean and David Hardin were elected to full three-year terms on the Borough

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of Rutherford Board of Education at the annual school election held on February 13, 1974.

COMMISSIONER OF EDUCATION

April 16, 1974

In the Matter of the Annual School Election Held in the School District of the Borough of Island Heights, Ocean County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, John James Blake, Jr. (Robert M. Bonomo, Esq., of Counsel)

Petitioner, Richard G. Pryor, a write-in candidate for membership on the Island Heights Board of Education, alleges that many voters were denied an opportunity to properly cast their ballots for him in the 1974 school election. He requested a recount of the ballots cast and an investigation into the conduct of the election.

An inquiry was conducted on March 7, 1974 at the Robert J. Miller Airpark, Route 530, Berkeley Township, and in the office of the Ocean County Superintendent of Schools, Toms River. Counsel for petitioner waived the filing of a hearing examiner's report. Therefore, the Commissioner of Education will determine this matter based upon the record before him.

Only one polling place and one machine were used (Jamestown). There is no question about the results of the vote on the public question. The votes cast for candidates were examined and the *Combined Statement of Result of [the] School Election* is shown as follows:

		Votes Counted For Candidates		
Names of Candidates	**Terms**	**At Polls**	**Absentee**	**Total**
Lucy Bottomley	for 3 years	159	3	162
Richard Morrison	for 3 years	143	3	146
Joseph Dean	for 3 years	125	0	125
Richard Walsh	for 1 year	145	2	147
Richard G. Pryor	for 3 years	62	2	64
Richard G. Pryor	for 1 year	13	1	14
John De Leo	for 3 years	9	-	9
John De Leo	for 1 year	16	4	20
James Paris	for 3 years	3	2	5
James Paris	for 1 year	3	-	3
Jame Harris	for 1 year	1	-	1
Rodger Pryor	for 1 year	1	-	1
Fred Olton	for 3 years	2	-	2
James Winn	for 1 year	1	-	1
Betty J. Scammel	for 1 year	1	-	1

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Petitioner does not contest the award of seats on the Board of Education to those three persons who won terms for three years, however, he avers that he announced publicly that he would be a write-in candidate for a one-year unexpired term and that the improper instructions given to voters at the polling place caused them to (1) lose their vote, or (2) cast it for him improperly for a three-year term.

The table, *ante,* shows that petitioner received fewer votes than two other candidates for the one-year term. However, petitioner avers that those votes cast for him for the three-year term were meant to be cast for the one-year term, and if so considered, they would be more than enough to give him a seat on the Board of Education.

Petitioner's protest is stated specifically as follows:

> "1. the voting machine was inadequately designated so that those voters desiring to vote for Mr. Pryor as a write-in candidate were mislead and confused and 63 out of 75 votes cast for Mr. Pryor were disallowed,
>
> "2. several voters have complained that the Ocean County Board of Election workers in control of the voting machine mislead or misinformed them as to how they were to cast in their write-in votes so that the votes were disallowed,
>
> "3. no instructional ballots were posted near the voting machine as required by New Jersey Statutes." (Petitioner's letter of February 21, 1974)

The transcript of the inquiry and the record submitted to the Commissioner reveal the following:

Petitioner alleges that he announced publicly that he was a candidate only for a one-year term. (Tr. 3-4) He alleges also that the lack of the displaying of instructional ballots pursuant to statute, *N.J.S.A.* 19:49-4, and the inadequate instructions given to voters about casting a write-in ballot were the cause of his defeat. He submitted nineteen affidavits of voters, each stating that:

> "Due to the fact that the write-in column was not adequately designated, I am convinced that my vote which I intended to cast for Mr. Pryor for the said office, was not properly counted."

The Board Secretary admitted that she did not give the election workers any instructions prior to the annual school election. The election workers testified that they have worked the polls together in prior Primary and General Elections, and that they handled this school election in the same way that those elections were handled. They testified further that they gave proper instructions to every voter who asked about the operation of the machine, and that they tried to give detailed information on the write-in procedure when asked by a voter. (Affidavits; Exhibits A, B; Tr. 33-38; 44-45)

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They admitted that they did not display the sample ballot which should have been removed from inside the machine door and prominently displayed to the voters. However, they testified that they explained and demonstrated the machine itself when asked. (Tr. 44-50)

The testimony of several witnesses for petitioner shows that they were confused about casting a write-in ballot and may have cast it in the wrong place or even lost their ballot by tinkering with the write-in gates. (Tr. 53-54) However, there was no testimony nor evidence that any voter was told that he should write in petitioner's name in the space which provided for the three-year term. In fact, petitioner testified that he was not specifically told to write in his name in the large (first) square, but that it seemed to be the most appropriate place for a write-in ballot. (Tr. 69) There was similar testimony from other witnesses.

An examination of the face of the Jamestown voting machine shows that there are a number of slots across the top of the machine which are covered by metal slides or gates. These slots are numbered sequentially, beginning with number 1, and the voter must raise the proper slot corresponding to the term of office for which he wishes to cast his ballot and then write in his personal choice. The first slot on the machine is a large rectangle, obviously different from the others. To the left of this slot are the words "Personal Choice" indicating that write-in ballots are to be cast on this line.

Some of the voters testified that they mistakenly cast their ballot in the large square (three-year term). Others wrote on the write square on which the words "Personal Choice" were written.

The face of the machine was set up in pertinent part as follows:

For Membership to Board of Education Full Term – Three (3) Years (Vote for Three)			For Membership to Board of Education (Unexpired One Year Term) Vote for two
1A	2A	3A	4A
Lucy	Richard	Joseph	Richard
BOTTOMLEY	MORRISON	DEAN	WALSH

It can be seen that only one candidate's name appeared on the machine for a one-year unexpired term. However, there is no restriction placed on any voter that would limit his vote to that particular one-year term, or a term of any other duration for which there was a vacancy. The voters who wished to cast their write-in ballots for a one-year unexpired term could have done so by raising the slide on slot four and/or five and writing the name[s] of their personal choice.

The Commissioner is now asked to determine whether or not those sixty-four voters who voted for petitioner for the three-year term actually meant to vote for petitioner for a one-year term; or in the alternative, determine that the lack of the posting of an instructional ballot, coupled with the alleged

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improper instruction of the election workers, is sufficient reason for setting aside the election. The inquiry confirmed the announced results, *ante*. Therefore, only the procedural aspects of the election need to be addressed.

The testimony discloses that the election workers were experienced and that the Board Secretary was new. The election workers doubted that the Board Secretary could give them any procedural instructions, and they testified that they had given voters all necessary instructions. Although the sample ballot display was not exhibited, the Commissioner finds evidence in the record that the election was conducted in essential compliance with the statutes and the spirit of the election laws. While the Commissioner cannot condone the failure to adhere precisely to the statutory requirement to post sample ballots (and display the machine sample), he concludes that there was essential compliance with the statutes and sufficient evidence to show that honest effort and good faith instructions were given to voters who requested assistance.

On the basis of the evidence before him, the Commissioner cannot determine that ballots cast for a three-year term for Candidate Pryor were actually meant for a one-year term. Therefore, the Commissioner must conclude that the voters cast their ballots for the terms shown in the announced results, *ante*.

The Commissioner directs the Board Secretary to hereafter instruct the election workers regarding the conduct of school elections pursuant to *N.J.S.A.* 18A:14-1 *et seq*. Absent a finding of improper or illegal action sufficient to set aside the results of the election, the Commissioner determines that the election results are not invalidated herein by the minor irregularities in the election procedure as evidenced at the inquiry.

In similar matters wherein there was found substantial compliance with statutory requirements, both the Commissioner and the courts have upheld the validity of elections. *In the Matter of the Election Inquiry In the South Brunswick District, Middlesex County*, 1972 *S.L.D.* 16; *Dimon v. Ehrlich et als.*, 97 *N.J. Super.* 88 (*App. Div.* 1967)

For the foregoing reasons, the results of the annual school election will stand as announced.

COMMISSIONER OF EDUCATION

April 16, 1974

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In the Matter of the Annual School Election Held in the School District of the Township of Lyndhurst, Bergen County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting at the annual school election held February 13, 1974 in the School District of the Township of Lyndhurst, Bergen County, for three members of the Board of Education for full terms of three years each were as follows:

	At Polls	Absentee	Total
Ronald W. Bogle	858	11	869
James D. Scotti	745	0	745
Joseph F. Breslin, Jr.	726	3	729
Anthony J. Rosa	715	9	724
Michael W. O'Gorman	658	7	665
John Betleiewski	587	9	596
Peter Ferriero	537	0	537
Massimo Chierico	522	2	524

Pursuant to a letter request, dated February 21, 1974, from Ralph A. Polito, Esq., counsel for Candidate Anthony J. Rosa, the Commissioner of Education directed his authorized representative to conduct a recheck of the totals on the voting machines used in this election.

The recheck was made at the warehouse of the Bergen County Board of Elections in Hackensack on March 5, 1974.

It was agreed that the recount of the votes cast would be limited to Candidates Anthony J. Rosa and Joseph F. Breslin, Jr.

The Commissioner's representative reports that the announced tally for Candidates Rosa and Breslin as set forth above was confirmed as follows:

	At Polls	Absentee	Total
Anthony J. Rosa	715	9	724
Joseph F. Breslin, Jr.	726	3	729

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner finds and determines that Ronald W. Bogle, James D. Scotti, and Joseph F. Breslin, Jr. were elected to full three-year terms on the Township of Lyndhurst Board of Education at the annual school election held on February 13, 1974.

COMMISSIONER OF EDUCATION

April 16, 1974

You are viewing an archived copy from the New Jersey State Library.

Westfield Education Association,

Petitioner,

v.

Board of Education of the Town of Westfield, Union County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Petitioner, Mortimer Katz, Esq., and Peter S. Valentine, Esq.

For the Respondent, Nichols, Thomson & Peek (William D. Peek, Esq., of Counsel)

This matter comes before the Commissioner of Education on Motion filed by the Westfield Education Association, hereinafter "Association," to enjoin the Westfield Board of Education, hereinafter "Board," from causing its schools to be open for classes on April 17, 18, and 19, 1974. The Board opposes the Association's Motion, *sub judice,* and asserts that its determination to conduct classes on those three days is in concert with its obligation to the pupils of the Town of Westfield.

Initially, the Association filed a verified complaint (P-6) in Superior Court of New Jersey, Union County, Chancery Division, with an Application for an Order to Show Cause against the Board. The Court declined to rule on the Application and although the matter was not remanded to the Commissioner, the Court opined that the Association might wish to pursue its available administrative remedies.

The Commissioner's office was first informed of this dispute by telephone late in the morning of April 10, 1974 by counsel to the Association. Immediately thereafter, a telephone conversation occurred between the Commissioner's office and counsel to the Board.

It was then determined that the Commissioner would assert jurisdiction in this matter pursuant to his authority at *N.J.S.A.* 18A:6-9. Because of the time element being critical in this dispute – the three days in question being less than a week away – the parties were notified to appear before a representative of the Commissioner at 3:00 p.m. that day, April 10, 1974, to present arguments in support of their respective positions. Leave was granted the Association to file its Motion papers at the time of its 3:00 p.m. appearance.

The record of that argument, with supporting documents, is now before the Commissioner.

The events leading to this dispute are these. During December 1973 when the impact of the present fuel energy crisis was most severe, the State Board of

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Education pursuant to its authority at *N.J.S.A.* 18A:4-15 General rule-making power and *N.J.S.A.* 18A:4-16 Incidental powers conferred, determined that:

> "WHEREAS, it is recognized that the public schools face an energy crisis, and
>
> "WHEREAS, on December 3, the Governor's Cabinet Committee on Energy did accept and support a proposal to extend the school Christmas vacation to January 7, 1974, now therefore be it
>
> "RESOLVED, that the Christmas vacation shall be extended through the first week of January; students to return to school January 7, 1974."

Thereafter, on January 8, 1974, the Board adopted the following resolutions: (P-4)

> "*** On motion of Mrs. Allen, seconded by Mr. Leslie, it was moved to approve the following changes in the school calendar for 1973-74:
>
> > "Ratify the closing on January 2, 3, 4, 1974 as directed by the New Jersey State Board of Education.
> >
> > "Designate April 17, 18, 19, 1974 as school days to insure the required 180-day minimum school year.
> >
> > ***
>
> "All these changes are part of the effort to conserve on fuel in the present crisis.***"

On April 2, 1974, Assembly Bill No. 1258, hereinafter "Bill," was signed into law and, in its entirety, provides as follows:

> "Be it enacted *by the Senate and General Assembly of the State of New Jersey:*
>
> "1. The days of January 2, 3 and 4 of 1974 during which schools were closed in this State by order of the State Board of Education shall for all purposes including State aid be considered as days when schools were open and facilities provided.
>
> "2. This act shall take effect immediately."

The Statement of the Bill reads as follows:

> "The purpose of this bill is to count 3 days during which schools were closed in this State by order of the State Board of Education as days when schools were open for all purposes including qualification of these schools for State aid."

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Originally, the school calendar adopted by the Board on April 3, 1973 (P-2) provided that the days between April 15 and April 19, inclusive, were to be considered "Spring Vacation" and as such "Pupil Holidays." Thus, according to the original school calendar, pupils were excused from class on Thursday, April 11, 1974, and were not to report back for class until Monday, April 22, 1974.

However, by virtue of its action on January 8, 1974, *ante,* by which it designated April 17, 18 and 19, as school days, the Board altered its original school calendar, *ante,* so that pupils were then expected to report for class on Wednesday, April 17, 1974.

The Association argues that the Board's unilateral action of January 8, 1974, *ante,* is violative of the Agreement (P-1) entered into between the parties. Specifically, the Association points to Article V of the Agreement which provides, in its entirety, as follows:

> "A. There shall be no increase in the number of days that teachers are required to be in school when students are not present without negotiations.
>
> "B. There shall be no increase in the length of the school day without negotiations.
>
> "C. The Board and the Association shall arrive at a mutually satisfactory school calendar after due consideration and consultation with other interested parties for the school year 1972-73 [It is agreed that this Agreement was extended by the parties for the 1973-74 school year].
>
> "D. Prior to any adjustment in the starting time of the teaching work day, the WEA [Association] will be consulted prior to such decision and provided such change is necessary and reasonable the WEA will not unreasonably withhold agreement."

Subsequent to the passage into law of the Bill, the Association requested the Board to rescind its earlier resolution (P-4) which provided that school would be in session on April 17, 18, and 19. The Association argues that the only reason the Board adopted that resolution was to meet the 180-day requirement for State aid and further argues that, because the Bill is now law, there is no need to alter the original school calendar. (P-2) The Board has refused the Association's request and denies that the only reason for holding class sessions on April 17, 18, and 19 is for purposes of State aid.

The Association asserts that not only did the Board violate Article V of its Agreement as set forth, *ante,* but it also countermanded the express intention of the Legislature articulated by the Bill. In this regard, the Association relies on a similar case in which a board sought to shorten the spring recess by three days and the education association was successful in obtaining a court-ordered restraint against the board from so doing. In *Englewood Teachers Association v. Board of Education of the City of Englewood, New Jersey Superior Court, Chancery Division,* Order to Show Cause, April 10, 1974, Temporary Stay of

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Judgment denied April 11, 1974 (Appellate Division). The Honorable George B. Gelman, J.S.C., in ordering the Englewood Board to adhere to its original school calendar which provided that classes would not be held on April 17, 18, and 19, 1974, held, *inter alia:*

> "*** the statute [Assembly Bill 1258] means "' that teachers are to be credited with three days of service for the days of January 2, 3 and 4 ***."
>
> "*** I am satisfied that the Legislature has the power to do it, [to enact legislation which provides that teachers rendered service on January 2, 3, and 4 when, in fact, the schools were closed] since all boards of education and all of our school law is a creature of the Legislature, and if the Legislature so wished it could alter educational policy and could establish vacations whenever it deemed fit in their discretion: I see no reason why they do not have the authority to enact legislation having this purpose and having such an effect as here.
>
> "The boards of education have no alternative but to follow whatever the legislative command is. And if that command is to say that three days which did not exist in fact exist, then that is it so far as the Board is concerned.***" (at pp. 8-9)

Finally, the Association concludes by asserting the Legislature fully intended the Bill to be beneficial to teachers because it included the phrase "*** shall for all purposes ***." This phrase, the Association contends, precludes boards of education from unilaterally changing terms and conditions of employment without prior negotiation. Because this Board did unilaterally change the school calendar, and in light of the Bill, the Association prays that the Commissioner restrain the Board from ordering classes to be conducted on April 17, 18, and 19, 1974.

The Board, in the first instance, argues that the Association's complaint be dismissed because of the lack of timeliness. The Board avers that its pupils having been dismissed on Thursday, April 11, 1974 with the expectation of returning for classes on April 17, 1974, could not now be properly notified, if the Association prevails in this matter, to return the following Monday, April 22, 1974. The Commissioner rejects this allegation of the Board, for a review of the school calendar sent home to parents in September 1974, entitled "Parents' School Calendar 1973-74," (P-3) reports the procedure for unanticipated school closings as follows:

> "*** Radio stations WOR, WNEW, WVNJ and WERA will carry notice of school closing due to inclement weather *or other emergencies.*
>
> "In addition, the Fire Department will sound the Town Air Raid sirens at 7 a.m. for 1½ minutes. ***" (*Emphasis supplied.*)

The Commissioner believes that adequate procedures have been established

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by the Board to satisfactorily notify pupils of the unanticipated closing of school. Accordingly, the Board's Motion to Dismiss is denied.

The Board argues that its action of January 8, 1974 by which it resolved to conduct class sessions (P-4, *ante*) on April 17, 18, and 19 is not an amendment to its Agreement (P-1, *ante*) with the Association. This position, the Board avers, is grounded on a provision of the school calendar (P-2, *ante*) it adopted on April 3, 1974, which provides:

> "*** NOTE: In the event more than one Snow Day is needed the additional days will be made up at Spring Vacation, beginning with April 19 [the last of the three days in dispute herein] and working back." (P-2)

Rather than its January resolution (P-4) being an amendment to the Agreement (P-1), the Board asserts that that action is nothing more than its effort to provide 180 classroom days of instruction for its pupils as required by statute and by regulation of the State Board of Education as set forth at *New Jersey Administrative Code, Title* 6, *Chapter* 27, *Section* 1, *Subsection* 13 (*N.J.A.C.* 6:27-1.13) which provides, *inter alia*:

> "The following words and terms, when used in this Chapter, shall have the following meanings *** 'School year.' A school year shall consist of not less than 180 school days.***"

The Board argues that notwithstanding the passage of the Bill, the fact remains that its pupils were deprived of three days of education during January and it is those days of classroom instruction for its pupils that it wants recouped. The Board contends that its January resolution (P-4) was an exercise of its authority to make up days when necessary as evidenced by the provision on the face of the school calendar (P-2) in regard to snow days. The Board argues that the "snow days" provision really means having the authority to make up days when school had to be closed in an emergency, such as the assassinations of President John F. Kennedy and the Reverend Dr. Martin Luther King. The Board avers that it really does not have to "snow" for it, the Board, to make up days when necessary to achieve 180 school days.

Pointing out that its determination to have classes conducted on April 17, 18, and 19 is in no way punitive to the members of the Association (for they did not report to duty on the three days in January), nor violative of the Agreement (for the total number of school days in session as set forth in the original calendar (P-2) has not been increased), the Board argues that if it is not allowed to have classes conducted on the three days in question, not only will its pupils lose three days of instruction, but the taxpayers of Westfield will be paying for services not actually rendered.

The Board, in arguing that it has the responsibility to provide its pupils with a sufficient number of daily class sessions, cites *Dunellen Board of Education et al. v. Dunellen Education Association et al.*, 64 *N.J.* 17, (1973) and *Burlington County College Faculty Association v. Board of Trustees, Burlington County College,* 64 *N.J.* 10 (1973) as support.

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Finally, the Board avers that, prior to its action of January 8, 1974 in regard to its resolution (P-4), the Association agreed with the necessity of having three additional days of class instruction as evidenced by a letter (R-1) dated January 3, 1974, and sent by the President of the Association to the President of the Board. That letter is reproduced here, in pertinent part:

> "*** The [staff] poll [of when the three days should be made up] revealed a strong feeling from the teachers that these days be made up in June ***"
>
> "*** However, since it seems that we all must live with the situation, we ask that you seriously consider the wishes of the teachers in your deliberations ***."

It is noted that the letter (R-1) from the President of the Association to the President of the Board represented an attitude prior to the passage of the Bill.

The Board, in its opposition to the Association's Motion herein, asserts that the Bill is unconstitutional in that it violates "*** Article 10 of the Constitution of the United States ***." (Tr. 28) The Association argues that the constitutionality of the Bill is not a proper matter to be adjudicated by this administrative tribunal.

In regard to the constitutionality of the Bill, the Commissioner is without authority to declare the Bill in question unconstitutional. It is the duty of State agencies and administrative bodies to accept a legislative act as constitutional until such time as it is declared unconstitutional by a qualified judicial body. See *Dominick F. Colangelo v. Board of Education of the City of Camden,* 1956-57 *S.L.D.* 62; *George B. Thorp v. Board of Trustees of Schools for Industrial Education–Newark College of Engineering,* 1949-50 *S.L.D.* 61, affirmed State Board of Education, 1950-51 *S.L.D.* 70, affirmed 6 *N.J.* 498 (1951).

The Commissioner has thoroughly reviewed the arguments of the parties, the cases cited in support of their respective positions, and the Commissioner's prior decisions in regard to school calendars.

In *Carl Moldovan et al. v. Board of Education of the Township of Hamilton, Mercer County,* 1971 *S.L.D.* 246, the Commissioner extensively reviewed the purposes of the school calendar and the relevant statutes which are *in pari materia* and cited in *Eugene Somma et al. v. Board of Education of the City of Long Branch, Monmouth County,* 1974 *S.L.D.* 276. The Commissioner stated the following conclusion in *Moldovan, supra:*

> "*** The whole of these parts clearly indicates that the Legislature has provided for: (1) a defined school year, (2) the adoption of a school calendar, (3) a minimum number of 180 days of operation of public schools in order for a local board to receive an apportionment of state aid, and (4) compulsory school attendance with penalties for the violation thereof. These statutes *in pari materia* serve the State policy and the

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> deeply-rooted purpose of the law to provide for '*** a thorough and efficient system of public schools for the instruction of all the children in the State.'***" (at p. 251)

Each district board of education in this State bears the responsibility to conduct the public schools within its charge in the best interests of the children to be served. *Clinton F. Smith et al. v. Board of Education of the Borough of Paramus et al., Bergen County,* 1968 *S.L.D.* 62, affirmed 1968 *S.L.D.* 69, dismissed New Jersey Superior Court, Appellate Division, September 8, 1969 This overriding purpose of the public schools is clearly expressed in *Bates v. Board of Education,* 72 *P.* 907 (*Calif. Sup. Ct.* 1903); *McGrath v. Burkhart,* 280 *P. 2d* 864 (*Calif. App.* 1955), quoted with approval in *Victor Porcelli et al. v. Franklyn Titus, Superintendent of the Newark Board of Education and the Newark Board of Education, Essex County,* 1968 *S.L.D.* 225, affirmed State Board of Education on April 2, 1969, affirmed 108 *N.J. Super.* 301, 312 (*App. Div.* 1969), *cert. denied* 55 *N.J.* 310 (1970):

> "***'The public schools were not created, nor are they supported for the benefit of the teachers therein, *** but for the benefit of the pupils and the resulting benefit to their parents and the Community at large.'***" (at p. 229)

As the Commissioner previously stated in *Moldovan, supra,* and *Evan Goldman et al. v. Board of Education of the Borough of Bergenfield, Bergen County,* 1973 *S.L.D.* 441 a local board of education has the authority and the required duty to adopt a school calendar as part of the instructional plan which will best serve the interests of the children attending the public schools within the district. The statute, *N.J.S.A.* 18A:36-2, confers the specific duty upon each local board of education to adopt a school calendar, and this duty may not be either countermanded or surrendered by agreement. *Moldovan, supra* The provisions of the agreement between the Board and the Association (Exhibit P-1, Article V) which, in the Commissioner's judgment, provide that the school calendar shall be arrived at through negotiation with the Association are *ultra vires* and accordingly set aside. *Burlington County College Faculty Assoc. v. Board of Trustees, Burlington County College, supra*

Notwithstanding the statutory authority and responsibility for local boards of education to establish their own school calendars (*N.J.S.A.* 18A:36-2) and the general rule-making authority of the State Board of Education set forth at *N.J.S.A.* 18A:4-15) both agencies are and in the instance of local boards of education as noted by Judge Gelman in *Englewood Teachers Association, supra,* creatures of the Legislature. As such they have only those powers as are specifically granted, necessarily implied or incidental to authority expressly conferred by the Legislature. *Edwards v. Mayor and Council of Moonachie,* 3 *N.J.* 17 (1949); *N.J. Good Humor Inc. v. Bradley Beach,* 124 *N.J.L.* 162 (*E. & A.* 1939) Such powers can neither be increased nor diminished except by the Legislature. *Burke v. Kenny,* 6 *N.J. Super.* 524 (*Law Div.* 1949)

In regard to the legislative intent as it applies to the Bill, the Commissioner is mindful of the guidance provided by the New Jersey Supreme Court as it

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relates to statutory construction in *Duke Power Company v. Edward J. Patten, Secretary of State of New Jersey et al.*, 20 *N.J.* 42 (1955). There, the Court stated:

> "*** Where the wording of a statute is clear and explicit the court is not permitted to indulge in any interpretation other than that called for by the express words set forth.***" (at p. 43)

That the Legislature saw fit to include in the Bill the phrase "*** shall for all purposes ***" means, in the Commissioner's judgment, precisely that: for all purposes, including the purpose which has precipitated the instant dispute. It is clear that the Board's resolution of January 8, 1974, (P-4, *ante*) was generated by the State Board's directive to close school on January 2, 3, and 4, 1974. And, if the Legislature states that those days are, were, and shall be considered as "*** days when schools were open ***," as it surely did through the Bill, then the express purpose for which the Board altered or changed the school calendar (P-2, *ante*) no longer exists. It follows, therefore, that, in this unique instance, the Board, through its adoption of the resolution establishing April 17, 18, and 19, 1974 as school days, transcended its statutory authority and is accordingly set aside.

It must be emphasized that the determination of the Commissioner as set forth herein is grounded on his view of the legislative intent of Assembly Bill No. 1258, and in no way alters previous holdings of the Commissioner related to school calendars as set forth in *Somma, supra, Goldman, supra*, and *Moldovan, supra.*

Accordingly, for the reasons stated herein, the Commissioner of Education: ORDERS that the Westfield Board of Education rescind its resolution of January 8, 1974, in regard to the conduct of class sessions on April 17, 18, and 19, 1974; enjoins the Westfield Board of Education from causing classes to be conducted on April 17, 18 and 19, 1974; and, permanently enjoins the Westfield Board of Education from causing the class days of January 2, 3, and 4, 1974 from being added to the 1973-74 school calendar adopted by it on April 3, 1973.

COMMISSIONER OF EDUCATION

April 16, 1974

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Westfield Education Association,

Petitioner-Appellee,

v.

Board of Education of the Town of Westfield, Union County,

Respondent-Appellant.

STATE BOARD OF EDUCATION

DECISION

Decision on Motion of the Commissioner of Education, April 16, 1974

For the Petitioner-Appellee, Mortimer Katz, Esq.

For the Respondent-Appellant, Nichols, Thomson & Peek (William D. Peek, Esq., of Counsel)

This matter has become moot and requires no further determination by the State Board. However, even though the matter under consideration pertains to the 1973-74 school term, and is set apart because of the limitations imposed by the energy crisis, we are mindful of the necessity for expressing certain reservations. We, therefore, feel compelled to reiterate the following: (1) it is imperative that we act in ways most beneficial to children and society; (2) children must be exposed to maximum educational opportunity; (3) the school calendar should enhance, not inhibit, the educational opportunity of our children. Reflecting these concerns, and because we consider the school year so vitally important, we strongly urge that the pattern of satisfactory completion of the school term that has been established in the schools of New Jersey continue. *Evan Goldman et al. v. Board of Education of the Borough of Bergenfield,* 1973 *S.L.D.* 441, affirmed State Board of Education, 1974 *S.L.D.* (February 6, 1974), appeal filed March 11, 1974 with Superior Court of New Jersey.

June 26, 1974

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Ronald Elliott Burgin,

Petitioner,

v.

Board of Education of the Borough of Avalon, Cape May County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Ronald Elliott Burgin, *Pro Se*

For the Respondent, John H. Mead, Esq.

Petitioner, a nontenured teaching staff member initially employed for the 1972-73 school year by the Board of Education of the Borough of Avalon, Cape May County, hereinafter "Board," avers that he is entitled to reemployment for the 1973-74 school year because he was not given timely and proper written notice of his contract renewal or nonrenewal pursuant to *N.J.S.A.* 18A:27-10. The Board denies petitioner's allegations and avers that such notice was properly given.

This matter is submitted to the Commissioner of Education for Summary Judgment on the exhibits marked in evidence and Briefs.

The Board operates one elementary school with nine teachers and one non-teaching administrative principal. Petitioner was in his first year of employment with the Board during the 1972-73 school year. At a Board meeting held on February 19, 1973, the Board determined not to re-hire petitioner for various reasons, which included his inability to maintain discipline in his classroom. (Respondent's Brief, at p. 1) At this meeting, the Board decided to have the administrative principal comply with the provisions of *N.J.S.A.* 18A:27-10 and send a written notice to petitioner. (Respondent's Brief, at p. 2) It was also determined at this Board meeting that, since petitioner was a first-year teacher and his performance might improve in the next few months, he would have a chance to be re-hired if such improvement occurred. (Respondent's Brief, at p. 2) Petitioner accepted this conditional offer and did not respond to the written notice by the administrative principal dated February 28, 1973, which reads as follows:

> "The Avalon Board of Education has decided not to award you a contract for the 1973-74 school year. However, we will reconsider this contract by April 15 if you wish us to do so.
>
> "I will be available at your request to meet with you to discuss the reasons for this decision."
>
> "Yours truly,
> "[Signature] "Albert Ogden, Admin. Principal"
> (Exhibit R-2)

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Petitioner does not deny that he was advised his reemployment would be reconsidered if he made the necessary improvements. Nor does he deny the Board's assertion that it determined at a regular Board meeting on April 10, 1973, that "existing circumstances did not justify a change in the Board's position" not to re-hire him. (Respondent's Brief, at p. 2) Petitioner thereafter received a letter from the administrative principal dated April 11, 1973, which reads as follows:

> "I am requesting a meeting in my office on Monday, April 16 at 3:30 for the purpose of discussing your employment for the next school year. The 'Teachers Agreement' Article IV, paragraph D requires written notice of such meeting and that you are entitled to have a member of the 'Association' present to advise you and to represent you.
>
> "Yours truly,
> "[Signature]
> "Albert Ogden, Admin. Principal"
>
> (Exhibit R-3)

Petitioner refused to acknowledge the letter (Exhibit R-2) as an official notice by the Board. He does not deny that he subsequently conferred with the administrative principal on April 16, 1973 (Exhibit R-3), but he does not acknowledge any oral determinations by the administrative principal at that conference as official written notice by the Board pursuant to *N.J.S.A.* 18A:27-10 that he would not be reemployed. Specifically, the statute provides:

> "On or before April 30 in each year, every *board of education* in the State *shall give* to each nontenure teaching staff member continuously employed by it since the preceding September 30 either
>
> > "a. A *written offer* of a contract for employment for the next succeeding year***, or
> >
> > "b. A *written notice* that such employment will not be offered." (*Emphasis supplied.*)

Petitioner does not deny that the administrative principal advised him orally on April 16, 1973, that the Board determined he would not be re-hired.

On May 22, 1973, petitioner notified the Board by letter that he was accepting its "offer of employment for the coming school year" (Exhibit R-4) in compliance with *N.J.S.A.* 18A:27-12. This statute requires that such notification by a teaching staff member be given "in writing, on or before June 1" in each school year.

Thereafter, on June 8, 1973, petitioner received a letter from the Board attorney indicating that he had been properly notified of the nonrenewal of his contract and directing him to seek other employment for the 1973-74 school year. (Exhibit R-5)

Petitioner then notified the Board on August 13, 1973, as follows:

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"I have been waiting some time for your reply to my letter dated May 22, 1973. Since I have had no indication from the Avalon Board of Education to the contrary, I am still employed as a teacher in the Avalon School District. If you no longer require my services as a teacher in your school please indicate so in the proper legal form. This proper legal form is a two month written notice from 'The Avalon Board of Education'." (Exhibit R-6)

The exchange of correspondence between petitioner and the Board terminated in regard to the matter, *sub judice,* when the Board attorney notified petitioner by letter of August 20, 1973, as follows:

"I have received a copy of your letter dated August 13, 1973, directed to the Avalon Board of Education.

"I am attorney and solicitor for the Board of Education and in that capacity and for these purposes, I am authorized to perform functions on behalf of the Board of Education.

"Mr. Albert Ogden is the Administrative Principal, employed by the Avalon Board of Education, and in that capacity he is authorized to give notices and perform other functions at the direction of the Avalon Board of Education.

"Mr. Ogden in a letter to you early this year, and the undersigned, in a letter to you of June 8, 1973, both have clearly stated that it is the position of the Avalon Board of Education not to contract with you for employment for the 1973-74 school year.

"In view of our previous correspondence, I cannot understand the statement contained in your recent letter indicating that you are waiting for a reply to your letter of May 22, 1973 and indicating that you have had no indication from the Avalon Board of Education as to employment. My letter to you of July [June] 8, 1973 stated that it was in reply to your letter of May 22, 1973.

"As attorney for the Avalon Board of Education I again restate the position of the Board that the Board has no contractural (sic) obligation to you beyond the existing contract and intends to have no contractural (sic) obligation with you beyond the existing contract." (Exhibit R-7)

Petitioner appeared at the Avalon School on September 4, 1973 to report for work but was advised by the administrative principal "*** that there was no reason for his presence at the School.***" (Respondent's Brief, at p. 3)

Petitioner asserts that he received no communication from the Board in regard to his employment and further asserts that *N.J.S.A.* 18A:27-10 requires that he be notified in writing by the Board and that such notice be "*** attested to by the affixed signatures of the Respondent Board President and Board Secretary***." (Petitioner's Brief, at pp. 4-5)

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He further considers the letter from the administrative principal (Exhibit R-2) and the later meeting with him (Exhibit R-3) of no moment. He concludes that lack of proper and timely notice (*N.J.S.A.* 18A:27-10) resulted in an affirmative offer of employment pursuant to *N.J.S.A.* 18A:27-11 which provides:

> "Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education."

None of the facts recited herein are in dispute. This matter does require, however, a detailed interpretation of *N.J.S.A.* 18A:27-10 in terms of the precise form of the statutorily required written notice. There is no question that written notice is required by April 30 in any school year; however, in the instant matter, the opposing parties dispute the adequacy and form of the notice. (Exhibits R-2, R-3)

A similar matter was decided by the Commissioner in *Thomas Aitken v. Board of Education of the Township of Manalapan, Monmouth County,* 1974 *S.L.D.* 207. In that decision the issues which required a finding of fact were:

> "***1). Did the Board, prior to April 30, 1973, decide, either in private or public session, not to renew petitioner's contract for the 1973-74 school year?
>
> "2). If it did, was 'written notice' of such decision, as required by law, (*N.J.S.A.* 18A:27-10) given to petitioner thereafter in timely sequence?***" (at p. 208)

The issues in the instant matter are precisely the same. Moreover, paragraph 2, *ante,* may be further defined to query whether or not such written notice by a school administrator meets the statutory requirement if (a) the board decides not to renew a teaching staff member's contract prior to April 30, in any school year, and (b) the board directs its school administrator to so notify the teaching staff member in writing.

The statutory construction of *N.J.S.A.* 18A:17-20 is relevant in making this determination. It reads:

> "The superintendent of schools shall have general supervision over the schools of the district or districts under rules and regulations prescribed by the state board and shall keep himself informed as to their condition and progress and shall report thereon, from time to time, to, and as directed

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by, the board and he shall have such other powers and perform such other duties as may be prescribed by the board or boards employing him.

"He shall have a seat on the board or boards of education employing him and the right to speak on all educational matters at meetings of the board or boards but shall have no vote."

The Commissioner asserted in *Aitken, supra,* as follows:

"*** Thus, it is clear, that it is the local board of education which must decide the status of its nontenured employees each year, and it must do so on or before April 30. It is equally clear that *subsequent to such decision,* but within the same time parameter, the *decision* must be transmitted by the Board through its administrative agents in 'written form' to such employees.***" (at p. 209) (*Emphasis supplied.*)

The Commissioner determines, therefore, that *N.J.S.A.* 18A:17-20, read *in pari materia* with *N.J.S.A.* 18A:27-10, clearly permits written notice to be given by any designated school administrator or board secretary, *after the board has made its decision in public or private* and has directed him/her to do so.

The Commissioner decided in *Aitken, supra,* that

"*** the Board did not conclusively determine petitioner's status with respect to employment for the 1973-74 school year prior to April 30, 1973. Also, no written notice of *a decision by the Board* *** was afforded *** as required by [statute]." (*Emphasis supplied.*) (at p. 212)

The Commissioner determined in *Aitken, supra,* that:

"***absent written notice to petitioner on or before April 30, 1973 *of a decision by the Board* not to offer petitioner a contract for the succeeding school year, and, in view of the written acceptance of such employment by petitioner *** as required by *N.J.S.A.* 18A:27-12, a contract between the Board and petitioner is in effect for the school year 1973-74.***" (*Emphasis supplied.*) (at p. 212)

Such is the case in the instant matter. Although Exhibit R-2, *ante,* indicates that the Board has "decided" by February 28, 1973, not to offer a contract to petitioner, it stated additionally that it would "reconsider this contract by April 15." The letter from the administrative principal dated April 11, 1973 (Exhibit R-3), "*** requesting a meeting in my office on Monday, April 16 at 3:30 for the purpose of discussing your employment for the next school year ***," shows clearly that the Board had not yet decided not to reemploy petitioner. Additionally, there were no written statements given to petitioner prior to April 30, 1973, as a result of the April 16 meeting, and petitioner could have reasonably expected consideration for reemployment up to April 16, 1973. (Exhibit R-3) However, assuming *arguendo,* that the Board had decided not to reemploy petitioner for the coming school year, petitioner was not notified in *writing* by the Board of its designated school administrator as

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required by *N.J.S.A.* 18A:27-10. The Board's later attempts to confirm the actions of the administrative principal through letters from its counsel (Exhibits R-5, R-7) are deficient and will be set aside because they do not meet the statutory requirement for *written notice* prior to April 30.

The Board raised the defense of laches which is likewise set aside. The Commissioner determines that petitioner believed he had a right to expect reemployment pursuant to statute. He persevered in this belief and, in fact, reported to work in September 1973. When he was not permitted to work he filed his Petition of Appeal on September 11, 1973.

Accordingly, the Commissioner determines that, absent specific written notice to petitioner on or before April 30, 1973 of a decision by the Board not to offer petitioner a contract for the succeeding school year, and, in view of the written acceptance of such employment by petitioner (Exhibit R-4) as required by *N.J.S.A.* 18A:27-12, a contract between the Board and petitioner is in effect for the school year 1973-74. Such contract must provide the benefits accorded by petitioner's 1972-73 contract with the Board, but with such increases in salary as may be required by Board policy during the 1973-74 school year. *N.J.S.A.* 18A:27-11 The Commissioner directs the Board to restore petitioner forthwith to his position as a teacher in the schools of the Borough of Avalon and further directs the Board to provide petitioner with a copy of his 1973-74 employment contract.

Additionally, the Commissioner directs the Board to pay to petitioner any salary withheld from him during the period beginning September 1973 to this date, mitigated by any earnings of petitioner during this period.

COMMISSIONER OF EDUCATION

April 17, 1974

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Board of Education of the City of New Brunswick,

Petitioner,

v.

Mayor and Council of the City of New Brunswick, Middlesex County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Terrill M. Brenner, Esq.

For the Respondents, Malcolm R. Busch, Esq.

Petitioner, the Board of Education of the School District of the City of New Brunswick, hereinafter "Board," appeals from an action of the Mayor and Council of the City of New Brunswick, hereinafter "Council," certifying to the Middlesex County Board of Taxation an amount of appropriations for school purposes for the 1973-74 school year $157,101 less than that proposed by the Board.

Petitioner alleges that it is impossible to maintain the thorough and efficient system of public schools mandated by the *New Jersey Constitution* or to provide suitable educational facilities and programs within the limit of appropriations certified by Council. Petitioner prays for relief in the form of an order by the Commissioner of Education (1) determining that the resolution of certification adopted by Council is unreasonable and (2) restoring the total $157,101 to the amount to be raised by local taxation for school purposes for the 1973-74 school year.

Council answers that, as the governing body of the City of New Brunswick, it is charged by law with the duty of providing a thorough, efficient, and adequate system of government for all of the people of New Brunswick, including the school children, and must balance the interests of all of the citizens of the community in determining the areas in which public moneys should be expended including the ability of the taxpayers to raise the necessary funds. Council also contends that programs proposed by the Board in its budget are not absolutely necessary for an adequate and proper school system, and that Council has the obligation of ordering priorities in the expenditure of municipal funds, including school programs. Council avers that its reduction will not deprive the school children of needed improvements to physical facilities, necessary teaching and guidance staff, or other educational provisions. Council maintains that it has taken into full consideration the needs of the school system, as well as the City as a whole, and has adequately provided for the public schools.

A hearing on the Petition of Appeal was held on November 14, 1973 at the State Department of Education, Trenton, by a hearing officer appointed by the Commissioner. Numerous exhibits prepared by the parties were received and marked in evidence, and oral testimony was heard.

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The report of the hearing officer is as follows:

New Brunswick is a Type I school district having a Board of School Estimate. The Board adopted and submitted to the Board of School Estimate a proposed budget for the 1973-74 school year in the total amount of $9,443,472 of which $6,888,787.50 was to be raised by local taxation. The Board of School Estimate, on February 9, 1973, following a public hearing, fixed and determined the amount to be raised by local taxation for 1973-74 at $6,731,686.50, a reduction of $157,101. On March 7, 1973, Council certified to the Middlesex County Board of Taxation the following local school tax levy for the calendar year 1973:

January 1, 1973 to June 30, 1973	$3,115,843.25
July 1, 1973 to December 31, 1973	3,365,843.25
Total 1973	$6,481,686.50

The amount for the second half of 1973 represents one-half of the $6,731,686.50 approved by the Board of School Estimate for the 1973-74 school year.

The items which are suggested by Council to comprise the total reduction of $157,101 are set forth in the following table and will be considered *seriatim* by the hearing officer.

CURRENT EXPENSE

Account	Item	Amount Reduced
J110B	Sal.-Bd. Sec. Off.	$53,279
J110F	Sal.-Supt. Off.	
J110J	Sal.-Bldgs. & Grounds	(Aggregate reduction
J110L	Sal.-Pers. Off.	from twenty-four
J110N	Sal.-Other Adm	salary line items for
J211	Sal.-Prin.	fringe benefits and
J212	Sal.-Supvr.	additional personnel.)
J213	Sal.-Tchr.	
J214A	Sal.-Libr.	
J214B	Sal.-Guid.	
J214C	Sal.-Psych.	
J214C1	Sal.-Social Worker	
J214C2	Sal.-Learn. Dis. Spec.	
J214D	Sal.-A-V	
J215A	Sal.-Prin. Off.	
J215B	Sal.-Supvr. Off.	
J215C	Sal.-Other Instr. Clerks	
J216	Sal.-Aides	
J310A	Sal.-Attend. Pers.	
J410A3	Sal.-Nurses	
J410A5	Sal.-Phys. Therap.	
J610A	Sal.-Janitors	

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Account	Item	Amount Reduced
J610C	Sal.-Other Pers.	
J710B	Sal.-Maint. Pers.	
	Subtotal Aggregate Reduction	$53,279
J110L	Sal.-Pers. Off.	3,650
J120C	Archit. Fees	3,000
J130F	Supt. Off.-Other Exp.	100
J130I	Bus. Adm.-Other Exp.	50
J130J	Bldgs. & Grounds-Other Exp.	100
J130L	Pers. Off.-Other Exp.	50
J130M	Prtg. & Publ.	4,000
J212	Sal.-Supvr.	2,000
J215C	Sal.-Other Instr. Clerks	5,800
J220	Textbooks	7,810
J230C	A-V Mat.	6,000
J240	Teaching Supls.	6,281
J250A	Misc. Instr. Supls.	1,000
J250B	Instr. Trav. Exp.	1,000
J250C	Misc. Instr. Exp.	1,300
J720A	Grounds-Contr. Serv.	1,000
J730C	New Equip.-Instr. & Noninstr.	45,000
J910	Sal.-Food Serv.	8,081
J1112	Sal.-Civic Act.	2,000
	Subtotal Current Exp. Reductions	$151,501
CAPITAL OUTLAY		
J1230C	Remodeling	$ 5,600
	Subtotal Capital Outlay Reductions	$ 5,600
	Total Reductions	$157,101

Salary Accounts *Reduction $53,279*

Council claims that the Board added a sum for fringe benefits to the base of the 1972-73 salaries before calculating a 5.5 percent salary increase, plus regular increments, longevity increments, extra compensation, and, in the case of professional employees, advanced degrees, for the 1973-74 school year. Council also avers that the Board did not reduce 1972-73 teacher salaries and teacher aide salaries by ten teachers and ten aides respectively, before adding a 5.5 percent salary increase, plus regular and longevity increments, in arriving at the total amounts required by salary line items for 1973-74. Council asserts that an aggregate reduction of $53,279 should be made from the twenty-four salary line items listed in the table, *ante*. (Exhibit R-1)

Council asserts that during the 1972-73 school year the Board added fourteen positions to its total staff, and thirteen of these positions are to be funded by the 1973-74 school budget. These fourteen positions are stated by Council to be the following: (Exhibit R-3)

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Number	Positions	Amount
(1)	Assistant Superintendent	$ 23,968
(1)	Multi-Media Services Director	21,879
(2)	Learning Disabilities Specialists	26,460
(2)	Community Agents	15,600
(2)	Clerk-Secys in Superintendent's Office	11,400
(2)	Clerk-Secys in Supervisor's Office	11,600
(1)	Attendance Officer	6,000
(1)	Maintenance Man	18,924
(2)	Consultants to Board	36,000
(14)	Total Salaries Added, 1973-74	$171,831

Council claims that the Board is also seeking to add new positions to the 1973-74 school budget as follows:

Number	Position	Amount
(1)	Supervisor	$15,000
(2)	Librarians	20,400
(1)	Learning Disabilities Specialist	12,000
(1)	Clerk-Secretary	5,800
(1)	Janitor	5,800
(6)	Total Salaries, Additional Personnel (Exhibit R-3)	$59,000

In order to determine whether or not the Board proves the need for restoration of any or all of the $53,279 suggested reduction, it is necessary to examine the various affected salary line items.

J110B Salary – Board Secretary's Office

In this budgetary line item a total of $47,986.62 was expended, including an over-expenditure of $2,659.62, for 1972-73. (Exhibit P-16)

For 1973-74, the Board originally budgeted $51,591 which included a 5.5 percent salary increase, plus regular increments, longevity increments, extra compensation, and overtime. (Exhibit R-2) The actual salaries approved by the Board for 1973-74 total $57,386, an increase of $9,399.38 over the 1972-73 expenditure. (Exhibit P-21) Part of this increase is caused by the inclusion of a salary of $6,014 for a secretary for whom only $1,300 was budgeted during 1972-73 because $4,000 of her salary was paid from other sources during 1972-73. For practical purposes, this represents the addition of one full-time secretary in J110B for 1973-74. As it now stands, J110B has a deficit of $5,795 for 1973-74.

J110F Salary – Superintendent's Office

For 1972-73, this line item, originally budgeted at $93,515, received a $30,539.95 supplemental allocation for a total of $124,054.95, with actual expenditures totaling $124,204.95 (Exhibit P-16) The Board's explanation is that a principal was promoted to assistant superintendent and his salary was

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charged to J110F with no provision in the 1972-73 budget. The supplemental appropriation did cover this additional salary. (Exhibit P-6)

For 1973-74, the Board transferred one salary from J110F to J110L, and budgeted $83,335.35 for J110F. (Exhibit R-2) The Board's documentation discloses that two secretaries were added to J110F during 1972-73. (Exhibit P-6) Also, one assistant superintendent and one secretary were transferred from J110F to J110L, personnel office salaries, for 1973-74. Therefore, of the originally budgeted amount of $83,335.35, the total amount now committed for 1973-74 contractual salaries is $49,437, leaving a balance of $33,898.

J110L Salary – Personnel Office

As a result of the transfers to this line item from J110F, as noted above, the total of contractual salaries committed in line item J110L for 1973-74 is $70,667 which represents a deficit of $33,098 over the originally budgeted amount of $37,569.

J110N Salary – Other Administration

This line item did not appear in the original 1972-73 school budget but was added by means of a supplemental appropriation or a transfer of funds in the amount of $34,992.34. For 1973-74, the Board budgeted $19,378 but now has committed contractual salaries totaling $49,287 which produces a deficit of $29,909. This line item includes salaries for one consultant to the Board, one implementation services director, and one additional person at a salary of $6,945. (Exhibit P-21) The Board claims that the position of implementation services director is necessary to plan and administer an in-service program funded by a $200,005 federal grant combined with a $237,000 grant received by the teachers. Also, the Board avers that this director will supervise the principals of the various schools in order to support innovative programs in each schoolhouse. Council asserts that adequate administrative personnel are available within the district to perform these duties, or, in the alternative, the salary cost should be funded from the grants for the in-service program.

J211 Salary – Principal

The Board originally budgeted $398,722 (Exhibits R-2, P-21) in this line item and has actual salary commitments of $408,490, which represents a deficit of $9,768. One additional principal or vice-principal is included for 1973-74, but the Board claims it has eliminated one administrative assistant to provide for this additional position. (Exhibit P-12)

J212 Salary – Supervisors

During 1972-73, the Board created two additional supervisory positions which were not originally budgeted. One supervisory position was for the Gibbons School and the second was a director of educational technology, also referred to as a director of multi-media services. (Exhibits P-6, P-12) The Board ended the 1972-73 school year with seven directors and five supervisors. For 1973-74, the Board proposes to reduce the five supervisors to four, by transferring the supervisor of boys' physical education to a department chairman

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for boys' physical education. The amount of $198,504, originally budgeted for 1973-74, is therefore reduced to $181,678, leaving a balance of $16,826. (Exhibits R-2, P-12, P-16)

J213 Salary – Teachers

For 1973-74, the Board originally budgeted $4,930,388 in this line item. At the present time, contractual salary commitments total $4,862,432, leaving a balance of $67,956. The Board claims that it has eliminated ten teaching positions for 1973-74 as the result of a drop in enrollment of 569 pupils. The Board's budget work sheets disclose the Board did reduce the number of teachers by ten but also show the addition of one new reading teacher for 1973-74. (Exhibit R-2)

J214 Salary – Librarians

In this line item, the Board has included two additional librarians for 1973-74, an increase from six to eight. The Board budgeted $95,047 for 1973-74, an increase of $25,704.13 over actual expenditures for 1972-73. These eight librarians will serve twelve schools and three special facilities during 1973-74. (Exhibit P-10)

J214C2 Salary – Learning Disabilities Specialist

For 1973-74, the Board has included one additional learning disabilities specialist in this line item. (Exhibits P-1, R-2) A total of $41,198 was originally budgeted but salary commitments totaling $42,304 will create a deficit of $1,106 for 1973-74. The addition of one position in this line item brings the total to three learning disabilities specialists.

J215C Salary – Other Instruction–Clerks

The Board has added one new position to this line item for 1973-74, bringing the total to six. J215A includes twenty-two clerks for principals and vice-principals, and J215B provides eight clerks for the supervisors. The Board had budgeted $64,724 for J215C, but salary commitments in the total amount of $50,425 will create a surplus of $14,299.

J216 Salary – Aides

The positions of ten security aides have been reduced in this line item for 1973-74, leaving a total of thirty-three. Twenty-six teacher and lunchroom aides are also included in this line item, making a total of fifty-nine aides for 1973-74. (Exhibit P-12) The Board had budgeted $240,328 in this line item, but salary commitments total $261,349, leaving a deficit of $21,021. The Board claims that two community aides have been eliminated for 1973-74 (Exhibit P-12), but salaries for two community aides have been approved under line item J1112 in the amount of $16,460 for 1973-74. (Exhibit P-21)

J610A Salary – Janitors

One additional janitorial position has been added to this line item by the Board for 1973-74, bringing the total personnel to thirty-seven. The Board

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budgeted $307,163 in this line item (Exhibit R-2), but salary commitments total only $274,570, leaving a balance of $32,593. (Exhibit P-21)

In summary, the Board did, in fact, add fourteen additional positions to its total staff during the 1972-73 school year and financed these positions by utilizing funds from the unappropriated free balance in the current expense account. It appears that these positions must now be funded by local school taxes for the 1973-74 school year. In addition, the Board has added six new positions for the 1973-74 school year which were not included in the fourteen added during 1972-73.

An examination has been made of the following twenty-five salary line items: J110B, J110F, J110J, J110L, J110N, J211, J212, J213, J214A, J214B, J214C, J214C1, J214C2, J214D, J215A, J215B, J215C, J216, J310A, J410A3, J410A5, J610A, J610C, J710B and J1112.

The total commitment for salaries contained in these line items is $7,280,717. The amount budgeted for these line items is $7,314,088. There is a balance of $33,371.

It is recommended that $33,371 of Council's proposed reduction of $53,279 be sustained, and the amount of $19,908 be restored.

J110L Salary – Personnel Office *Reduction $3,650*

Council asserts that only one secretary is budgeted in this line item, and the proposed reduction represents the difference between the salary of the original secretary which was $9,450 and a new secretary at $5,800. Actually, this line item now includes the salaries of two assistant superintendents and two secretaries, as a result of the transfer previously mentioned. The secretaries' actual 1973-74 salaries are $7,202 for the one transferred from J110F, and $8,968 for the replacement of the original secretary.

Therefore, it is recommended that the $3,650 reduction be restored.

J120C Architects Fees *Reduction $3,000*

This line item did not appear in the 1972-73 school budget. For 1973-74, the Board budgeted $7,000 in this line item, and Council claims that the Board's plans are not sufficiently developed to require the total of $7,000 for architects' fees. The Board asserts that the allocation is for the development of preliminary plans for a middle school and the relocation of central offices but admits that a reduction of $2,000 would be reasonable. (Exhibit P-1)

The Board's arguments for the restoration of $1,000 of the $3,000 reduction do not prove the necessity for these moneys. Therefore, it is recommended that the reduction of $3,000 remain undisturbed.

J130F, I, J, L Other Expenses *Reduction $300*

Council's aggregate reduction in these four line items consists of a $50

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reduction in travel expenses for one month for the Superintendent and each of the three assistant superintendents. Council claims that the reduction is reasonable because each of these four administrators receives $50 a month for twelve months, but each has one month of vacation. The Board states that each of these administrators could submit vouchers to qualify for the total yearly allowance.

It is recommended that the total reduction of $300 be sustained.

J130M Printing and Publishing *Reduction $4,000*

Council's reduction of $4,000 from the $11,000 budgeted in this line item is intended to make available $7,000 which is near the amount of $8,053.81 expended during 1972-73 for which there was no budget allocation.

The Board avers that budgeted necessities total $11,000 for this line item, but $1,000 has not been expended to date because purchase of a computer has been delayed.

Since the Board has not set forth sufficient facts to prove the necessity for restoration of the $4,000, it is recommended that the reduction be permitted to stand.

J212 Salary – Supervisor *Reduction $2,000*

Council suggests that $2,000 of the salary of the multi-media director should be paid from a recent educational reform grant from the U.S. Office of Health, Education and Welfare, in the amount of $200,005 which was not anticipated as revenue for 1973-74.

The Board replies that Title VII, *P.L.* 92-318, which enabled the grant, does not permit payment of a partial salary which would in effect supplant a Board of Education obligation.

Since the total salary of the director is a contractual obligation of the Board, it is recommended that the $2,000 be restored.

J215C Salary – Other Instruction – Clerks *Reduction $5,800*

Council states that, since four additional secretarial positions were added during the 1972-73 school year with no budgetary appropriation and must be funded for 1973-74, there should not be still another additional secretarial position included in the 1973-74 school budget. Council suggests that secretarial services be rearranged to provide assistance for the multi-media director and two new elementary librarians who the Board says will be served by the additional secretary.

In view of the expansion of the number of secretarial positions during 1972-73, the Board should be able to provide adequate secretarial services with the existing secretarial staff without adding this new position.

Accordingly, it is recommended that the reduction of $5,800 be sustained.

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J220 Textbooks *Reduction $7,810*

Council's suggested reduction would leave a balance of $55,000 in this line item. Council points out that in 1971-72 the Board budgeted $54,930 but expended only $45,527. For 1972-73, the Board budgeted $56,100, which was increased to $58,500, but expended only $47,171.83. (Exhibit P-16) Council believes the Board purchased all the textbooks necessary and used the balance of $11,345.11 to pay salaries for positions created during the course of the 1972-73 school year.

The Board claims that a number of mini-courses added to the high school curriculum and new programs added to the elementary schools fully substantiate the need for the total allocation of $62,810.

In view of the facts which clearly show the Board's experience during the past two school years, it is recommended that the reduction remain undisturbed. The allocation of $55,000 will provide $8,000 more than was expended during 1972-73, and total enrollment is expected to remain unchanged.

J230C A-V Materials *Reduction $6,000*

From the amount of $20,000 budgeted by the Board, Council suggests a reduction of $6,000, leaving a balance of $14,000. Council claims that for 1972-73 the Board budgeted $14,500, but expended only $8,606. For 1972-73, Council states the Board budgeted $14,500, but expended only $7,243.67 and transferred $7,245.33 to other line items, probably to pay salaries for unbudgeted positions created during 1972-73. (Exhibits R-3, P-16)

The Board's claim that this line item has suffered each year from budget reductions does not appear to be supported by the facts. (Exhibit P-1)

It is recommended that a reduction of $5,000 be sustained and that the amount of $1,000 be restored to this line item which will leave an available balance of $15,000 for 1973-74.

J240 Teaching Supplies *Reduction $6,281*

The Board's budgeted allocation of $87.934 would be reduced to $81,653 by Council's suggested reduction of $6,281. The Board's actual 1972-73 expenditures in this line item were $95,741.77 The Board's allocation is based upon an estimated expenditure of $14.00 for each of 6,281 pupils which is a moderate provision.

Therefore, it is recommended that the amount of $6,281 be restored to this line item for 1973-74.

J250A Miscellaneous – Instruction – Supplies *Reduction $1,000*

Council's reduction would leave a balance of $19,000 in this line item for 1973-74. For 1972-73, the Board budgeted $15,000 but overexpended to a total of $19,122.80. The Board claims that the number of offices has increased during the past five years to the point where over forty offices for principals, directors,

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supervisors, department heads, and other administrative personnel must be supported. The Board's own cost figures disclose that the overexpenditure during 1972-73 represented a large one-year increase. (Exhibit P-1)

It is recommended that the reduction be sustained, since the remaining $19,000 provides $4,000 more than was provided in 1972-73.

J250B Instruction – Travel Expenses *Reduction $1,000*

Council's proposed reduction would leave a balance of $5,750 in this line item. Council states that $5,073 was expended for 1971-72 and $5,044.38 for 1972-73. (Exhibit P-16) Council asserts that expenses for this purpose should remain constant from year to year, particularly with a declining school enrollment. The Board claims that mileage reimbursement has increased from $.12 to $.15 per mile, which was not contemplated in the budgetary allocation.

There is no question but that rapidly increasing fuel prices will result in higher costs for the same amount of travel. Therefore, it is recommended that the $1,000 reduction be restored.

J250C Miscellaneous – Instruction – Expense *Reduction $1,300*

Council's reduction would leave a balance of $29,109 in this line item which would still be an increase of almost $8,000 over the amount budgeted for 1972-73.

The Board's position is that $1,300 represents thirteen days at $100 per diem for in-service program consultants.

There is no clear proof that the Board will be unable to engage consultants for its in-service program as the result of this reduction; therefore, the reduction should stand.

J720A Grounds – Contracted Services *Reduction $1,000*

Council points out that expenditures in this line item for 1970-71 were $711, for 1971-72 $1,990, and no expenditures were made during 1973-74. (Exhibits R-3, P-16) The Board avers that the entire amount is necessary for certain unspecified repairs at one school. The reduction would leave $1,500 remaining in this line item.

Absent a clear showing of a specific need for the entire proposed allocation of $2,500, the reduction of $1,000 should be undisturbed.

J730C New Equipment – Instructional & Noninstructional Reduction $45,000

The Board's budgetary allocation for this line item is $54,949.50. Council states that the Board has also budgeted $36,700 for instructional equipment in line item L1240C and has an unappropriated free balance of $66,305.12 in the capital outlay account. Council also points out that the $200,005 grant from the federal government under the Emergency School Aid Act includes $37,254 for instructional equipment for the School District. Council asserts that the Board

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had a total of $27,500 in J730C for 1972-73 but expended only $10,024.04 and transferred $17,475.96 to other line items. For 1972-73, the Board had $84,080 in L1240C for instructional equipment but expended only $47,553.81, leaving a balance of $36,526.19. (Exhibit P-16)

Based on the above facts, it is recommended that the reduction be sustained. The Board can utilize part of the unexpended free balance to purchase additional equipment if it so desires. With the reduction the Board still has $46,050 in J730C and L1240C, plus the $37,254 allocation from the Emergency School Aid Act. In addition, the Board has $20,000 for equipment replacement in J730A for 1973-74.

J910 Salary – Food Services *Reduction $8,081*

Council claims that expenditures under this line item for 1972-73 were $2,860, and for 1973-74 the Board has increased the allocation to $18,199 with no explanation. (Exhibits R-3, P-15, P-16)

The Board replies that the increase merely reflects the transfer of the salary of the director of food services from the J213 line item to J910. According to the Board, this line item now indicates a true depiction of salaries for food services.

Since the salary of a director of food services should properly be included in line item J910, it is recommended that the $8,081 reduction be restored.

J1112 Salary – Civic Action *Reduction $2,000*

Council's reduction from the $18,000 allocation set by the Board is based upon the contention that civic organizations should bear some of the costs for personnel when they receive free use of school facilities.

The Board states that increased use of the schools requires more salary allocations for personnel. It must be noted that the salaries for two community agents, totaling $16,460 are charged to this line item. (Exhibit P-21) The Board's documentary evidence regarding staff positions (Exhibit P-12) states that these two positions are to be eliminated for 1973-74. Therefore, it is recommended that the reduction remain undisturbed.

J1230C Remodeling *Reduction $5,600*

Council's suggested reduction of $5,600 would leave a balance in this line item of $15,000 which would be the same amount budgeted for 1972-73. Council points out that only $7,435.41 was expended during 1972-73 and $7,564.59 was transferred to other line items. Also, the capital outlay account has an unappropriated free balance of $66,305.12. (Exhibit P-16)

The Board asserts that these funds are required for the replacement of deteriorated window sashes (Exhibit P-1), but Council replies that adequate funds are available to do this work. Under line item J720B, the Board has budgeted $122,200 for repairs to buildings. (Exhibit P-15)

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On the basis of the above-stated facts, it is recommended that the reduction be sustained.

The recommendations of the hearing officer are summarized as follows:

CURRENT EXPENSE Account	Item	Proposed Reduction	Amount Restored	Amount Not Restored
	Sal.-Line Items	$ 53,279	$19,908	$ 33,371
J110L	Sal.-Pers. Off.	3,650	3,650	–0–
J120C	Archit. Fees	3,000	–0–	3,000
J130	Other Exp. (Travel)	300	–0–	300
J130M	Prtg. & Publ.	4,000	–0–	4,000
J212	Sal.-Supvr.	2,000	2,000	–0–
J215C	Sal.-Other Instr. Clerks	5,800	–0–	5,800
J220	Textbooks	7,810	–0–	7,810
J230C	A-V Mat.	6,000	1,000	5,000
J240	Teaching Supls.	6,281	6,281	–0–
J250A	Misc. Instr. Supls.	1,000	–0–	1,000
J250B	Instr. Trav. Exp.	1,000	1,000	–0–
J250C	Misc. Instr. Exp.	1,300	–0–	1,300
J720A	Grounds-Contr. Serv.	1,000	–0–	1,000
J730C	New Equip.-Instr. & Noninstr.	45,000	–0–	45,000
J910	Sal.-Food Serv.	8,081	8,081	–0–
J1112	Sal.-Civic Act.	2,000	–0–	2,000
	Subtotal Current Expense	$151,501	$41,920	$109,581
CAPITAL OUTLAY				
J1230C	Remodeling	$ 5,600	$ –0–	$ 5,600
	Subtotal Capital Outlay	$ 5,600	$ –0–	$ 5,600
	Totals	$157,101	$41,920	$115,181

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the exceptions thereto filed by the Board. The Commissioner is aware of the difficult and unique problems which are present in a large urban school district. He is cognizant of the effort being made by the New Brunswick Board of Education to improve the educational program offered to its pupils. The Commissioner notes that many desirable and systematically-planned programs are being advanced in an effort to solve many of the problems which are peculiar to urban school systems.

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In its exceptions, the Board argues that the reduction suggested by Council in line item J1230C, Remodeling, in the amount of $5,600, which the hearing examiner recommended to be sustained, should be restored because the Board of School Estimate did not formally act to reduce the amount proposed to be raised by local taxation for capital outlay purposes, but only acted to reduce the amount of local taxation proposed for current expenses for the 1973-74 school year. In the first instance, the Commissioner observes that the Board's Petition of Appeal states that it adopted a resolution proposing that $6,888,787.50 be raised for current expenses for the 1973-74 school year, and the Board of School Estimate reduced this amount by $157,101, certifying the amount of local taxation to be raised for school purposes for 1973-74 as $6,731,686.50, designated for current expenses. It appears that both parties dealt with one lump sum for all purposes when taking the aforementioned respective formal actions. The Commissioner is constrained to point out that a municipal governing body is not required to submit a listing of suggested reductions, accompanied by a detailed statement setting forth its underlying determinations and supporting reasons for the reductions, until a formal Petition of Appeal is filed by a local board of education. *Board of Education of East Brunswick v. Township Council of East Brunswick,* 48 *N.J.* 94,105-106 (1966) This is precisely the series of events which occurred in the instant matter. Council was within its rights to suggest a reduction in a capital outlay line item in following the appropriate and necessary procedures described above, and the Commissioner so holds.

From a review of the record before him, the Commissioner takes notice that several budgetary line items as proposed by the Board in its tentative school budget were deficient in total amounts to provide for the actual commitments charged to such line items. At the same time, other line items were budgeted for amounts in excess of the actual commitments. One obvious reason for these discrepancies, particularly in salary line items, is the fact that additional persons were employed during the previous 1972-73 school year, and numerous transfers of personnel also took place. It is clear that the line item amounts were not in every instance adjusted to accurately reflect the commitments charged to them. The Commissioner directs the Board to adjust all of the line items in the 1973-74 school budget, in order to make certain that all commitments are provided for in each instance by sufficient funds. This will provide a more accurate presentation of the Board's commitments in all budgetary line items, particularly and most importantly in those for salaries of personnel.

The Commissioner has reviewed and considered the remaining comments made by the Board in its exceptions, and finds no necessity to deal with each in detail. Suffice it to say, the Commissioner is not persuaded that the total amount of reduction recommended to be sustained, namely $109,581, should be restored. The burden of proof for the restoration of funds for suggested reductions lies with the Board. From the record in this case, the Commissioner finds that the Board has not succeeded in providing sufficient proof that all of these funds must be restored in order that the Board may provide a thorough and efficient system of public schools during the 1973-74 school year.

The Commissioner, having considered the exceptions to the report of the hearing examiner, as well as the entire record in the matter, *sub judice,* accepts

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the findings and recommendations of the hearing examiner and holds them for his own. He determines that the amount previously certified is inadequate to maintain a thorough and efficient program of education in the schools of the City of New Brunswick for the 1973-74 school year.

It is therefore ordered that the Mayor and City Council of the City of New Brunswick certify the additional amount of $41,920 to the Middlesex County Board of Taxation for the current expenses of the School District of the City of New Brunswick for the 1973-74 school year, so that the entire amount of such certification for current expenses shall be $6,773,606.50.

COMMISSIONER OF EDUCATION

April 17, 1974

"R.B.," a minor,

Petitioner,

v.

Board of Education of the City of Trenton, Mercer County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

This matter having been brought before the Commissioner of Education (Joseph F. Zach, Deputy Assistant Commissioner, Division of Controversies and Disputes), by William J. McNichol, Esq., attorney for petitioner, R.B., on a Notice of Motion for Interim Relief, dated September 4, 1973, requesting temporary reinstatement pending adjudication of the Petition of Appeal, Albert Cooper III, Esq., appearing for the School District of the City of Trenton; and

It appearing that on June 6, 1973, petitioner was suspended from attendance as a ninth grade pupil in Junior High School No. 4 by the school principal as the result of an incident which took place on the above-named date between petitioner and a teacher; and

It appearing that petitioner had received five suspensions during the 1972-73 academic year prior to the aforementioned incident of June 6, 1973, and was on strict probation at the time of the June 6, 1973 incident; and

It appearing that petitioner was evaluated by the Child Study Team of the School District, the report of which is dated April 6, 1973; and

It appearing that petitioner received a hearing before a committee of the Board of Education on August 30, 1973; and

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It appearing that the Board determined that petitioner's suspension would continue pending a reevaluation of petitioner by the Child Study Team; and

The arguments of counsel having been heard regarding the allegation by petitioner that irreparable harm may result if petitioner is denied immediate reinstatement as a pupil in the Senior High School; and

The Commissioner having found no possibility of irreparable harm by the continuation of petitioner's aforementioned suspension and, furthermore, having determined that the Board's action directing a reevaluation of petitioner by the School District's Child Study Team was a sound exercise of discretion; therefore

IT IS ORDERED that petitioner's request for interim relief, *pendente lite*, is denied; and

IT IS ORDERED THAT the Board of Education of the City of Trenton complete the reevaluation of petitioner by the Child Study Team within twenty-one (21) days of this date, and further, that the Board make an appropriate placement of petitioner based upon the forthcoming recommendations and report of the Child Study Team; and

IT IS HEREBY ORDERED that home instruction be provided for petitioner during the interim period prior to the reinstatement of petitioner in an appropriate academic program.

Entered this 7th day of September 1973.

COMMISSIONER OF EDUCATION

"R.B.," a minor,

Petitioner,

v.

Board of Education of the City of Trenton, Mercer County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, William J. McNichol, Esq.

For the Respondent, McLaughlin, Abbots & Cooper (James J. McLaughlin, Esq., of Counsel)

This matter having been opened before the Commissioner of Education (Lawrence C. Anderson, Director, Division of Controversies and Disputes) by

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William J. McNichol, Esq., attorney for petitioner, "R.B.," as the sequel to an Order of the Commissioner dated September 7, 1973, wherein the Acting Commissioner, in response to petitioner's prayer for relief had ordered the Board of Education of the City of Trenton to provide petitioner with home instruction for an interim period and subsequently to provide an "appropriate" educational placement for petitioner; and

It appearing that petitioner has been afforded such placement in an educational program approved by the Board of Education with the concurrence of petitioner; and

It appearing that petitioner's principal prayer for relief has thus been granted; and

By agreement of counsel the sole remaining prayer of petitioner is for a declaratory judgment concerned with an appropriate due process procedure which is, or should be, required at the time of an initial pupil suspension from school; and

The Commissioner having already set forth his views with respect to pupil suspensions generally in *Gustave M. Wermuth and Sylvia Wermuth as natural parents and guardians v. Julius C. Bernstein, Principal of Livingston High School and Board of Education of the Township of Livingston, Essex County*, 1965 *S.L.D.* 121; *John Haddad, a minor, by his parents and natural guardians, Joseph L. Haddad and Regina Haddad v. Board of Education of the Township of Cranford et al.*, 1968 *S.L.D.* 98; and

It appearing that in any event the declaratory judgment requested herein is grounded on issues which are moot and pose no possibility of relief by the Commissioner of Education; therefore

IT IS ORDERED on this 23rd day of April 1974, that the Petition of Appeal herein be and the same is hereby finally dismissed.

COMMISSIONER OF EDUCATION

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"R.K.," by his guardian *ad litem*,

Petitioner,

v.

Board of Education of the Matawan Regional School District, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Kantor, Burns & Kantor (Lawrence D. Kantor, Esq., of Counsel)

For the Respondent, DeMaio & Yacker (Vincent C. DeMaio, Esq., of Counsel)

This matter having been brought before the Commissioner of Education by Lawrence D. Kantor, Esq., attorney for petitioner, R.K., on a Motion for Interim Relief, dated March 27, 1974, requesting immediate reinstatement of petitioner into the regular high school program from which he was suspended on February 7, 1974, Vincent C. DeMaio, Esq., appearing for the Board of Education of the Matawan Regional School District, hereinafter "Board"; and

It appearing that petitioner was suspended from school on February 7, 1974, pending an expulsion hearing; and

It appearing that the reason for such suspension was a false bomb threat made by telephone to the school as admitted by petitioner; and

It appearing that petitioner on March 4, 1974 at the expulsion hearing, with benefit of representation by counsel, was not expelled, but continued on suspension pending further evaluation by the Board's Child Study Team with medical and psychiatric examinations required; and

It appearing that on March 11, 1974, R.K. was placed on probation by the Monmouth County Juvenile and Domestic Relations Court for the above-named offense; and

It appearing that on March 25, 1974, petitioner, as represented by counsel, was provided a further hearing by the Board, whereupon the Board suspended petitioner for the remainder of the 1973-74 school year with benefit of home instruction, opportunity to take final examinations, and credit assignment to be validated upon successful course completion; and

It appearing that from February 7, 1974 through March 25, 1974, petitioner received little more than forty-five minutes *total* home instruction from a qualified *certified* home instructor; and

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It appearing that on April 4, 1974, on an Order to Show Cause, the matter was reviewed in the Chancery Division of the Superior Court, Monmouth County, resulting in an Order that supplemental home instruction be provided petitioner, which instruction has since been provided petitioner in the amount of two to three hours per day; and

It appearing that the Board held another hearing on the matter on April 18, 1974, wherein its Child Study Team Director and Assistant Superintendent of Schools made recommendation that petitioner not be returned to school at that time; and

It appearing that the above incident does not stand alone as an isolated instance of serious violation of proper pupil behavior on the part of petitioner; and

It appearing that the Board on April 18, 1974, determined that petitioner's suspension would continue pending further reevaluation by the Child Study Team and the Community Mental Health Center; and

The arguments of counsel having been heard regarding the allegation by petitioner that irreparable harm may result if petitioner is denied immediate reinstatement as a pupil in the high school; and

The Commissioner having carefully weighed the possibility of irreparable harm against the Board's responsibility to insure the orderly operation of its school, and, furthermore, having determined that the Board's action directing further evaluation and treatment of petitioner was a sound exercise in discretion; therefore

IT IS ORDERED that petitioner's request for interim relief, *pendente lite,* is denied; and

IT IS ORDERED that the Board of Education of the Matawan Regional School District continue to provide petitioner such supplemental home instruction as is required by *N.J.A.C.* 6:28-3.13 and as may be additionally required to compensate for the period from February 7, 1974 through March 25, 1974, when home instruction was improperly withheld or provided in insufficient amount to petitioner.

ORDERED this 24th day of April 1974.

COMMISSIONER OF EDUCATION

Case dismissed August 28, 1974

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In the Matter of "T," by her parents and natural guardians,

Petitioners,

v.

Board of Education of the Borough of Tenafly, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Capone, Gittleman & Anastasi (Melvin Gittleman, Esq., of Counsel)

For the Respondent, Tennant and La Sala (George G. Tennant, Jr., Esq., of Counsel)

Petitioners, parents of a handicapped child heretofore and hereafter identified as "T," aver that they have been compelled to provide educational training for their child by virtue of a failure and refusal of the Board of Education of the Borough of Tenafly, hereinafter "Board," to do so. They also maintain that the Board has failed to comply with a previous recommendation of the Commissioner of Education contained in a Decision of the Commissioner dated September 9, 1970. At this juncture, they demand a judgment in support of their contentions and also the reimbursement of expenses which they state they have assumed for their child's school tuition costs and other related expenses incurred for transportation, training, and supplies. The Board maintains that it has provided an appropriate educational program for T and that it has complied with all recommendations of the Commissioner.

An oral argument on a Motion of the Board and a hearing with respect to certain factual data in dispute were conducted on October 23, 1973 by a hearing examiner appointed by the Commissioner at the office of the Bergen County Superintendent of Schools, Wood-Ridge. The record of such argument and hearing is supplemented by memoranda of counsel and a total of five exhibits. The report of the hearing examiner is as follows:

The instant dispute is contained in two separate Petitions of Appeal which, by agreement of the parties, are consolidated for adjudication as one Petition but with the separate designation of section "A" and section "B." The consolidated Petition is entitled *In the Matter of "T," by her parents and natural guardians v. Board of Education of the Borough of Tenafly*. George Tennant, Jr., Esq., is the attorney of record on behalf of the Board. The representation on behalf of petitioners is, however, divided in the following manner:

1. With respect to section A – Mr. Melvin Gittleman, Esq.

2. With respect to section B – Mr. Murray Sockolow, acting *Pro Se*.

At the conference of the parties held on July 19, 1973, it was agreed that the primary issue for determination in this matter is whether or not the Board

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has fulfilled its responsibility to provide an appropriate educational program for T. However, there is also a secondary issue concerned specifically with the basic prayer of section A of the Petition which was the subject for argument on a Motion of the Board.

Both the primary and secondary issues, however, have developed over a long period of years and are rooted for factual delineation in two previous decisions of the Commissioner and a decision of the State Board of Education; *In the Matter of "T" by her parents and natural guardians v. Board of Education of the Borough of Tenafly, Bergen County,* 1968 *S.L.D.* 87; Decision to Remand, State Board of Ecucation, 1969 *S.L.D.* 205; Decision on Remand, 1970 *S.L.D.* 283. (These decisions will hereinafter be designated In the Matter of "T" (1968), Decision to Remand, and Decision on Remand.) The principal findings of these decisions will now be set forth so that the instant controversy may be viewed in its proper context, and in order to establish the requisite factual background.

In his initial decision, In the Matter of "T" (1968), the Commissioner found that T had been properly classified by the Board as "trainable mentally retarded." Such decision was grounded in the testimony of members of the Board's Child Study Team and teachers who were familiar with the nature and severity of the child's handicap. Such testimony, reported at 1968 *S.L.D.* 88, was contrary, however, to the testimony of witnesses for petitioners, who testified, in essence, that such classification did not make adequate provision for the development of learning potential.

Nevertheless, the Commissioner said:

> "*** The Commissioner has carefully reviewed and considered the report of the hearing examiner as set forth above. He recognizes the problem herein as one in which there may conceivably be wide differences of professional opinion. He further recognizes and shares with petitioners their deep concern that their daughter may have such educational opportunity as will help her to develop to her fullest potential. There has been no lack of such concern upon the part of respondent and its administrators, specialists, and teachers.
>
> "The statutes of New Jersey have, since 1954, made specific provision for the identification, classification, and education of public school children having learning handicaps, whether they be caused by mental or physical impairment. See *N.J.S.* 18A:46-6 through 46-19. Boards of education are required to provide suitable educational programs for pupils so classified. *N.J.S.* 18A:46-13.
>
> "On the basis of the testimony presented in this matter, the Commissioner concludes, and so *finds, that "T" was properly classified by respondent for educational purposes as trainable mentally retarded,* and as such was placed by respondent in a class for trainable children. The petition herein is accordingly dismissed." (*Emphasis supplied.*) (at p. 89)

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This decision of the Commissioner was appealed to the State Board of Education and in its short Decision to Remand the State Board said:

> "We remand to the Commissioner of Education, after hearing the appeal presented before the State Board of Education on April 2, 1969, with the suggestion that an examination of the child would be helpful and that he arrange the examination." (1969 *S.L.D.* at 205)

Thereafter, the Commissioner determined that the recommended "examination" should be conducted by a County Child Study Team (*cf. N.J.S.A.* 18A:46-3,5), and he designated the Morris County Child Study Team to perform this function. The Team was composed of a psychologist, social worker, learning disabilities specialist, and a neuro-pediatrician. Their report was received by the Commissioner on July 6, 1970. The report of this Team was included in the Commissioner's Decision on Remand, *ante,* as follows:

> "***'Chapter 46, Public Laws of 1968, is specific in requiring the identification and classification of all handicapped children not necessarily for the purpose of categorizing them or for special class placement, but to determine the appropriate educational program which will best serve the child. Diagnosis and classification should include a medical examination, a psychological evaluation, and educational assessment and developmental history.
>
> 'On the basis of the team evaluation, educational assessment, psychological evaluation, social history and medical examination, it is our opinion that 'T' be classified as a *multiply-handicapped* child. It is recommended that she receive instruction in a class that would offer specific programs to meet her needs. These would include remedial assistance in basic tool subjects, perceptual-motor training and intensive speech correction. The possibility of residential school placement should also be explored.
>
> 'This report is based on the examinations, tests and interviews undertaken and completed in May and June, 1970, by the undersigned. Morris County
>
> Child Study Team'***" (*Emphasis supplied.*) (at p. 284)

Having reviewed the report of the Morris County Child Study Team, the Commissioner then concluded that the classification of T should be changed from that of a "trainable mentally retarded" child to a "multiply handicapped" child. His determination in this regard received the following expression:

> "***Careful review and consideration having been given to the report and recommendations of the Team, the Commissioner finds that 'T' is a *multiply-handicapped* child who *now* functions above the trainable mentally retarded level which the Commissioner's prior decision affirmed. The Commissioner therefore concludes, and so finds, that placement in a trainable mentally retarded class does not provide an adequate education program to meet 'T's' needs. He therefore directs that respondent place 'T' in a class that would offer specific programs to meet her needs, including

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remedial assistance in basic tool subjects, perceptual-motor training, and intensive speech correction. He further recommends that, in the interests of both 'T' and her family, the possibility of a residential school placement should be explored.

"To assist respondent Board in the fulfillment of this directive, the Commissioner *recommends* that respondent *arrange with the Morris County Superintendent of Schools to utilize the consultative services of the Morris County Child Study Team." (Emphasis supplied.)* (at p. 284)

This concludes a summary of the prior litigation and decisions in this matter. The instant Petition of Appeal, sections A and B, rests for adjudication in the factual determinations and recommendations which are contained in these decisions of 1968, 1969 and 1970.

The first section of the instant Petition of Appeal for discussion herein was filed on June 18, 1973, and is reproduced in its entirety as follows:

"*** 1. On September 9, 1970, the Commissioner of Education of the State of New Jersey, determined that the Board of Education of the Borough of Tenafly, the respondent herein, had prior to that time failed to provide an adequate educational program to meet the needs of the petitioners' child herein known and designated as 'T'. A copy of the Commissioner's opinion is appended hereto.

"2. Prior to the opinion of the Commissioner and subsequent thereto, petitioners were compelled to provide education training, transportation and supplies for their child by virtue of the failure and refusal of the Tenafly Board of Education to do so in accordance with the provisions of N.J.S.A. 18A:46-8 and N.J.S.A. 18A:46-13 and other related statutes of the State of New Jersey.

"WHEREFORE petitioners pray for reimbursement of expenses for tuition, transportation, training and supplies expended by them by virtue of the aforesaid failure of the Tenafly Board of Education to provide an adequate educational program for their child."

It is this section A of the Petition which was the cause of the Board's Motion to Dismiss and the subject of oral argument at the hearing of October 23, 1973.

In the Board's view, expressed in its Memorandum of Law which was received in the Division of Controversies and Disputes on October 19, 1973, the Commissioner does not have jurisdiction to direct the Board to pay money damages such as those claimed herein (a total of $35,745.97). In support of this view the Board cites *Jackson v. Concord Company,* 101 *N.J. Super.* 126 (*App. Div.* 1968); *Zahorian v. Russell Fitt Real Estate Agency,* 62 *N.J.* 399 (1973) minority opinion at p. 417; *Sherry v. Schomp,* 31 *N.J. Super.* 267, 269 (*App. Div.* 1954). Further, the Board cites the following decisions of the Commissioner and the State Board in this regard: *Sergey Padukow v. Board of Education of the Township of Jackson, Ocean County,* 1967 *S.L.D.* 251, aff'd State Board of

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Education, 1968 *S.L.D.* 263; *Irving Thielle et al. v. Board of Education of the Borough of Fair Lawn, Bergen County*, 1968 *S.L.D.* 245.

While maintaining that there is no basis in law for the monetary claims advanced herein, the Board has also filed a Memorandum Directed to Petitioners' Cause of Action. Specifically, in this regard, the Board disputes certain assertions of petitioners contained in the Memorandum on Behalf of Petitioners wherein it is said:

> "*** It is clear therefore, that between the years 1962 and 1970 the child was misclassified by the Tenafly Board of Education and was not in fact receiving the 'suitable facilities' required by the statute.***" (at p. 2)

In the Board's view:

> "*** There is nothing in the record before the State Department of Education which supports this statement. In the Commissioner's decision, dated April 25, 1968, [reported in full, *ante*] *** the Commissioner found as a fact that the child *** was properly classified as 'trainable but not educable'.
>
> "Subsequently, the State Board of Education found that the records in the hearings below were 'incomplete' and that the child should be re-evaluated by the Morris County Child Study Team. This was done. At no time, has the Commissioner either stated or implied that the child 'T' had been *'misclassified'* prior to the evaluation *** by the Morris County Child Study Team.***" (Memorandum Directed to Petitioners' Cause of Action, at p. 2)

Further, the Board argues:

> "*** There is nothing in the opinion of the Commissioner (dated September 9, 1970) [reported in full, *ante*, as Decision on Remand] from which it can fairly be concluded that the facilities which had been provided, in previous years (1962-1969) by the Tenafly Board of Education, were ruled by the Commissioner *to have been 'not suitable'*, based on the record and the evidence before the Tenafly Board of Education, *prior* to the time of the re-evaluation of the child in the spring and summer of 1970 by the Morris County Child Study Team***." (Memorandum Directed to Petitioners' Cause of Action, at pp. 2-3) (*Emphasis in text.*)

Thus, it may be seen that the Board's argument is two-fold in support of its Motion to Dismiss. The Board argues that there is no authority for the Commissioner to consider such prayers as are here advanced for "reimbursement of expenses" and, further, that even if there were, there is no basis for the claim that the Board has failed to meet its obligations to the child of petitioners.

Petitioners aver, on the other hand, that prior decisions of the

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Commissioner are authority for the proposition that a local board of education may be held liable for such "expenses" as are here demanded when such Board has been found to have failed to provide a suitable educational program or facilities for a handicapped child. In support of this contention, petitioners cite *Jonathan Traurig v. Board of Education of the Township of Livingston, Essex County,* 1971 *S.L.D.* 260, aff'd State Board of Education 266; and *Malcolm Woodstein and Ina Woodstein v. Board of Education of the Township of Clark, Union County,* 1970 *S.L.D.* 220. Petitioners also cite a decision of the Court in *Sleight v. Board of Education of Paterson,* 112 *N.J.L.* 422, (*E. & A.* 1933) in support of their view that a board of education "*** could be liable on the theory of *quantum meruit* for services rendered to it in fulfilling its educational function.***" (Memorandum on Behalf of Petitioners, at p. 5)

The Board supports its position herein with a series of affidavits:

(a) an affidavit of the Superintendent of the Tenafly Public Schools

(b) an affidavit of the Director of Child Study in the Tenafly School System

(c) an affidavit of a New Jersey State Child Study Supervisor associated with the State Department of Education

(d) an affidavit of the Coordinator in the Multiple Handicapped Center, Wayne Township, New Jersey

(e) an affidavit of the school psychologist at the Multiple Handicapped Center, Wayne Township Public Schools

(f) an affidavit of a former teacher of neurologically impaired pupils, Tenafly Public Schools

(g) an affidavit of the Deputy Assistant Commissioner in the State Department of Education, Trenton.

Such affidavits are a reiteration of certain factual testimony developed during the course of the hearings in 1967 and referenced in the decisions of the Commissioner and the State Board in that year, and in 1968 and 1969 reported, *ante*. Additionally, however, the recital contained in the affidavits serves as a chronological record of efforts made by the Board on behalf of T in the years subsequent to 1969.

Petitioners have also furnished an affidavit by the father of T which states that his child was classified as "trainable" in 1962 but that such classification was contrary to the professional advice he had received "*** to the effect that the educational facilities provided for my child were not in fact suitable in light of her condition.***" (from affidavit of the father of petitioner, at pp. 1-2) Wherefore, he states, "*** It became necessary therefore for me between 1962 and 1970 to provide the education and transportation for my child which she

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was not receiving through the facilities provided by the Tenafly Board of Education.***" (at p. 2) Attached to this affidavit is an itemized, year by year listing of expenditures allegedly made by petitioners. This listing includes expenses for various testing procedures, therapy sessions, appliances, materials, educational trips, mileage costs, books, transcripts of the hearings conducted in 1967, etc.

The hearing examiner has reviewed all such affidavits and the contentions of the parties with respect to the merits of the Petition, section A, herein to complete a summary recital for purposes of the record. He observes that the prayers recited, *ante,* are grounded on an avowal that:

1. "T" has been classified incorrectly as a trainable child during all of the period 1962-1970 and that the Decision to Remand and the Decision on Remand supported this view; and

2. petitioners were cognizant at all times during those years that there was an incorrect classification and such cognizance justified their personal expenditure of funds to assure an appropriate education for their daughter; and, therefore,

3. having voluntarily expended such funds they are now entitled to reimbursement.

However, the hearing examiner finds no merit in such argument and avowal. While the State Board of Education in its Decision to Remand recommended further examination of T and while the Commissioner subsequently determined in his Decision on Remand that T *now* (in 1969) should be reclassified as multiply handicapped, it is nowhere stated or expressly inferred that the classification of T *had* been in error. Classifications of handicapped children do change in time, and this fact is recognized in the rules of the State Board of Education which require periodic reexamination of the status of handicapped children. *N.J.A.C.* 6 The requirement would otherwise stand as a mandated exercise in futility.

Assuming, *arguendo,* however, that the above finding is incorrect and that the decisions of the Commissioner and the State Board should be construed to mean that T had been classified incorrectly for an eight-year period, we are still confronted with the Motion herein which is grounded on the argument that the Commissioner lacks jurisdiction. The question then becomes one of basic law: may the Commissioner confer an award amounting to money damages for services and goods privately obtained by the parents of a school pupil where, as herein, such services and goods are incremental to a full instructional program already provided by a school district? The hearing examiner knows of no authority for such an award in statutory prescription and concludes that the award is proscribed by prior decisions of the Courts and the Commissioner and State Board.

In this regard, in *Jackson v. Concord Company, supra,* the Court said:

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> "*** The award of damages to a person suffering monetary loss as the result of the unlawful action of a third party has traditionally been limited to judicial proceedings. Power to award damages will not be extended to an administrative body unless the legislative purpose to grant such power is plainly indicated.***" (at p. 133)

There is no such "power" conferred on the Commissioner by any statute in the education laws, *Title* 18A. Nor has the Commissioner ever exercised it. (See *Celina G. David v. Board of Education of the Borough of Cliffside Park, Bergen County,* 1967 *S.L.D.* 192 *and Fred Bartlett, Jr., v. Board of Education of the Township of Wall, Monmouth County,* 1971 *S.L.D.* 163 for cases of peripheral pertinence.) Such finding is not disturbed by the decision of the Commissioner in *Traurig, supra,* since therein there was no award of monetary damages but the refunding of tuition costs for which, the Commissioner held, the local board of education was responsible. The facts of that matter are clearly distinguishable from those herein since the Tenafly Board has never agreed, in the first instance to the expenditures which petitioners have allegedly made and for which they now demand payment.

For the reasons advanced, *ante,* the hearing examiner recommends that the Motion to Dismiss the Petition, section A, be granted.

The second section B of the instant Petition is directly pertinent to the Decision on Remand, excerpts of which are set forth, *ante.* This section was the subject of limited proofs at the hearing of October 23, 1973, and is reproduced in its entirety as follows:

> "*** 1. The Commissioner of Education recommended that the respondent arrange with the Morris County Superintendent of Schools to utilize the consultative services of the Morris County Child Study Team.
>
> "2. The respondent has failed to comply with the recommendation of the Commissioner and that the interests of 'T' have been disregarded by the respondent.
>
> Wherefore, petitioner requests that the respondent be compelled by the Commissioner of Education to have the Morris County Child Study Team examine and evaluate 'T'."

The only witness produced by petitioners in support of the allegation herein contained was the father of T, counsel *pro se,* who stated that the charge was true in fact—that the Board had not complied with the recommendation to utilize the services of the Morris County Child Study Team and, thus, had disregarded the interests of T.

However, the Board, by testimony and documentation disputed the truth of the allegation. In this regard the hearing examiner cites excerpts from certain exhibits introduced at the hearing of October 1973 as follows:

1. From a letter (R-1) dated November 3, 1970, written by the

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Superintendent of the Tenafly Public Schools to the Director of Child Study Teams, Morris County:

> "I am pleased to report to you that we have made arrangements to place [T] in the class for the multiply handicapped held in the Wayne Public School beginning Tuesday, November 10.
>
> "This is in accordance with the *instruction of your Child Study Team* that she be placed in a class for the multiply handicapped.***" (*Emphasis supplied.*)

2. From a letter (R-4) written by the aforementioned Superintendent of Schools to petitioners on December 21, 1971. This letter was concerned with a school placement for T in the school year 1972-73, and it indicates the Morris County Team had again been consulted. It then states:

> "*** The reason for the consultation with the Morris County Team was the fact that the classification of multiply handicapped was made by the team and their consultive services were recommended by Dr. Marburger in the event assistance was needed in securing a suitable educational placement for ['T']. *** it was my feeling that a complete review of the situation with the classifying team was indicated prior to arranging any other placement.***" (See also R-3.)

A review of these documents and of the affidavits submitted by the Board lead to the firm conclusion that the Board has, in fact, utilized the services of the Morris County Child Study Team in the interim since the time of the Decision on Remand to the date of June 1972 (at which time T was withdrawn from school). The hearing examiner so finds. Accordingly, the hearing examiner finds that the portion of the instant Petition of Appeal, section B, which sets forth a contrary avowal is not sustained, and he recommends that it be dismissed.

Finally, while the findings, *ante,* support the Board in the instant controversy, it remains to be said that petitioners still retain the entitlement ot enroll their child (age 16) in a program adjudged as appropriate by the Tenafly Board's Child Study Team. Such entitlement remains unfettered in principle and tempered only by the practicality that if such decision is made by petitioners there should be adequate notice of intention in this regard.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the previous decisions rendered *In the Matter of "T" by her parents and natural guardians v. Board of Education of the Borough of Tenafly, Bergen County,* 1968 *S.L.D.* 87; decision to remand, State

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Board of Education, 1969 *S.L.D.* 205; decision on remand by the Commissioner of Education, 1970 *S.L.D.* 283.

It is not necessary to repeat here the recitation of factual findings set forth in the report of the hearing examiner, which the Commissioner adopts as his own findings.

The Commissioner determines that there is no evidence to support petitioners' allegation that their child had been incorrectly classified during the period from 1962 through 1970. In the Commissioner's judgment, the circumstances of this child's educational, psychological, and social development changed, and therefore, the child's classification was appropriately changed. Hopefully, this child will improve as the result of the dual processes of educational development and maturation in the ensuing years, and accordingly will be reclassified to accurately reflect a reduction in her unfortunate impairments. Even assuming, *arguendo,* that the Commissioner is wrong in his judgment of this child's classification, the Commissioner can find no authority of law whereby, under those circumstances, he could order the Board to pay an award of monetary damages to the parents of T for expenditures for educational services they have privately obtained rather than availing themselves of the instructional program provided by the school district. The words of the New Jersey Superior Court in *Jackson v. Concord Company,* 101 *N.J. Super.* 126 (*App. Div.* 1968) are particularly applicable to the question of whether an administrative agency of the State has the authority to confer an award of monetary damages. The Court stated the following conclusion:

> "*** The award of damages to a person suffering monetary loss as the result of the unlawful action of a third party has traditionally been limited to judicial proceedings. Power to award damages will not be extended to an administrative body unless the legislative purpose to grant such power is plainly indicated.***" (at p. 133)

The record before the Commissioner does not support a conclusion, as petitioners allege, that the Board has failed to comply with the Commissioner's directive to secure an evaluation of and recommendations for the placement of T by the Morris County Child Study Team.

The Commissioner is constrained to remind both parties that the parents of T retain the right to enroll their child in an educational program sponsored by the Board of Education of the Borough of Tenafly, which may be deemed suitable by the Board's administrative officers, based upon recommendations made by the Board's Child Study Team.

For the reasons stated above, the Commissioner finds and determines that the contentions of petitioners are without merit. Accordingly, the Petition of Appeal, in both parts, is hereby dismissed.

COMMISSIONER OF EDUCATION

April 24, 1974

Pending before State Board of Education

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Thomas Smith, Jr.,

Petitioner,

v.

Board of Education of the Township of Egg Harbor, Atlantic County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, McCarter & English (Steven B. Hoskins, Esq., of Counsel)

For the Respondent, A. Ralph Perone, Esq.

Petitioner, a teaching staff member continuously employed as a school principal and Superintendent of Schools by the Board of Education of the Township of Egg Harbor, hereinafter "Board," during all of the period beginning July 1, 1970 through December 30, 1973, alleges that such employment entitles him to the tenure protection which the statutes afford, and that the decision of the Board on this latter date to relieve him of all duties as Superintendent is *ultra vires* and should be rendered a nullity. The Board denies that petitioner has in fact acquired a tenure status as Superintendent of Schools on the grounds that his certification status was deficient during a part of the period of his service.

This matter is submitted on a Stipulation of Facts and Briefs for Summary Judgment by the Commissioner of Education. The relevant facts may be concisely stated as follows:

Petitioner was first employed by the Board as a school principal by a contract executed on April 21, 1970 for the period July 1, 1970 to the 30th day of June 1971. (PR-1) His service as principal for that total period was continuous and the certificate of "Secondary School Principal" which he held was entirely appropriate to the duties which he performed. (PR-6)

In May 1971, a second contract of employment was executed between petitioner and the Board for the year July 1, 1971 through June 30, 1972. This contract also specified that petitioner's service was to be that of a principal. (PR-2) However, on August 16, 1971, this contract was, in effect, aborted by mutual agreement and petitioner and the Board executed a second contract effective from the first day of August 1971 to the first day of August 1972. This contract (PR-3) specified that petitioner was to be employed as Superintendent of Schools.

Petitioner's performance of duties as Superintendent was continuous thereafter from the date of August 1, 1971 through the date of October 30, 1973, at which time the Board moved to relieve him of such duties, and in the

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interim a fourth contract (PR-4) and a fifth contract (PR-5), similar in every essential respect to petitioner's first contract as Superintendent (PR-3) had been executed between the parties to the controversy herein. While a Board resolution of October 30, 1973, purported to relieve petitioner of his duties as Superintendent, he continued in such duties through the month of December 1973, according to the 60 day notice clause which the contract of employment contained.

All of the service of petitioner as Superintendent was performed while he possessed the required certificate of "School Administrator," except that during the initial period of such service in the months August through December 1971, he possessed only a certificate to serve as a school principal.

Thus, in summary, petitioner was continuously employed by the Board for a total period of three years, six months: as a principal, one year, one month, and as Superintendent of Schools, two years, five months. Petitioner was properly certificated during that period, with the exception that in the period August 1, 1971, when he began his service as Superintendent, to January 1, 1972, petitioner's certification remained that of a principal. The narrow issue to be decided is whether or not petitioner has acquired a tenure status in the school district as either Superintendent of Schools or as a principal.

Petitioner asserts that the facts, *ante*, are sufficient and conclusive proof that he has met all the precise requirements to attain a tenure status as a principal and as Superintendent of Schools. In support of this assertion he cites several prior decisions of the Commissioner. *Robert F. X. Van Wagner v. Board of Education of the Borough of Roselle, Union County*, 1973 *S.L.D.* 488; *Alfred W. Freeland v. Board of Education of the Scotch Plains–Fanwood Regional School District, Union County*, 1972 *S.L.D.* 53, affirmed State Board of Education 1972 *S.L.D.* 58, affirmed New Jersey Superior Court, Appellate Division, 1973 *S.L.D.* 768; *Cornelius T. McGlynn v. Board of Education of the Township of Lumberton, Burlington County*, 1972 *S.L.D.* 28, interv. denied State Board of Education September 13, 1972, affirmed as *Robert Kolbeck v. New Jersey State Board of Education, Board of Education of the Township of Lumberton and Cornelius T. McGlynn, New Jersey Superior Court, Appellate Division*, 1973 *S.L.D.* 770 Accordingly, petitioner prays for reinstatement in his position as Superintendent with all appropriate salary payments and benefits, and further, that he be awarded counsel fees and costs.

The Board denies that the facts, *ante*, justify such a conclusion. In the Board's view, the fact that petitioner served during the period August through December 1971, as Superintendent of Schools without the certificate required for that position, justifies an alternate conclusion that his creditable period of service toward a tenure entitlement was broken. In this regard, the Board cites *N.J.S.A.* 18A:28-5, 6, and *N.J.S.A.* 18A:17-17. The last statute cited reads as follows:

> "No person shall be appointed, or act as or perform the duties of, superintendent or assistant superintendent of schools *unless he holds an*

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appropriate certificate as prescribed by the state board." (*Emphasis supplied.*)

Further, the Board avers that petitioner bears the burden of proof that he has acquired a tenure status.

The applicable statutes herein, *N.J.S.A.* 18A:28-5, 6 and 26-6, are quoted as follows:

18A:28-5. Tenure of teaching staff members

"The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses *** and such other employees are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B or article 2 of chapter 6 *** after employment in such district or by such board for:

(a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

(c) the equivalent of more than three academic years within a period of any four consecutive academic years;

provided that the time in which such teaching staff member has been employed as such in the district in which he was employed at the end of the academic year immediately preceding July 1, 1962, shall be counted in determining such period or periods of employment in that district or under that board but no such teaching staff member shall obtain tenure prior to July 1, 1964 in any position in any district or under any board of education other than as a teacher, principal, assistant superintendent or superintendent, or as a school nurse, school nurse supervisor, head school nurse, chief school nurse, school nurse coordinator, or as the holder of any position under which nursing services are performed in the public schools."

18A:28-6. Tenure upon transfer or promotion

"Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to

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another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:

(a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or

(b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or

(c) employment in the new position within a period of any three consecutive academic years for the equivalent of more than two academic years;

provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion."

18A:26-6. Certificates required for employment of teaching staff members in districts having city district examiners

"No teaching staff member shall be employed in any of the schools of a district having a district board of examiners unless he shall be issued a certificate by said board and holds an appropriate certificate issued by the state board of examiners or the county superintendent of schools of the county."

In the instant matter, the Board does not contend that petitioner has not served the periods of time statutorily required to attain a tenure status either as Superintendent or as a principal in the school district. Instead, the Board argues that a part of petitioner's serving as Superintendent, as detailed, *ante,* was rendered under an inapplicable certificate and, thus, the running time toward a tenure entitlement in either position was broken. The Board also asserts that the only time period after December 1971, which could be credited toward a tenure status for petitioner would be the time commencing when petitioner acquired a School Administrator's certificate, which was at some unspecified date in January 1972.

Thus, the Board ascribes to petitioner the onus for not being properly certificated and argues, in effect, that all services petitioner performed in such circumstance should not be counted as part of the total time period necessary for him to attain a tenure status.

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The Commissioner cannot agree with the Board's contention and, to the contrary, holds that petitioner was eminently qualified in terms of academic preparation for the services he did perform for the Board during the period of August through December 1971. It was the Board's duty, not petitioner's, to secure coverage for him as the "acting administrator" of the district during the relatively short period necessary for the acquisition of full certification. This holding is grounded on the fact that the State Board of Education has clearly set forth procedures to be followed in all such cases as described herein, in order to promote the thorough and efficient continuing operation of local school districts. These procedures do not deter nor prevent the performance of just such duties as petitioner in the instant matter performed. The provisions are contained in the Administrative Code as *N.J.A.C.* 6:3-1.1, which reads as follows:

> "(a) If because of illness or death or *some other good and sufficient reason,* the board of education must fill the post of superintendent of schools, assistant superintendent of schools *** with a person who is designated as the acting administrator in a respective situation and who is *not properly certified to hold the position; it shall be the duty of the board of education* to make written application to the Commissioner of Education for permission to employ such person in an acting capacity, stating the reasons why such action is necessary.***" (*Emphasis supplied.*)

The Board neglected its duty to comply with *N.J.A.C.* 6:3-1.1 in this matter, and therefore it can hardly, at this juncture, expect that petitioner should bear the blame or be penalized with respect to his tenure status. Petitioner did what the Board agreed, by contract (PR-3), he should do; from August 1, 1971, he served as Superintendent, and he is entitled to have the time from August 1, 1971 to January 1972 credited toward the total time necessary to acquire a tenure status. The Commissioner so holds.

Accordingly, the Commissioner finds that at the conclusion of the work day on June 30, 1973, petitioner had completed the "three consecutive calendar years" required for the acquisition of a tenure status as a "teaching staff member" by the applicable statute. (*N.J.S.A.* 18A:28-5) At that time, petitioner acquired a tenure status both in that general category and as a principal. *Robert F. X. Van Wagner, supra; Alfred Freeland, supra; Cornelius T. McGlynn, supra* Additionally, the Commissioner holds that on August 1, 1973, petitioner had completed a period of "two consecutive calendar years" in a "new position" which entitled him from that time forward to a tenure status in the position of Superintendent of Schools. *N.J.S.A.* 18A:28-6

Accordingly, the Commissioner finds that the Board could not, as it purported to do on October 30, 1973, dismiss petitioner as Superintendent or relieve him of the duties and responsibilities of that office except in the manner that the statutes prescribe, (*N.J.S.A.* 18A:6-10 *et seq.*) and the Commissioner directs that petitioner be restored to the position of superintendent of schools forthwith. The Commissioner further directs that this restoration be made retroactive to the day that petitioner was relieved of his duties and

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responsibilities as Superintendent, and that he be awarded all the corollary emoluments to which he is entitled by contract and/or by law.

Finally, the Commissioner can find no authority of law to grant petitioner's request for counsel fees and costs. *Fred Bartlett, Jr., v. Board of Education of the Township of Wall, Monmouth County,* 1971 *S.L.D.* 163; *Romanowski v. Jersey City Board of Education,* 1966 *S.L.D.* 219; *David v. Cliffside Park Board of Education,* 1967 *S.L.D.* 192 Accordingly, this prayer of the Petition is denied.

COMMISSIONER OF EDUCATION

April 25, 1974

Joseph F. Paddock,

Petitioner,

v.

Board of Education of the Borough of Demarest, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Joseph F. Paddock, *Pro Se*

For the Respondent, Kiefer, Bollermann & Kaplowitz (Christian Bollermann, Esq., of Counsel)

Petitioner, a resident of Demarest, alleges that the Board of Education of the Borough of Demarest, hereinafter "Board," arbitrarily and capriciously denied his request that his son be transferred from the morning to afternoon kindergarten class and did otherwise violate its established assignment policies for such classes. The Board denies that it acted improperly, contrary to its stated policies, or that petitioner's son was harmed as the result of his class assignment.

At a conference of counsel before a representative of the Commissioner of Education held January 7, 1974, it was agreed that the facts would be jointly stipulated by the parties prior to oral argument scheduled for January 25, 1974. However, attempts at joint stipulation proved futile and a plenary hearing was held on January 25, 1974 before a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton.

There is no material disagreement over certain basic facts which are herewith set forth as follows:

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Petitioner's son was assigned in September 1973 to the morning kindergarten class at the Luther Lee Emerson Elementary School by agents of the Board. The Board operates two elementary schools, each of which has both a morning and afternoon kindergarten class. The enrollment in these four classes ranges from twenty-one to twenty-three pupils.

Kindergarten pupils in the morning class attending the Board's County Road School were all born after April 30, 1968. Those in the afternoon class were all born prior to April 30, 1968. Kindergarten pupils in the morning class attending Luther Lee Emerson School were born after April 30, 1968, with the exception of two born January 1968, one in December 1967, and petitioner's son born April 20, 1968. Pupils in the afternoon class of this school were all born prior to April 30, 1968, with the exception of one born in May 1968 and another in September 1968. (Exhibit B)

On September 7, 1973, petitioner requested that the Board reassign his son to the afternoon class in order that he would attend class with what generally constituted the older group of kindergarten pupils at this school. Reassignment was denied in turn by the principal, the Superintendent, and the Board.

The Board's policy on assignment of pupils to kindergarten classes reads as follows:

> "The assignment of pupils to grades kindergarten through fourth shall be made by the superintendent to either the Luther Lee Emerson School or to the County Road School. In making such assignments the superintendent shall consider the availability of classroom space and the proximity of residence to each building.***" (R-11)

The Board has adopted no rigid policy with regard to assignment of kindergarten pupils from geographic areas. However, the staff has been guided by a dividing line running eastward of the Northern Railroad tracks which bisect the community. (R-16)

The Board's policy on age of entrance to kindergarten (R-12) requires that a pupil be five years old by September 30 of the year of enrollment or otherwise be declared eligible under provisions of the early admission policy which gives sole discretion to the Superintendent in such matters. Under the early admission policy one kindergarten pupil was enrolled at the County Road School and two were likewise enrolled at the Luther Lee Emerson School.

Two kindergarten pupils living on Duck Pond Road deep within the geographic area served by the County Road School, were assigned to the Luther Lee Emerson School.

Petitioner argues that April 30, 1968, represents a *de facto* cutoff date for assignment of pupils to the afternoon session of Demarest kindergarten classes and that his son, whose birthdate of April 20, 1968, occurred earlier than the

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cutoff date, was improperly assigned to the morning kindergarten class. He further contends that the subsequent denial of his request to transfer his son into the afternoon class was arbitrary, capricious, and contrary to the Board's practices and policy. In support of this contention, he states that four pupils born prior to April 30, 1968, were improperly assigned to the morning session, and one pupil born in May 1968 was improperly assigned to the afternoon session. Such improper assignments, he contends adversely affected his son's assignment or reassignment to the older group of kindergarten pupils at the Luther Lee Emerson School as was requested.

Petitioner contends that, if one or more pupils younger than his son and born later than April 30, 1968, were assigned to the afternoon session, the Board could not properly deny his request that his son be reassigned to the afternoon kindergarten class. He further asserts that his son would be better served and educated if he were assigned to the class with the older group of pupils.

In support of his contention that the Board's denial of his request was arbitrary and capricious, petitioner alleges that special consideration in assignment of pupils was given to other parents of kindergarten pupils, but was denied to him.

Additionally, petitioner charges that the Board exercised imprudent judgment in giving special consideration to parents of pupils residing outside the boundary limits served by the Luther Lee Emerson School, resulting in the enrollment of those pupils at that school, and thereby affecting the assignment of his own son as herein controverted.

Finally, petitioner prays that the Commissioner will order the Board to reassign his son to the older class of kindergarten pupils at the Luther Lee Emerson School.

The Board, while conceding that age of children is used as a guideline for the assignment of pupils to kindergarten classes, denies the existence of a *de facto* cutoff date which must be rigidly adhered to by its administrators. It further denies that the Board or its administrators were motivated by improper considerations or acted in a capricious or arbitrary manner.

Likewise the Board contends that its geographic guidelines are flexible and must remain so in the interests of a thorough and efficient educational system to be operated in an economical manner.

While conceding that two pupils younger than petitioner's son are assigned to the afternoon session, the Board points out that three pupils older than petitioner's son are in the younger group which meets in the morning session. The Board holds that a rigid regard to age would require that they be assigned to the afternoon session before such consideration could be extended to petitioner's son and that such reassignments would seriously unbalance the total classroom enrollments and adversely affect the educational process. Additionally, the Board points out that a rigid division of its kindergarten pupils would place petitioner's son in the younger group of pupils. (R-1; R-2)

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Finally, the Board asserts that petitioner's son is well adjusted in the morning session, that if he were reassigned to the afternoon class he would have the same teacher and be instructed in the same program and classroom, and that such reassignment is not recommended by its professional educators.

The hearing examiner observes that an April 30, 1968 cutoff date for kindergarten class assignment appears to have been generally adhered to by the principal, but that no Board policy or directive exists compelling a rigid adherence thereto. The hearing examiner finds no statutory requirement for the establishment of such a rigid demarcation date. It is doubtful that such would serve the district in the best interest of either economy or educational efficiency. The exigencies of birth dates of pupils born within a given twelve-month period, as well as the maturation of pupils at time of enrollment, would indicate otherwise.

A similar flexibility is found to exist within the Board's policy on assignment of kindergarten pupils wherein it states:

> "*** In making such assignments the superintendent shall consider the availability of classroom space and the proximity of residence to each building.***" (R-11)

In that the Superintendent is directed only *to consider* these things, it is clear that he is not bound rigidly thereby nor precluded from heeding other considerations which may arise.

The hearing examiner observes that the actual class assignments for grades K-4 were made by the principal acting under delegated authority of the Superintendent. In so doing, he was compelled to act within a framework of available classroom space and assigned professional staff available in the two elementary schools for which he was responsible. Both were adequate but not unlimited and required a careful balancing of enrollment in the four kindergarten classes. In this regard the principal testified that it was necessary to assign five students who lived east of the railroad tracks to the Luther Lee Emerson School to achieve such balance. (Tr. 21) He further testified that he assigned all of these five, regardless of age, to the morning session in order to facilitate establishment of car pools for these children living up to two miles from the school. (Tr. 22) Such class balancing, he testified, is a yearly problem and involves all grades in the two elementary schools. (Tr. 15) He further stated that the dividing line is currently different for each grade, kindergarten through fourth.

Additional testimony of the principal confirmed that he, being newly arrived in the area, had inadvertently assigned two pupils from Duck Pond Road, the geographic area served by County Road School, to the Luther Lee Emerson School. (Tr. 24) He had also honored a commitment of his predecessor to enroll three pupils in the same kindergarten class for what he believed to be valid educational reasons. (R-13) (Tr. 16) These pupils were enrolled together in the afternoon session, since two of the three were older children. The third was born May 3, 1968.

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Concerning his reaction to petitioner's request for his son's reassignment, the principal stated:

> "*** after I had had the conversation with Mrs. Paddock and Mr. Paddock and it had become apparent that the Paddocks were concerned about the placement, I felt that it was important in terms of my own judgment, as to whether or not the situation had been handled correctly, and whether or not the placement was, in fact, a proper placement to talk to the teacher about the child himself. Because my major concern, as an educator, is with the child. And I asked Mrs. Horner to please give me a statement analysis, in a sense, on how Kenneth was doing. *** The report that she gave me, which I refer to dated September 21, did indicate that Kenny was an average child in the academic area, and he seems to be adjusting well to the classroom situation***." (Tr. 36)

Additional professional evaluations of the progress of petitioner's son were described by the principal at the hearing. (Tr. 36-40)

Such convincing testimony of the principal leads the hearing examiner to conclude that the principal, as the person initially responsible for the kindergarten assignment herein controverted, did not act in an impulsive, capricious, or arbitrary manner in making the initial assignment or in refusing to reassign petitioner's son. It is clearly within the province of the Board to establish rules for the government and management of the public schools pursuant to *N.J.S.A.* 18A:11-1. The hearing examiner finds no evidence of statutory or other violation, or that the Board or its agents acted in an improper, arbitrary, or capricious manner.

Rather, the hearing examiner finds that the principal was motivated by reasonable consideration regarding class size, travel considerations of pupils from remote areas, and what he believed to be valid considerations of certain commitments made by his predecessor. His thoroughness in reviewing the educational validity of his placement of petitioner's son contradicts a charge of capricious action.

The hearing examiner does not find proof that special consideration for class assignment was improperly accorded by the principal to other persons. Rather, he finds that human error and lack of familiarity with new surroundings coupled with certain commitments of his predecessor account for such variations as exist in geographical and age groupings in the kindergarten classes.

Absent a clear finding of illegal or improper action on the part of the Board or its agents (Tr. 66), the hearing examiner recommends that the Commissioner dismiss the Petition for insufficient proof of the allegations contained therein.

This concludes the report of the hearing examiner.

* * * *

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The Commissioner has reviewed the report of the hearing examiner and has attempted to assess what purports to be the exceptions of petitioner pertinent thereto which have been printed or marked in a random manner on a copy of the report. Such exceptions are nowhere in evidence in sequential, narrative form.

However, the matter of class assignment and, in particular, the session assignment of kindergarten pupils is clearly a "management" prerogative of local boards of education (*N.J.S.A.* 18A:11-1) and such prerogative will not be assumed or usurped by the Commissioner absent a definitive showing that the action of a local board of education was arbitrary, in bad faith, without rational basis, or discriminatory. *Vincent Massaro v. Board of Education of the Borough of Bergenfield, Bergen County,* 1965 *S.L.D.* 84; *Kopera v. Board of Education of West Orange,* 60 *N.J. Super.* 288, 297 (*App. Div.* 1960); *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, 13, aff. State Board of Education 15, aff. 135 *N.J.L.* 329 (*Sup.. Ct.* 1947), 136 *N.J.L.* 521 (*E. & A.* 1947) Such a required definitive showing cannot be found in the record before the Commissioner. In fact, the record requires a directly opposite conclusion. The Commissioner so holds.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

April 25, 1974

Lynne Di Angelis,

Petitioner,

v.

Board of Education of the Borough of Riverdale, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, John J. Greco, Esq.

For the Respondent, Irwin, Salameno & Sabbath (Herbert W. Irwin, Esq., of Counsel)

Petitioner avers that her service with the Board of Education of the Borough of Riverdale, Morris County, hereinafter "Board," has earned her a tenure status in the position of Board Secretary, and that she was illegally dismissed by the Board in contradiction of her alleged tenure rights.

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The Board denies both petitioner's avowal that she attained a tenure status and the alleged impropriety of her dismissal.

A hearing in the matter was conducted by a hearing examiner appointed by the Commissioner of Education at the office of the Morris County Superintendent of Schools, Morris Plains, on January 7, 1974. Memoranda of Law were filed subsequent to the hearing. The report of the hearing examiner follows in the form of a recital of facts as stipulated or otherwise determined from the documentary data and testimony at the hearing:

Petitioner was officially employed by the Board on August 26, 1970 by Resolution B.3.a.17 which read:

> "Resolved, that Mrs. E. Lynne Di Angelis be offered the position of Secretary of the Board of Education, of the Borough of Riverdale, her appointment to be effective October 1, 1970 to June 30, 1971, but her employment to begin September 14, 1970, under the direction of Mrs. Shirley F. Shaw from September 14, 1970, commencing September 30, 1970, at an annual salary of $6,300.00, in accordance with job description, two week vacation during first year and nine (9) paid holidays in accordance with a directive of the Riverdale Board of Education.
>
> "Be it further resolved that the president and secretary of the school board are authorized and empowered to enter into a contract with Mrs. E. Lynne Di Angelis, in accordance with the foregoing." (Exhibit A)

Petitioner reported for work on September 14, 1970, and for several days thereafter was oriented to her new position by the then Board Secretary, Mrs. Shaw. During this period petitioner both received instruction and performed work in matters regarding board meetings, board minutes (P-1; P-2), reports, transportation, payroll, deductions, pensions, withholding, Social Security, deposits, purchase orders, vouchers, tuition, posting, accounting, and correspondence. (Tr. 25-27, 36-40)

The date of Mrs. Shaw's last full working day for the Board is in dispute. Herein the hearing examiner relies upon the testimony of Mrs. Shaw (Tr. 11) and finds that this date was in fact September 23, 1970. Petitioner's recollection that the date was September 18, 1970, was admittedly uncertain (Tr. 36-37) and is further shown to be faulty wherein she stated that on the day following September 18, 1970, she and Mrs. Shaw attended a School Business Administrators Association meeting together. (Tr. 26-27) In fact, however, the September 1970 meeting of that Association was held on Thursday, September 17, 1970.

Following this period of orientation of petitioner, Mrs. Shaw was on vacation for the last five working days of September. With regard to this period, Mrs. Shaw testified as follows:

> ***
>
> "Q. Was there any unfinished work of yours remaining to be done when you left the office on September 23rd?

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"A. No, I don't think so, I did everything that required my signature before I left; and I went on vacation but I was available if they had need of my signature.

"Q. And did you let them know that you were available?

"A. Yes, I did.

"Q. Where did you spend your vacation?

"A. At home which is a block from the school.

"Q. I see. Did you receive any calls from the school between September 23 and September 30th?

"A. No, I did not.

"Q. So apparently your services were not required?

"A. No.

"Q. When did you say your resignation was effective?

"A. September 30, 1970.***" (Tr. 13)

During the days when Mrs. Shaw was on vacation prior to October 1, 1970, petitioner continued to do the work commonly assigned or statutorily required of a Board Secretary with the exception of signing checks. However, it is clear that no signature was needed for checks from the date of Mrs. Shaw's departure through October 11, 1970. (R-1, R-3) It is also clear that the signature authority for petitioner to sign checks drawn on the Board's general account first became effective on October 1, 1970. (R-4, R-5) Additionally, petitioner's bond as Board Secretary first became effective on September 28, 1970. (R-6)

Petitioner was paid the same prorated salary from September 14, 1970 through September 30, 1970, that she was paid thereafter through June 30, 1971 in accordance with her employment contract, a contract without a termination clause. (Exhibit D) She worked during the 1971-72 school year under a contract (Exhibit E) which was likewise issued without a termination clause. However, her employment contract for the 1972-73 school year (Exhibit F) did contain a termination clause which reads:

"*** 7. The within contract may be terminated by either party upon the giving of a 30 day notice of termination to the other party by certified mail, return receipt requested.***" (Exhibit F)

On June 20, 1973, the Board voted to issue a contract for the 1973-74 school year to petitioner (Exhibit C) but no contract was ever executed. After a

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delay (allegedly occasioned by discussion of sick leave days for twelve-month employees) petitioner prepared, signed, and sent her contract to the Board for signature of the President in September 1973. Petitioner did, however, continue to perform her duties and was paid from July 1, 1973 through September 19, 1973, on which date the Board voted to rescind its motion of June 20, 1973, *ante*, and to terminate petitioner. (Tr. 48) Thereupon, the Vice-President of the Board contacted petitioner by telephone, offered her an opportunity to resign (which she refused), and gave her notice of the Board's decision to terminate her employment forthwith. On the next day petitioner reported for duty but acceded to the Superintendent's order to turn over her keys to him. (Tr. 46)

Thereafter, petitioner was notified of the Board's September 19, 1973 action by a letter hand delivered to her home and again by a letter dated September 20, 1973, postmarked September 25, 1973, and delivered the following day by certified mail, which reads:

> "*** The Board of Education of the Borough of Riverdale hereby notifies you that as of Thursday, September 20, 1973, your employment as school board secretary is terminated, to take effect immediately.*** " (P-4)

Petitioner was paid by the Board for thirty days beyond September 20, 1973, and for three days of accumulated vacation entitlement, presumably in accordance with the terms of her last executed contract.

Thereafter, counsel for petitioner presented the Petition herein dated October 16, 1973 with the prayer that the Commissioner require the Board to restore her to the position of Board Secretary with such salary as may be due her.

Petitioner argues that she was continuously employed as and doing the work of Board Secretary between September 14, 1970, and September 19, 1973, including the period from September 14, 1970 through September 30, 1970, and that all of this time must be counted toward tenure in the light of *Robert F.X. Van Wagner v. Board of Education of the Borough of Roselle, Union County,* 1973 *S.L.D.* 488. Therein, the Commissioner reaffirmed what he had said in *Ann A. Quinlan v. Board of Education of the Township of North Bergen, Hudson County,* 1959-60 *S.L.D.* 113 as follows:

> "*** The Commissioner must be vigilant to protect those who are entitled to tenure from the erosion of their tenure rights by subterfuge and evasion. *** The duties performed rather than the title of a position must be controlling in determining whether a position is protected by tenure. Nomenclatures may not be the deciding factor.***" (at p. 114)

Additionally, petitioner cites *Juanita Zielenski v. Board of Education of the Town of Guttenberg, Hudson County,* 1971 *S.L.D.* 664, decided by State Board of Education on February 8, 1971, wherein it is said:

> "*** other cases make it clear that whether an employment is as a regular

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> teacher or substitute teacher is not to be determined by the designation given the employment by an employing board, but by an examination of the factual picture presented. *Downs v. Board of Education of Hoboken,* 13 *N.J. Misc.* 853 (1935); *Board of Education of Jersey City v. Wall et al.,* 119 *N.J.L.* 308 (*Sup. Ct.* 1938)***" (at p. 665)

Finally, petitioner asserts that the Board cannot seriously argue that, if a school board secretary at any time becomes physically or mentally incapacitated and unable to perform duties, the board would be forced to function without a secretary.

Conversely, the Board avers that petitioner could not have become Board Secretary during the period from September 14, 1970 through September 30, 1970, because the position was occupied during that period by her predecessor whose resignation was not effective until September 30, 1970. In this regard the Board cites *N.J.S.A.* 18A:16-1 and *N.J.S.A.* 18A:17-5 which make provision for but *one* board secretary in any school district. The Board asserts that there has never been, even in the largest school district of the State, more than one board secretary serving a district simultaneously. Additionally cited is *Alvin A. Fry v. Board of Education of the Township of Lower Penns Neck, Salem County,* 1954-55 *S.L.D.* 94.

The Board further asserts that a board secretary is a creature of statute and may serve only by act of appointment by a board of education, and that petitioner's duties prior to her official appointment could in no way constitute her a *de facto* board secretary. Additionally, the Board argues that, prior to her being bonded (September 28, 1970), and a signatory to the Board's general account (October 1, 1970), she could not properly perform the full duties of the office of Board Secretary.

Finally, in support of its contention that petitioner does not have tenure, the Board cites *N.J.S.A.* 18A: 17-13 which states in pertinent part:

> "***No assignment secretary or acting secretary shall acquire tenure of office, position or employment as secretary."

and *N.J.S.A.* 18A:16-1.1 which provides that:

> "***the board of education may designate some person to act in place of any officer or employee during the absence ***of any such officer or employee subject to the provisions of section 18A:17-13.
>
> "***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 before the Commissioner is what portion, if any, of petitioner's service to the Board between September 14, 1970, and September 30, 1970, must legally be counted toward the acquisition by petitioner of a tenure status in the position of Board Secretary. If any portion of this time must be so

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counted, was petitioner's total period of service then sufficient to meet the statutory requirements for the acquisition of a tenure status, thus rendering the Board's termination of her employment *ultra vires.*

This concludes the report of the hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and reviewed the exceptions thereto filed by the Board.

A tenure status is achieved whenever any person, otherwise eligible by statute, serves the precise time required pursuant to statute for the position or employment in question. *Canfield v. Board of Education of Pine Hill Borough,* 51 *N.J.* 400 (1968) In the instant matter the status of petitioner must be determined solely on the basis of the time she served as Secretary to the Board of Education of the Borough of Riverdale.

The record clearly shows that petitioner's appointment as Board Secretary was effective October 1, 1970, although her employment under the tutelage of the former Board Secretary began on September 14, 1970. The record discloses also that petitioner's employment as Board Secretary was terminated by formal action of the Board on September 19, 1973. Petitioner does not deny that she was notified in writing of that determination on September 21, 1973 (Respondent's Brief, at pp. 3-4) and on September 26, 1973, she was further notified by certified mail. (P-4) Petitioner's contract with the Board required notification in writing of termination of employment. The Commissioner determines, therefore, that petitioner was officially and properly given notice of the termination of her employment by the certified mail letter delivered to her on September 26, 1973.

The statute which specifies the manner of acquisition of tenure by board secretaries (*N.J.S.A.* 18A:17-2) reads in pertinent part as follows:

> "Tenure of secretaries, assistant secretaries, school business administrators, business managers and secretarial and clerical employees
>
> > "a. Any 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 and has or shall have served therein for three consecutive calendar years***shall hold his office***under tenure***."

This statute clearly provides that a tenure status is acquired on the 365th day of the third consecutive calendar year. The Commissioner has determined that the termination date of petitioner's employment was September 26, 1973, *ante;* therefore, if her hiring on September 14, 1970, is officially considered as employment as a board secretary, then petitioner has earned a tenure status. However, if petitioner's employment under the initial contract dated October 1, 1970, is paramount in determining the initial date of her employment as Board

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Secretary, then she clearly did not serve the requisite time pursuant to *N.J.S.A.* 18A:17-2. A determination of her employment status between September 14, 1970, and September 30, 1970, is necessary for the proper resolution of the issue, *sub judice.*

The Board resolution (Exhibit A) and petitioner's initial contract (Exhibit D) clearly disclose the Board's intent to employ her as Board Secretary beginning October 1, 1970. This intent is stated precisely in petitioner's contract in which she agreed to her employment as "***Board Secretary in the public school, under the control of said Board of Education, from the *1st day of October, 1970,* to the 30th day of June 1971***." (Exhibit D) (*Emphasis supplied.*) The Board resolution states, also, that petitioner's employment between September 14, 1970, and September 30, 1970, would be under the direction of the former Board Secretary whose employment terminated on September 30, 1970. This fact is not denied by petitioner, and nothing in the record suggests that she did not understand the nature of her employment during that brief period.

The Commissioner does not find any subterfuge by the Board in the method of petitioner's initial employment. The Board properly decided that the statutes permit the employment of one board secretary only (*N.J.S.A.* 18A:16-1, *N.J.S.A.* 18A:17-5); therefore, her appointment to the position was effective on October 1, 1970, the first day following the termination of employment of the former Board Secretary on September 30, 1970.

The Commissioner further determines that petitioner's status between September 14, 1970, and September 30, 1970, should properly have been designated as that of assistant secretary pursuant to *N.J.S.A.* 18A:17-13 which reads in pertinent part as follows:

> "The Board may, by a recorded roll call majority vote of its full membership appoint an assistant secretary who may be chosen from among its members and may fix his term of employment and compensation.
>
> "An assistant secretary shall assist the secretary in the performance of his duties and perform such other duties as the board may from time to time prescribe.
>
> "An assistant secretary shall act as secretary of the board and perform all duties and be subject to all of the obligations of the secretary during the secretary's absence or inability to act or during a vacancy in the office of secretary, unless or until the board shall, by a like vote, designate another person to act as secretary during such time.***
>
> "No assistant secretary or acting secretary shall acquire tenure of office *** as secretary."

This statute states clearly than an assistant board secretary cannot acquire

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a tenure status as a board secretary; therefore, the time served as an assistant secretary may not be applied to the time served as a board secretary for the purpose of earning a tenure status.

The Commissioner concludes that petitioner was, in essence, promoted from Assistant Board Secretary to Board Secretary on October 1, 1970, the official date of her contractual employment as Board Secretary.

The Commissioner determines finally that petitioner's employment as Board Secretary began on October 1, 1970, and was terminated on September 26, 1973; therefore, she did not serve the necessary period of three consecutive calendar years as required by statute *N.J.S.A.* 18A:17-2 and did not acquire a tenure status.

For the reasons stated above, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

April 26, 1974

"A.D.,"

Petitioner,

v.

Board of Education of the East Windsor Regional School District, Mercer County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Legal Aid Society of Mercer County (William J. McNichol, Esq., of Counsel)

For the Respondent, Turp, Coates, Essl and Driggers (Henry G. P. Coates, Esq., of Counsel)

This matter having been brought before the Commissioner of Education by William J. McNichol, Esq., attorney for petitioner, "A.D.," on a Notice of Motion for Interim Relief, dated December 3, 1973, requesting immediate reinstatement of petitioner into the regular high school program from which she was suspended on November 13, 1973, Henry Coates, Esq., appearing for the Board of Education of the East Windsor Regional School District; and

It appearing that petitioner was suspended for five days on November 13, 1973; and

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It appearing that prior thereto, on November 9, 1973, petitioner had been afforded an opportunity to present her views to the school vice-principal with regard to the charges which resulted in her suspension; and

It appearing that such suspension has been extended and continued thereafter to the present day, encompassing a total period of thirty days; and

It appearing that no further hearing has been afforded petitioner in the interim; and

It appearing that request for such hearing was requested by counsel for petitioner; and

It appearing that the New Jersey Superior Court Judge in *R.R. v. Board of Education of Shore Regional High School,* 109 *N.J. Super.* 337, 350 (*Chan. Div.* 1970) stated that in such matters a full hearing must be afforded to the person suspended within twenty-one days, thereby guaranteeing due process; and

It appearing that failure of respondent to provide a hearing for petitioner within twenty-one days of her suspension violates her rights of due process to such hearing; therefore

IT IS ORDERED that petitioner be either reinstated in her regular educational program forthwith or afforded a hearing on the merits of the case against her within a five-day period of the date of this order.

Ordered this 20th day of December, 1973.

COMMISSIONER OF EDUCATION

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"A.D.,"

Petitioner,

v.

Board of Education of the East Windsor Regional School District, Mercer County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Legal Aid Society of Mercer County (William J. McNichol, Esq., of Counsel)

For the Respondent, Turp, Coates, Essl and Driggers (Henry G.P. Coates, Esq., of Counsel)

On the 20th day of December 1973, the Commissioner of Education issued an Order in this matter. The Order directed that petitioner, a fifteen-year old pupil on suspension from her regular school attendance in East Windsor Township, Mercer County:

> "*** be either reinstated in her regular educational program forthwith or afforded a hearing on the merits of the case against her within a five-day period of the date of this order.***"

At the present juncture, however, petitioner alleges that respondent has violated the Order of the Commissioner and has filed a second Notice of Motion to obtain relief. An oral argument with respect to this second Motion was held on January 3, 1974 at the State Department of Education, Trenton.

At this hearing it was adduced that the basic facts pertinent to the principal issue, herein, are not in dispute and that the issue is a narrow one, namely, whether or not respondent has or has not complied with the Order of the Commissioner, *ante.*

The Commissioner determines on the basis of facts presented at the hearing, that respondent has failed to comply in a conclusive manner to the alternatives set forth in the Order.

This determination is grounded on the fact that although a Committee of three members of the East Windsor Board of Education, plus one other member, did conduct a hearing on December 27, 1973 on the merits of the complaints against petitioner, a decision with respect to petitioner's status has been delayed to January 14, 1974. Such delay in the Commissioner's judgment is of an inordinate length and in the context of previous delay cannot be sustained. It is implicit in the wording of the Order of December 20, 1973, that such delay was to be avoided and a decision expedited. The Commissioner so holds.

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Accordingly, the Commissioner directs the East Windsor Board of Education to restore A.D. forthwith to her regular educational program.

COMMISSIONER OF EDUCATION

January 4, 1974

"A.D.,"

Petitioner,

v.

Board of Education of the East Windsor Regional School District, Mercer County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Legal Aid Society of Mercer County (William J. McNichol, Esq., of Counsel)

For the Respondent, Turp, Coates, Essl and Driggers (Henry G.P. Coates, Esq. , of Counsel)

On the 4th day of January 1974, the Commissioner of Education issued an Order in this matter as a sequel to an initial Order of the 20th day of December 1973. In their ultimate effect such orders directed the East Windsor Board of Education, hereinafter "Board," to restore A.D. forthwith to her regular educational program.

Subsequently, it now appears that the pupil was so restored and did attend school on January 7 and 8, 1974.

However, on the evening of January 8, 1974, the Board met in a special meeting and determined by a vote of 7 to 0 that A.D. should be expelled from her regular educational program in the East Windsor Schools but offered an alternative program instead. Additionally, the parents of A.D. were offered an opportunity "*** to have a psychiatric review of the student by the District's Child Study Team***." (P-1)

However, petitioner now advances a Third Notice of Motion that A.D. be restored to her regular educational program. The Motion is grounded on an argument that the Board was not qualified to render such judgment since, as a Board, it has not heard the evidence against A.D. in formal hearing nor been afforded a transcript of a hearing which was conducted by a Board committee plus one other member on December 27, 1973. Further, petitioner avers that the penalty imposed is too severe for the alleged infractions of A.D.

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The Board opposes the Motion and avers that the decision it made which is controverted herein was a proper exercise of its discretion.

Having considered such arguments; and

It appearing that the Board meeting of January 7, 1974, was a properly called special meeting of the Board and that a quorum of the Board was present; and

It appearing that four members of the Board had been present during all of the hearing afforded to A.D. on December 27, 1973; and

It appearing that all four of these members (constituting a majority of the members present at the meeting of January 8, 1974) voted affirmatively for the resolution to expel A.D. from the Hightstown High School day program; therefore

The Commissioner determines that the Board's action was procedurally correct and pursuant to the statutory prescription with respect to the expulsion of a school pupil. (*N.J.S.A.* 18A:37-1 *et seq.*) However, the Commissioner retains jurisdiction in this matter pending a review of the transcript or tape recording of the hearing afforded A.D. by the Board committee plus one member on December 27, 1973.

COMMISSIONER OF EDUCATION

January 23, 1974

"A.D.,"

Petitioner,

v.

Board of Education of the East Windsor Regional School District, Mercer County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Legal Aid Society of Mercer County (William J. McNichol, Esq., of Counsel)

For the Respondent, Turp, Coates, Essl and Driggers (Henry G.P. Coates, Esq., of Counsel)

Petitioner, a fifteen-year-old pupil enrolled in the ninth grade class of

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Hightstown High School, was suspended from school attendance on November 13, 1973. Thereafter, on January 8, 1974, by action of the Board of Education of the East Windsor Regional School District, hereinafter "Board," she was expelled from enrollment in the regular school program. At this juncture she still contests the Board's action on technical and legal grounds but also avers that the punishment of expulsion is excessive in the context of the alleged offense, the possession and sale of a controlled dangerous substance in pill form. The Board maintains its action to expel petitioner was one it is empowered to take pursuant to *N.J.S.A.* 18A:37-5, and that in this instance there is sufficient evidence to support its decision.

The specific issue for consideration is the merit of the charges against A.D. and the weight of the proofs in support thereof which were advanced at a hearing before a committee of the Board on December 27, 1973. Prior to that date, and, subsequently, by Orders of December 20, 1973, January 4, 1974, and January 23, 1974, the Commissioner of Education had addressed other prayers of petitioner for interim relief and for a judgment that the action of the Board on January 8, 1974, was technically illegal and should be rendered a nullity. The Commissioner's decision of January 23, 1974, adverse to petitioner, is now on appeal before the State Board of Education.

The three aforementioned Orders of the Commissioner were preceded by oral argument on separate Motions by petitioner, which were heard by a hearing examiner appointed by the Commissioner. The instant specific prayers concerned with the merit of the charges against petitioner are directly before the Commissioner for consideration.

This matter is before the Commissioner for review on the record of a hearing conducted by a Board committee on December 27, 1973. The statute, *N.J.S.A.* 18A:37-5, provides that local boards of education have the authority to expel pupils from enrollment in the public schools, and also have the concomitant obligation to afford and conduct the hearing which must preclude such action. (See *John Scher v. Board of Education of the Borough of West Orange, Essex County*, 1968 *S.L.D.* 92.) The statute of reference provides:

> "No suspension of a pupil by a teacher or a principal shall be continued longer than the second regular meeting of the board of education of the district after such suspension unless the same is continued by action of the board, and the power to reinstate, continue any suspension reported to it or *expel a pupil* shall be vested in each board." (*Emphasis supplied.*)

Pursuant to such statutory authority the Board herein did at a hearing conducted before four members of the Board on December 27, 1973, consider certain charges made against petitioner by school authorities. The hearing required approximately four hours and was recorded on a cassette tape recording device. The tapes of this hearing comprise the factual basis of this report. However, a transcript is not available.

On November 9, 1973, the Hightstown High School was in session and

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A.D. was in attendance. However, at approximately 10-10:30 a.m. on that day it came to the attention of teachers and/or school administrators that some pupils within the school were acting in an abnormal manner and an immediate investigation was required. School administrators, suspecting that overdoses of drugs were responsible for the abnormal actions, telephoned the Hightstown Police Department and received a prompt response. The school medical examiner was also summoned and was present at the school when police officers arrived.

Detective Bender of the Hightstown Police Department testified that upon his arrival at the school he was told that two pupils who were acting abnormally had already been taken to the hospital. He also stated he observed four or five other pupils in the school's office area who were acting abnormally, one girl was dribbling down her chin, a boy was babbling at the mouth, and it was determined that two or three other pupils could not walk, sit up straight, nor respond to questions.

Thereafter, school authorities and the police quickly launched an investigation to determine the cause of such abnormal behavior. They questioned many pupils, launched a search of lavatory areas and school grounds where other afflicted pupils might be found, and contacted parents by telephone.

As the result of the investigation it was ascertained that the cause of the evident abnormal behavior was a controlled dangerous substance contained in pill form known as the "yellow jacket." It was also ascertained, by questioning, that, among others, A.D. might somehow be involved.

Accordingly, the detective testified, A.D. and other pupils were brought to the school office and advised they did not have to "say anything." However, he testified that A.D. expressed concern about the general situation and spoke for a period of approximately five minutes with regard to it.

In summary form, the detective testified that A.D. told him, and an assistant principal, that she had not taken any of the pills which she admitted she had received, but had sold them to someone she could not identify. The assistant principal testified that A.D. said she had obtained three "yellow jackets" from an unidentified person in the school and had sold them "for cigarettes."

Subsequently, A.D. was taken to the police station, evidently without a prior opportunity to retrieve her coat from her locker, and her parents were notified. Thereafter, on November 12, 1973, she returned to school but was suspended on November 13 and, for all practical purposes, has been excluded from school to the present day.

The only other directly pertinent testimony to the merit of the charges herein was given by Detective Alston of the Hightstown Police Department. He stated he had heard A.D. tell her mother, while in the police station, that she

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had sold some pills for cigarette money and when asked the reason why she had done this she replied that she did not know.

It is stipulated that prior to the hearing of December 27, 1973, at which time the testimony reported in summary, *ante,* was adduced, A.D. had received written notice of the charges against her, was informed of the witnesses who would appear against her, and of the procedure which would be followed. It is also stipulated that, as of that date, she had been furnished affidavits containing statements from each of the witnesses who did, in fact, appear.

On the advice of counsel, A.D. did not testify at the hearing in her own defense and, in fact, the only witness who testified in her behalf was her mother. This testimony of the mother of A.D. was not directly related to the merits of the principal charge, the possession and distribution of drugs, but to peripheral matters, *i.e.* whether or not A.D. had been permitted to get her coat prior to the time she was taken to police headquarters, whether or not the school authorities had contacted A.D.'s parents in a timely manner, and details of A.D.'s continued suspension during the weeks subsequent to the initial suspension of November 13, 1973.

The following observation regarding the hearing procedure of December 27, 1973, and certain other facts of pertinence herein are noted by the Commissioner.

A.D. was present during all of the hearing of December 27, 1973, and was represented by counsel who cross-examined each witness who appeared against her. All witnesses were sequestered prior to the time each of them testified but affidavits of each witness had been furnished to counsel for A.D. in advance of the hearing. Additionally, by affidavit, counsel for A.D. states that she was "***never suspended or otherwise disciplined in a substantial manner in the East Windsor schools prior to the incident which is the subject of this action.***" The Commissioner can find no evidence to the contrary in this regard.

As noted, *ante,* the last of the Commissioner's Orders (that of January 23, 1974) is on appeal to the State Board of Education, and the appeal advances a great number of technical and legal arguments why A.D. should be restored to her regular school program. Such arguments need not be duplicated in this review of the merit of the charges against A.D. and the proofs in support thereof. However, it is noted that at the conclusion of the hearing held December 27, 1973, before the Board committee, there was an oral summation by respective counsel. At that time it was the principal contention of counsel for A.D. that her exclusion from school to that point was exclusion enough. At this juncture, by memorandum of January 29, 1974, he further maintains that A.D.'s alleged confession to a police officer and school officials on November 9, 1973, as reported, *ante,* is tainted by a failure to insure that the parents of A.D. were present and by the failure of school officials to give a *Miranda* warning to A.D. and to secure from her a clear waiver of her rights.

The Board contends that its decision of January 8, 1974, to expel A.D. from its day school program was both procedurally correct and warranted by the

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findings of fact as reported to it by the three-man subcommittee (plus one member). This finding of fact was that the evidence educed by the committee at the hearing held December 27, 1973, was sufficient proof that A.D. had received and sold certain pills containing a controlled dangerous substance on November 9, 1973. However, the Board also avers that its decision of January 8, 1974, to expel A.D. was tempered by a collateral decision to adopt the recommendations of its subcommittee which were:

***

"(1) that the student in question be expelled from the Hightstown High School day program,

"(2) that the Board provide an opportunity to the parents of the student to enroll the student in the East Windsor Evening High School for the academic program only,

"(3) that the Board provide an opporunity to the parents of the student to have a psychiatric review of the student by the District's Child Study Team with the results to be shared with the parents, and further,

"(4) any subsequent application for readmittance would have to be accomplished by a warrant from the District's Child Study Team that the student does not constitute a continuing danger to the physical well being of other pupils.***" (Respondent's Reply Memorandum of Law, at p. 17)

The Commissioner has reviewed the record of the hearing afforded to A.D. on December 27, 1973, and finds there was ample proof to support the latter judgment of the Board on January 8, 1974, that A.D. had, in fact, obtained, and then sold, pills containing a controlled dangerous substance on November 9, 1973. The proof was contained in the corroborated testimony of an assistant principal of the Hightstown High School, as reported, *ante*, and, in the context of the traumatic events of that day, such testimony cannot be ignored or held to be tainted because certain technical legal procedures may not have been totally followed. There was an obvious school emergency of the most serious kind. The extent of it was unknown for an extended period of two or three hours. Prompt and decisive action was required to identify the cause of the trouble and to initiate immediate corrective measures.

In these circumstances, prompt and decisive action was taken:

(a) some pupils accompanied by a school administrator were taken to the hospital

(b) parents were called by telephone

(c) the school medical examiner and police were summoned by telephone

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(d) lavatory areas and the school building generally were searched for other pupils who might be ill or incapacitated

(e) pupils were questioned to determine which pupils not yet identified might become ill.

Indeed, it appears from the record that school officials did everything that could be done to insure the care and safety of their pupils on November 9, 1973, and they did this quickly and efficiently according to the details of a prearranged plan.

There was adequate proof to justify a finding that A.D. had in fact obtained and sold pills containing a controlled dangerous substance on November 9, 1973. It remains to be determined whether this finding constituted sufficient cause for the latter decision of the Board on January 8, 1974, which mandated the expulsion of A.D. from the "day program." of Hightstown High School. In this regard it is noted that such expulsion has been already substantially tempered by the Board. A.D. may attend the evening program. She may avail herself of the services of the Child Study Team. By indirection she is told that future reentry into the school system's day program is a possibility. The question that remains is whether or not the exclusion of A.D. from the day school program of Hightstown High School is so severe a penalty in the circumstances in which it was imposed as to cause the Commissioner to interpose his discretion for that of the Board.

It is necessary to observe that there is nothing in the record to substantiate a finding that A.D. was a chronic offender against the discipline of the school and, in fact, it is represented that, although she was a poor pupil scholastically, she had never previously been suspended from school or been in serious trouble. It should also be observed that there was no evidence she herself had used the controlled dangerous substance contained in the pills called "yellow jackets." There is no clear evidence to support a conclusion that the sale of the pills by A.D. was the direct cause of the abnormal behavior of pupils which was the causative factor of the turmoil on November 9, 1973.

Having considered such facets of evidence and circumstances, the Commissioner concludes that the Board's decision to exclude A.D. from its day school program, and to temper the decision in other ways, as set forth *ante*, was an appropriate exercise of discretion by the Board. However, it appears to the Commissioner that the decision of the Board of Education of the East Windsor Regional School District should be reviewed in the month of May or June 1974, and that a rewording of paragraph 4 of the Board's resolution, *ante*, may well be in order at that time to provide that A.D. "will" be readmitted to the day school program of Hightstown High School in September 1974, if certain conditions are met.

Accordingly, the instant Petition is dismissed except as noted, *ante*.

COMMISSIONER OF EDUCATION

April 26, 1974

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"A.D.,"

Petitioner-Appellant,

v.

Board of Education of the East Windsor Regional School District, Mercer County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 20, 1973, January 4, 1974, and January 23, 1974

For the Petitioner-Appellant, Legal Aid Society of Mercer County (William J. McNichol, Esq., of Counsel)

For the Respondent-Appellee, Turp, Coates, Essl and Driggers (Henry G.P. Coates, Esq., of Counsel)

The request for a Stay of the Decision of the Commissioner of Education is denied.

March 6, 1974

Morris School District,

Petitioner,

v.

Board of Education of the Township of Harding and Board of Education of the Borough of Madison, Morris County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Meyner and Wiley (Stephen B. Wiley, Esq., of Counsel)

For the Respondent Harding Board, Mills, Doyle, Hock & Murphy (John M. Mills, Esq., of Counsel)

For the Respondent Madison Board, Cook and Knipe (Thomas P. Cook, Esq., of Counsel)

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This matter comes before the Commissioner of Education for a hearing *de novo* on the merits of an application by the Board of Education of the Township of Harding, Morris County, hereinafter "Harding Board," for a severance of the sending-receiving relationship which has heretofore existed between it and the Morris School District, Morris County, hereinafter "Morris Regional Board." The Board of Education of the Borough of Madison, Morris County, hereinafter "Madison Board," is joined with the Harding Board as a party in interest.

The specific causation for the hearing, *sub judice,* is an Order of the Appellate Division of the Superior Court of New Jersey, Judge Harold Kolovsky presiding, which was handed down May 15, 1973. Such Order urged a "speedy resolution of the controversy," herein contained, as a result of a hearing before the Commissioner and a decision thereafter "as soon as possible."

Pursuant to this direction, a hearing examiner appointed by the Commissioner conducted two conferences of Counsel on June 18 and July 27, 1973, and thereafter a hearing on the merits of the Petition was begun on September 12, 1973, and continued on the days of September 13, 14, 17, 18, and 21, 1973. By agreement of counsel, extensive written testimony was submitted in advance of the hearing (*N.J.S.A.* 18A:6-24) and subsequently counsel filed Briefs. Additionally, a total of sixty-six exhibits have been entered in evidence and copies of earlier Briefs which had been filed in prior litigation in this matter have been incorporated as part of the total record. The report of the hearing examiner is as follows:

The controversy herein is set within the total parameter of the law with respect to sending-receiving relationships between school districts. Such law is comprised of the prescription contained in the education statutes (Title 18A) and of a number of decisions made by the Commissioner and the courts. Accordingly, the hearing examiner proposes initially to set forth certain facets of applicable law in order that the facts and contentions of the parties herein may be viewed objectively in a relevant context.

Following this initial recital, the report of the hearing examiner will be organized to include a chronological and factual recital of the pertinent action of the parties and a review of the principal views which were expressed in oral and written form at the hearing, *ante.* Finally, the hearing examiner will set forth his findings and recommendations. Thus, the organization of this report may be summarized as follows:

I. The Law – Sending-Receiving Relationships
II. Factual Recital of Actions and Data
III. Contentions of the Parties
  (A) Position of the Harding Board
  (B) Position of the Madison Board
  (C) Position of the Morris Regional Board

IV. Statement of Issues
V. Review of Certain Other Testimony and Documentary Evidence
VI. Findings and Recommendations

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I.

The Law – Sending-Receiving Relationships

The pertinent statutes are *N.J.S.A.* 18A:38-11 and 13 which provide in their entirety as follows:

N.J.S.A. 18A:38-11

> "The board of education of every school district which lacks high school facilities within the district and has not designated a high school or high schools outside of the district for its high school pupils to attend shall designate a high school or high schools of this state for the attendance of such pupils."

N.J.S.A. 18A:38-13

> "No such designation of a high school or high schools and no such allocation or apportionment of pupils thereto, heretofore or hereafter made pursuant to law shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending districts except for *good and sufficient reason* upon application made to and approved by the commissioner, who shall make equitable determinations upon any such applications." (*Emphasis supplied.*)

The Commissioner's determination may be appealed to the State Board of Education which may "*** in its discretion affirm, reverse, revise or modify the determination appealed from." *N.J.S.A.* 18A:38-14

These statutes are the only ones directly applicable in this controversy since no contractual agreement pursuant to *N.J.S.A.* 18A:38-20 was in existence between the Harding Board and the Morris Regional Board at the time when the former petitioner attempted to sever its sending-receiving relationship.

N.J.S.A. 18A:6-9 provides that the Commissioner of Education

> "*** shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner."

Thus, it is clear that the instant matter is before the Commissioner as a controversy under the school law which is similar, on its merits, to many other controversies previously decided by the Commissioner. However, it is dissimilar in that the hearing, *ante*, on the Harding Board's resolution to sever its sending-receiving relationship with Morris Regional Board, comes as the result of a remand from the Superior Court – a remand of a matter for hearing wherein, in the first instance, the Commissioner had determined that the Harding Board's resolution was not in controversy and, thus, that no hearing was required. The Morris Regional Board's avowal to the contrary poses a prime issue for consideration in this report.

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These pertinent statutes require "good and sufficient" reason as the quantum of proof necessary for the severance of a sending-receiving relationship. Such proof must be examined in relation to multiple criteria established in previous decisions of the Commissioner and of the courts in order that a balanced judgment may be reached.

In this regard, and most recently, the Commissioner had occasion to set forth just such criteria *In the Matter of the Application of the Upper Freehold Regional Board of Education for the Termination of the Sending-Receiving Relationship with the Board of Education of the Township of Washington, Mercer County,* 1972 *S.L.D.* 627.

Therein he said:

"*** In interpreting the words of these statutes, and similar statutes which have preceded them, the Commissioner has often been required to elucidate the specifics which underlie such judgments.

"Thus, *In the Matter of the Application of the Board of Education of the Township of Green Brook, Somerset County, to Terminate the Sending-Receiving Contract with the Board of Education of the Borough of Dunellen,* 1967 *S.L.D.* 329, the Commissioner refused an application to terminate a sending-receiving relationship initiated by Green Brook, the sending district, on the principal grounds that the:

> '*** termination of the sending- receiving contract in 1968 will seriously affect Dunellen both financially and educationally, and he so holds.***' (at p. 334)

"As another case example, the Commissioner found that a sending-receiving relationship should be severed because a receiving district was unable to meet the demands upon it. He stated in this case, *In the Matter of the Termination of the Sending-Receiving Relationship Between the Boards of Education of the Township of Lakewood and the Township of Manchester, Ocean County,* 1966 *S.L.D.* 12, that:

> '*** continuation of the present sending-receiving relationship can be expected to impose such serious demands upon the high school facilities in Lakewood that the Lakewood Board of Education will be unable to provide suitable school facilities for its pupils and to maintain a thorough and efficient system of secondary education.***' (at p. 14)

"A similar request *In the Matter of the Application of the Board of Education of Caldwell-West Caldwell to Terminate Sending-Receiving Relationship With the Board of Education of the Township of Montville Beginning With the Ninth Grade for the School Year 1958-59,* 1957-58 *S.L.D.* 43 was also approved by the Commissioner and he stated that the:

> '*** High School is overcrowded, that to continue to increase this

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> overcrowding would impair the educational program of the district and that the pupils from Montville could receive an adequate educational program in any one of four high schools within a reasonable distance from Montville.***' (P-45)

"Perhaps the most complete rationale for decision-making involving sending-receiving relationships is found in *Board of Education of the Borough of Haworth v. Board of Education of the Borough of Dumont*, 1950-51 *S.L.D.* 42 wherein the Commissioner stated the following:

> '*** In considering an application for a change of designation or reallocation of pupils, the Commissioner must be mindful of the purpose of the high school designation law. In this State there are 165 school districts which maintain high schools for pupils of all high school grades. This means that 387 school districts must depend upon the 165 for the education of their high school pupils. This arrangement is mutually advantageous. The sending districts obtain high school facilities cheaper than such facilities can be provided by themselves and the additional pupils enable the receiving districts to expand their educational offerings and reduce their overhead.
>
> 'The success of the so-called 'receiving- sending set-up' has given New Jersey an enviable position in the nation in secondary education. New Jersey has fewer small high schools than any other State in the United States. It was to give stability to the receiving-sending set-up that the first high school designation law was enacted. Before the enactment of this law, receiving districts hesitated to bond themselves to erect buildings and to expand their facilities to provide for tuition pupils for the fear that the tuition pupils might be withdrawn after the facilities have been provided. The high school designation law protects such districts from the withdrawal of tuition pupils without good cause. This statute benefits the sending district as well as the receiving district. If the law were not in effect, many sending districts, either individually or by uniting with other districts, would be burdened with the erection and maintenance of high schools.
>
> 'In order to provide for cases where good and sufficient reasons exist for the transfer of pupils to another high school, the Legislature charged the Commissioner with the duty of determining when there is good and sufficient reason for a change of designation.
>
> 'The Commissioner feels constrained to exercise his discretion under the statute with great caution. Otherwise, the law will not accomplish the salutary purposes intended by the Legislature. Accordingly, the Commissioner will grant an application for change of designation or reallocation of pupils only when he is satisfied that positive benefits will accrue thereby to the high school pupils sufficient to overcome the claims of the receiving district to these pupils.

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> 'The burden of proof rests upon the petitioning board to establish the good and sufficient reason for change required by [Title 18:14-7]. It is the opinion of the Commissioner that the petitioner has not sustained this burden of proof.***' (at pp. 42-43)

> "For other decisions in this regard see *Board of Education of the Borough of Bradley Beach v. Board of Education of the City of Asbury Park,* 1959-60 *S.L.D.* 163; *Board of Education of the Borough of Allenhurst, Monmouth County, v. Board of Education of the City of Asbury Park, Monmouth County,* 1963 *S.L.D.* 167; *In the Matter of the Application of the Board of Education of the City of Vineland, Cumberland County, for the Termination of the Sending-Receiving Relationship with the School Districts of Newfield, Pittsgrove, Weymouth and Buena Regional,* decided by the Commissioner April 15, 1971.***" (at pp. 634-636)

These above-stated criteria are some which must be employed in reaching a determination regarding an application to sever an existing sending-receiving relationship such as the matter, *sub judice.* Furthermore, the Supreme Court of New Jersey established a new and additional parameter of consideration in *Beatrice M. Jenkins et al. v. Township of Morris School District and Board of Education,* 58 *N.J.* 483 (1971), wherein it held that the Commissioner had authority to "cross district lines" to avoid racially segregated districts and said

> "*** the situation here is indeed a specially compelling one and in traditional judicial fashion our holding may be *confined to it.* As has already been pointed out, here *we are* realistically *confronted* not with the multiple communities but *with a single community* having no visible or factually significant internal boundary separations, and with a *record* which overwhelmingly *points educationally* towards a *single regional district* rather than separate local districts.***" (*Emphasis supplied.*) (at p. 505)

and further,

> "*** the State Commissioner must have power to *cross district lines* to avoid 'segregation in fact' (*Booker,* 45 *N.J.* [1965] at 168), at least where, as here, there are no impracticalities and the concern is *not with multiple communities but with a single community* without visible or factually significant internal boundary separations.***" (*Emphasis supplied.*) (at p. 501)

In *Jenkins, supra,* the Court reversed the Commissioner's original determination that he had no power, either to prohibit the withdrawal of Morris Township pupils from Morristown High School, or to direct any steps on the part of the respective Boards toward merger of their school systems, or to grant any other relief to avoid the undesirable effects which he envisioned. *Jenkins,* at pp. 493, 503, 508

Thereafter, in *Jenkins,* the request of Morris Township, a sending district of Morristown, to sever its sending-receiving relationship with this latter district,

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was denied, and the Commissioner exercised the "power to cross district lines" which the Court has stated he "must have" and effectuated a regionalization instead. The instant controversy was occasioned, in part at least, as a direct result of such regionalization and, thus, a decision herein must be made in full cognizance of the decision in *Jenkins.* The parties herein recognized that fact while engaged in argument with respect to the import which the decision holds. (See also *Board of Education of the City of Asbury Park v. Board of Education of Shore Regional High School District et al.,* 1971 *S.L.D.* 221.)

Finally, it is noted that *In the Matter of the Application of the Board of Education of the Borough of South River for the Termination of the Sending-Receiving Relationship with the School District of Spotswood, Middlesex County,* 1970 *S.L.D.* 428 the Commissioner found that "good and sufficient" reason did exist for the severance of an existing sending-receiving relationship. However, the matter was subsequently remanded to the Commissioner for further hearing by the State Board of Education (1971 *S.L.D.* 659) because

> "*** The Commissioner's determination might well have been otherwise had *Jenkins* predated his opinion.***"

Ultimately the Commissioner reaffirmed his original determination in a subsequent decision in the same matter on June 1, 1972, and found that the severance would "not materially alter the existing racial balance between the districts." Such finding is of importance herein because Morris Regional Board avers that the Commissioner is, or should be, precluded from directing that a sending-receiving relationship be severed if racial balance is altered at all.

Thus, in summary, the law with respect to sending-receiving relationships in New Jersey embraces both statutory authority (Title 18A) and determinations made in numerous decisions by the Commissioner and the courts.

II.

Factual Recital of Action and Data

(A) Chronology of Action

The sending-receiving relationship between the Harding Board and the Morris Regional Board is of long standing, and between the years of 1957 and 1967 it was contractual. However, in 1967 the contract expired but the relationship continued.

Thereafter, in the year 1970-71, the litigation of *Jenkins, supra,* proceeded through the courts and resulted ultimately, as noted *ante,* in an Order of the Commissioner which created an "all purpose regional school district for all the school purposes of the Town of Morristown and the Township of Morris." (Order of the Commissioner, filed July 28, 1971) (PR-2)

The Order also contained a direction pertinent to the instant matter in paragraph 5, wherein the Commissioner said:

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> "5. The *County Superintendent* of Schools for the County of Morris is *directed to meet with the Board of Education* of the said *regional district* promptly upon its appointment, and with the *Boards of Education* of the Borough of Morris Plains and the *Township of Harding,* and to seek agreement among them: (a) as to the designation of a receiving district for the grade 9-12 students from the Township of Harding and the Borough of Morris Plains, and (b) as to a course of action for the study, consultation and investigation of the inclusion of the said two districts in the all purpose regional district herein created.***" (*Emphasis supplied.*)

Pursuant to such direction, and following appointment of the new Regional Board, the County Superintendent did in fact call such a meeting for November 18, 1971 by letter of October 22, 1971, addressed to the Secretaries of Harding Board and Morris Regional Board. The letter stated that the purpose of the meeting was to "seek agreement" as to the designation of a receiving district for high school pupils from Harding Township. (P-15H)

The meeting of November 18, 1971, was held as scheduled, and according to the affidavit of the Morris County Superintendent of Schools:

> "*** At this meeting the Harding Township Board of Education expressed its desire to study the possibility of seeking a designation other than the regional district for its secondary students. Mr. Michael Barry, President of the Regional District Board of Education responded by stating that the regional district will accept the designation as the receiving district for Harding Township high school pupils if Harding Township so requests, *but will not contest a request for a change of designation for Harding's secondary students beginning with sending next year's Ninth Grade pupils.* He further *requested* that a *decision be reached at an early date* in order to make the necessary provisions in the 1972-73 school budget currently being developed by the Regional School District.***" (*Emphasis supplied.*) (From Affidavit of the Morris County Superintendent of Schools before the Appellate Division, Superior Court, PR-2-24a)

This testimony was repeated by the County Superintendent at the hearing (Tr. III-17 *et seq.*) and was substantially confirmed in its essential details by all other testimony and evidence educed pertinent thereto. (See also Affidavit of the Superintendent of the Morris Regional Schools, PR-2-38a; Affidavit of the Superintendent of Harding Township Schools, PR-2-55a; and Tr. I-56-57; Tr. IV - 69.) Accordingly, it may be stated as fact that the newly created Morris Regional Board and the Harding Board did, on November 18, 1971, confer in an informal conference-type meeting with a majority of the membership of both Boards present and did agree that if the Harding Board decided on a change of designation for its high school pupils, effective September 1972, such decision would not be contested by the Morris Regional Board. The hearing examiner so finds. (It is noted here that there is considerable dispute concerning the binding nature, or effect, of such informal agreement.)

Thereafter, the Harding Board did engage in a study of the alternatives which were open to it with respect to a sending-receiving relationship for its high

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school pupils (P-2) and determined that its interests would best be served by effectuating a new relationship with the Madison Board. Subsequently, on December 21, 1971, the Harding Board adopted a resolution (PR-2-9a) which stated that it had entered into a ten-year agreement to this effect with the Madison Board. The resolution further contained a schedule which phased pupils into the Madison High School as follows:

> "School year 1972-1973 – Freshmen
> School year 1973-1974 – Freshmen and Sophomores
> School year 1974-1975 – Freshmen, Sophomores and Juniors
> School year 1975-1976 – All Harding high school pupils"

Additionally, there was contained in the resolution a parallel schedule of a gradual dissolution of the relationship with the Morris Regional Board, and the request that "*** for the school year 1975-1976 and thereafter that the sending-receiving relationship [with the Morris Regional Board] be terminated***." (PR-2-10a) A copy of this resolution was sent to the Morris Regional Board. (PR-2-8a)

Morris Regional Board took no official action with respect to the Harding Board's resolution, *ante,* during the months of December 1971 and January 1972, but at its organizational meeting held February 7, 1972, it resolved:

> "*** that this Board shall promptly undertake a study of the entire Harding Township Sending Relationship, and thereupon advise the Commissioner of Education of its position, and,
>
> "Further Resolved, that this Board respectfully requests the Commissioner to withhold any action with respect to the entire Harding Township Sending Relationship until this Board has had such opportunity to present its position." (PR-2-11a)

Copies of this resolution addressed to the Commissioner of Education were sent to the Morris County Superintendent of Schools, to the Harding Board, and to the Madison Board.

Thereafter, on March 7, 1972, Morris Regional Board addressed a letter to the Commissioner which requested a "***copy of the study and report which resulted from the meetings held by the County Superintendent *** regarding this proposal by Harding Township to withdraw its high school students from Morristown High School***" and informed the Commissioner it was prepared, able and willing to continue to receive the Harding Board's high school pupils on an interim basis. (PR-2-13a)

Subsequently, the Morris County Superintendent of Schools did comply with the request of the Morris Regional Board and in a letter dated April 21, 1972 (PR-2-15a), he set forth a history of his own efforts, pertinent hereto, and listed a set of conclusions which had led him to recommend to the Commissioner approval of the Harding Board's determination to effectuate a

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new relationship with the Madison Board. These conclusions, as set forth by the County Superintendent, are as follows:

"1. The number of high school students from Harding Township has no significant measurable effect on the educational program, utilization of facilities, racial balance, or costs of the regional district.

"2. The courses actually taken by Harding Township pupils at the Morristown High School closely parallel the courses offered at the Madison High School, with the exception of some vocational programs which are available to these and other students on a shared-time bases at the Morristown High School and at the County Vocational School. (List attached).

"3. The student population of the Madison High School represents a cross-section of a number of ethnic and socio-economic groups, including 6% black, thereby providing Harding Township students with continued opportunities for the rich educational experiences afforded by such a population.

"4. There are no significant differences in actual and projected tuition costs between the two school districts.

"5. Average distances and travel time from the centers of student population in Harding to either Morristown or Madison are little different and will have no apparent effect on normal transportation costs.

"6. Harding Township has no singular identity with any other one community: Madison, Morristown, Bernardsville and Chatham each serve a portion of Harding's population in terms of activities normally associated with community identity.

"7. There would appear to be some relevance and value in the opportunity for the currently small number of Harding Township pupils to gain greater self-identity in a smaller high school.

"8. Although the current and projected high school enrollments of Harding Township for the immediate future remain relatively unchanged, the potential for growth in the future could seriously impair the planning and orderly development of the regional district.***" (PR-2-15a, 16a)

Thereafter, on May 19, 1972, the Commissioner addressed a letter to the Secretary of the Morris Regional Board which effectively approved the plan of the Harding Board to sever its relationship with the Morris Regional Board on a phased basis beginning in September 1972 although, in the interim, the Morris Regional Board, by letter and resolution, had indicated it was "unanimously opposed" to such severance. (PR-2-20a, 21a)

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The present litigation thereupon ensued and although the State Board of Education affirmed the Commissioner's action on September 13, 1972 (PR-2-76a), this affirmance was rendered a nullity by the action of remand taken by the Appellate Division of the Superior Court on May 15, 1973, as noted, *ante*.

This concludes a narrative recital of the chronology of principal events which have progressed full circle to this second consideration by the Commissioner of the matter herein controverted. Although this chronology of events is not seriously disputed, there is great controversy regarding the importance of some of the events.

Finally, in September of 1972, pursuant to the terms of the ten-year agreement signed between the Harding Board and the Madison Board in December 1971 and despite the fact that the instant dispute was still in litigation, the ninth grade pupils from Harding Township were enrolled in Madison High School. At the present juncture, during the 1973-74 school year, these pupils are enrolled in the tenth grade, and they have been joined at Madison High School by pupils from Harding Township enrolled in the ninth grade. Eleventh grade and twelfth grade pupils resident in Harding Township are still enrolled in Morristown High School during this 1973-74 school year.

(B) Other Data

(1) Respective Building Capacity Data – Madison and Morris High Schools

It has been evident from the outset of preparations for this litigation of the merits of the Harding Board's resolution, adopted December 21, 1971, *ante*, to sever its relationship with the Morris Regional Board that data with respect to the functional capacities of both Madison and Morristown High Schools would be required. It has been equally clear, however, that the importance of such data would not be its objective portrayal of fact, but its worth as a guideline for subjective evaluation. Accordingly, in July 1973, the Facilities Services Division of the State Department of Education was requested to examine and study the pupil capacities of Madison and Morristown High Schools and to submit written reports which would be admitted as exhibits at the hearing.

This was done and, additionally, Dr. Irving Peterson, a consultant to the Division, testified and was cross-examined with respect to the building capacity data. According to Dr. Peterson, "*** there is no uniform system throughout the nation *** which may apply to an evaluation of school building capacities ***.. (Tr. II-12), but he said the State Department of Education has devised its own formula, in use since 1969, which attempts

> "*** to rate school buildings as to the number of pupils that the building can accommodate comfortably.***" (Tr. II-13)

He further labeled the formula as a "benchmark" or a "guideline," (Tr. II-46) and admitted that "extended schedules," "open campus policies," and "work

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experience programs" have had an effect on the objective validity of the data he presented at the hearing. (Tr. II-46-47)

However, with these and other subjective qualifications, Dr. Peterson testified that, in his judgment, the formula was useful and the data derived from it was admitted in evidence by the hearing examiner. (PR-1, 3)

This data, which generally employs a building utilization factor of 80 percent (with variations, particularly for common areas such as gymnasiums, auditoriums, cafeterias, etc.), sets forth the functional building capacities of the Morristown and Madison High Schools. It is detailed below, together with enrollment data as of September 1973 and an itemization of the facts with respect to the actual enrollment of the Harding Board's ninth and tenth grade pupils now in attendance at Madison High School, and the eleventh and twelfth grade pupils in attendance at the Morristown High School.

District	Functional Capacity	Enrollment (September 1973)
Morris	1361	2385 (61)*(See Tr. V-90.)
Madison	1005	1180 (88)*

* = From Harding

It is noted that the inclusion of all Harding pupils in one or the other of the two high schools in September 1973 would have resulted in an enrollment of:

Morris – 2473
Madison - 1241

(2) Enrollment by Race

Almost all of the pupils from Harding Township are white (one black student from Harding is listed as enrolled in Morristown High School in 1972) (P-27H) but Madison High School has an approximate enrollment of 6 percent black students. The enrollment of black students in Morristown High School is approximately 16 percent. (R-24) These figures compare with a calculation of an 18.8 percent black population for the Newark Standard Metropolitan Statistical Area which consists of Essex, Morris, and Union Counties. (R-25)

The Superintendent of Schools of the Morris School District projected the actual racial impact of a complete withdrawal of Harding Township's pupils from Morristown High School as less than 1 percent. (Calculation contained in the statement of the Superintendent is 6 percent x 16 percent or .96 percent, R-1) He further testified that the psychological effect from such withdrawal was more significant, in his judgment, than the percentage would indicate. (Tr. V-107) However, the County Superintendent testified that, in his judgment, such transfer of pupils from Morristown High School would be more than offset by the continued growth of the basically white population in the Morris Plains and Morris Township areas. (Tr. III-55)

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(3) Growth Projections – Enrollment

The following straight line projections of future pupil enrollment in high school grades were submitted at the hearing by the Harding Board and the Morris Regional Board for the five year period beginning in 1973 and ending with the school year 1978-79. (P-19; R-29) (The projections of Morris Regional Board do not include pupils from Morris Plains, approximately 350 pupils per year.)

Year	Harding Township	Morris Regional
1973	165	2057
1974	200	2056
1975	211	2071
1976	211	2111
1977	197	2150
1978	182	2176

With Morris Plains pupils included in its totals, and including present enrollment from Harding Township in grades eleven and twelve (for 1973 and 1974 only) Morris Regional Board projects the following totals: (R-7) (Table VIII)

Year	Total
1973	2343
1974	2255
1975	2201
1976	2235
1977	2271

A combination of the total enrollments at Morristown High School including Morris Regional, Harding Township, and Morris Plains, produces the following result: (R-7) (Table VII)

Year	Total
1973	2414
1974	2364
1975	2336
1976	2363
1977	2391

It must be emphasized, however, that all figures, *ante*, are projected as the result of a calculation of pupils presently enrolled in the schools of the various districts. (Straight Line Projections)

Madison Board's projection of pupil enrollment is similarly based upon pupils presently enrolled and is contained in Exhibit P-12 (M) as follows:

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Year	Total	Includes (Harding)
1973	1214	(100)
1974	1271	(153)
1975	1316	(194)
1976	1291	(181)
1977	1272	(169)
1978	1207	(156)

It is evident that all projected enrollments for the Madison and Morristown High School buildings are above the rated functional capacities of 1005 (Madison) and 1361 (Morris) even without the pupils from Harding Township. The argument herein is not so much with that fact, however, although the Morris Regional Board does dispute the correctness of the basic capacity calculation, but with an assessment of the severity of what might otherwise be labeled the evidence of overcrowding. The arguments in this regard are set forth in summary form in Section III.

(4) Tuition Income - Expense – Harding Township Pupils

Madison Board's projection of income to be derived as the result of tuition costs billed to the Harding Township Board is set forth in Exhibit P-13. The exhibit also lists estimates of instructional and operational expenses. However, for the purposes of this report, only those statistics which are pertinent to estimated total and net income are set forth as follows:

	Total Income	Net Income
1973-74*	$155,000	$124,686.00
1974-75**	237,150	191,821.39
1975-76	300,700	204,977.89
1976-77	280,550	183,400.59
1977-78	261,950	161,533.86
1978-79	241,800	138,074.16
1979-80	248,000	138,981.20
1980-81	248,000	133,819.80
1981-82	240,250	121,203.35

*Estimates based on tuition from pupils to be enrolled in grades 9 and 10

**Estimates based on pupils to be enrolled in grades 9, 10, 11

(5) The Schedule – Morristown High School

Morristown High School employs a modular scheduling system within the parameter of a school day containing, in general terminology, "split sessions." This system evidently was first inaugurated during the 1968-69 school year and has continued from that time to the present day.

In summary form, the system contains 20 mods, or periods, of 20 minutes each, per day, and a variable number of these mods per class per day is assigned

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at the beginning of each school year. From that point forward, however, respective mod assignments do not change.

Pupils are in general assigned to either one of two kinds of days; namely, one that begins early and ends early or one that begins with module five and ends with module 20 although such assignments are flexible. This assignment policy necessitates providing separate early and late buses from Harding Township to Morristown.

Otherwise, and in other ways, a pupil's day at Morristown High School is flexible, and there is an open campus policy in effect which does afford the pupil an opportunity to exercise a choice with respect to the expenditure of his time.

III.

Contention of the Parties

(A) Position of Harding Board

The Harding Board maintains that the Court's decision in *Jenkins, supra,* and the ultimate Order of the Commissioner of Education, which directed a merger of the districts of Morris Township and Morristown, obviated the necessity for the Harding Board to initiate an application to the Commissioner for a change in designation. Specifically, the Harding Board relies on that part of the Court's decision in *Jenkins* wherein it is said:

> "*** The Commissioner is adequately empowered to entertain such *further proceedings* pursuant to the petition and cross-petition as he finds appropriate.***" (*Emphasis supplied.*) (at p. 508)

and the part of the Commissioner's subsequent Order (PR-2-5a) which stated:

> "*** 5. The County Superintendent of Schools for the County of Morris is directed to meet with the Board of Education of the said regional district promptly upon its appointment, and with the Boards of Education of the Borough of Morris Plains and the Township of Harding, and to seek agreement among them: (a) as to the designation of a receiving district for the grade 9-12 students from the Townships of Harding and the Borough of Morris Plains.***"

Therefore, in the view of the Harding Board, the County Superintendent's call for a meeting of the Harding and Morris Regional Boards of Education on November 18, 1971, was a "further proceeding" of the total litigation of *Jenkins, supra,* and a directed response to the Order of the Commissioner. It follows, the Harding Board avers, that the agreement among those present at the meeting (that a determination by the Harding Board to sever its relationship with the Morris Regional Board would not be opposed) constitutes lawful reason for the separation.

Further, the Harding Board argues, the Morris Regional Board is barred at

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this juncture by laches from bringing any action to upset its relationship with the Madison Board and, additionally, that the present relationship between the Harding and the Morris Regional Boards is in the best interest of the pupils most vitally concerned.

Thus, while arguing, in effect, that the merits of its reasons for a severance of the sending-receiving relationship between the Harding Township and the Morris Regional Boards have already been lawfully adjudged and found adequate, the Harding Board has set them forth again, in a second resolution adopted June 28, 1973. (P-4H) The proofs at the hearing, *sub judice,* were advanced with respect to such reasons and they are concisely summarized as follows:

The Harding Board contends

1. That its relationship with Morris Regional Board has not been an exclusive one of exceptionally long standing and that, unlike the situation in *Jenkins, supra,* Harding Township and Morris Regional do not comprise a single community.

2. That Morristown High School is overcrowded and that this fact occasions overlapping "split sessions," an open campus policy, a reduction in the length of the academic day, and a lesser opportunity for pupils to participate in extra-curricular activities. Also, it is contended that the "split sessions" necessitate increased busing costs by the Harding Board and that even with such scheduling the Morris Regional Board must make use of sub-standard facilities.

3. That Morristown High School's use of a modular schedule places too great a responsibility on pupils from Harding and such use is objectionable in other ways.

4. That its pupils have a greater sense of identity with the pupils of Madison since the percentage of pupils enrolled there from Harding is and will be of a greater numerical significance.

The Harding Board's proofs at the hearing, *ante,* were with respect to such allegedly "good and sufficient reasons." Testimony pertinent thereto was offered by Harding Township's Superintendent of Schools, the President and the Secretary of the Harding Board, and by a member of the Board. Additionally, Harding (and Madison) relied on the testimony of the Morris County Superintendent of Schools and a total of thirty-one exhibits which were either admitted into evidence at the hearing or marked for purposes of identification. (P-5H, 6H, and 14H)

(B) Position of Madison Board

The Madison Board avers that it wants and needs the pupils from Harding Township to enable it to "maintain the excellence of its educational program and to expand its variety" (Resolution of Madison Board, approved July 17,

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1973, P-9 (M)) and maintains the agreement of December 21, 1971 between it and the Harding Board was made in good faith and should not now be aborted.

In the view of the Madison Board, the Morris Regional Board should be completely estopped from presenting arguments at this juncture against the Harding Board's withdrawal because, subsequent to the meeting of the parties herein on November 18, 1971, the Morris Regional Board took no official action, for an extended period of time, which countered the agreements which were the result of that meeting. However, the Madison Board also avers that:

> "*** even if the Commissioner should find inadequate grounds for a complete estoppel against Morris from its present attempt to reconstitute its sending-receiving relationship with Harding, the conduct of the Morris Board *** nevertheless furnishes a substantial reason for the Commissioner to allow the switch to be completed pursuant to the statutory procedure.***" (Supplemental Brief of Madison Board, December 1973, at p. 24)

In addition to this argument of "substantial reason" Madison Board also supports Harding Board's avowals that other "good and sufficient" reason exists, and has existed, for the severance of the sending-receiving relationship between Harding Board and Morris Regional Board, and further that Madison High School provides a satisfactory and desirable alternative. Briefly stated, the Madison Board advances the following views with respect to its own desirability as a suitable alternative district for the education of Harding Township's pupils:

1. Even admitting that by State criteria (PR-1) a degree of overcrowding exists in Madison High School, this overcrowding is not severe, and there is ample room for more students "even without resorting to overlapping split sessions or other devices." (Supplemental Brief of Madison Board, at p. 3)

2. Course offerings at Madison High School closely parallel the offerings at Morristown High School.

3. Madison High School's pupil population represents a cross section of ethnic groups which include approximately 6 percent black.

Further, the Madison Board avers that while such reasons support the change of designation controverted herein, there is no good reason to oppose it, because:

(1.) Racial balance will not be significantly altered in the regional district by such change.

(2.) Travel and transportation factors are similar regardless of which high school is designated.

(3.) Tuition costs of the two districts are similar, although the revenue from Harding Township's pupils is of more significance to Madison than to the Morris Regional Board.

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Additionally, the Madison Board argues that prior decisions of the Commissioner with respect to sending-receiving relationships "hold that the existence of a satisfactory alternative is exceedingly relevant" when an established relationship is in question. (Supplemental Brief of Madison, at p. 8) (See also Briefs of Madison identified as P-10M, P-11M, and P-28M.)

Witnesses testifying in support of the Madison Board included its Superintendent of Schools and a member of its Board of Education. (P-7M, 8M)

(C) Position of Morris Regional Board

The hearing examiner observes that the Morris Regional Board sets forth its argument at great length in its various Briefs (identified as R-13, 14, 15 prior to the instant hearing, and a Brief of 87 pages dated October 26, 1973) and a summary of such arguments must, of necessity, set forth only those salient points directly pertinent to the formulation of a set of principal issues which require a finding of fact. However, it should also be observed at this juncture that all of these arguments and contentions of the Harding Township Board and the Madison Board comprise the total record, and it is this record, not the summaries alone, which is before the Commissioner.

It may be stated that the Morris Regional Board's Briefs submit a rebuttal to all of the Harding Board's arguments with respect to estoppel and laches and set forth a version of the proofs adduced at the hearing which, it avers, counters any argument by the Harding Board that it has provided "good and sufficient" reason for the severance of the sending-receiving relationship. Additionally, the Morris Regional Board sets forth certain other arguments which it avers are sufficient to bar such a severance. Principally, these arguments are:

1. That the litigation in *Jenkins, supra,* –particularly the withdrawal of Harding therefrom and its stated intention to continue a relationship with Morris–acts as a collateral estoppel against the Harding Board in the instant matter. (See Tr. I-29 *et seq.* for argument on Motion to this effect.)

2. That in *Jenkins* there was a unique decision to create a new regional district "to redeem the constitutional rights" of pupils (Tr. I-27) and that this decision "insulates" the new district from tampering or change if such actions would render the practical effect of *Jenkins* a nullity.

3. That other decisions of the Commissioner have held that a sending-receiving relationship "*** must be preserved if a severance would result in increased racial imbalance between white and black students, regardless of how slight such increase might be or how few the number of students proposed to be withdrawn.***" (Brief of Morris Regional Board, at p. 5)

4. That the capacity of the Morristown High School has been set forth by the Commissioner in *Jenkins* in his decision of November 30, 1970 (at p. 6) as 2,450 pupils and that this capacity figure is appropos today.

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5. That pupils from Harding Township have and will continue to have a greater opportunity for a broader educational experience in Morristown High School than in Madison High School.

6. That "*** The needs and interests of a proposed new receiving high school are not relevant to consideration of an application under [*N.J.S.A.*] 18A:38-13 by a sending district to sever a 40 year old (or more) sending-receiving relationship.***" (Brief of Morris Regional Board, at p. 42)

7. That the loss of revenue from the Harding Board will be of great significance to the Morris Regional Board if the severance herein requested is allowed, since expenses of the Morris Regional Board will be diminished little by such severance.

8. That the interim Board of the Morris School District (which was in office at the time of the meeting of the parties November 18, 1971) cannot be faulted, because of its failure to respond immediately to the Harding Board's resolution of December 21, 1973 to sever its relationship with the Morris Regional Board since the interim Board was faced with a host of problems and, in the circumstances, the statement of the newly elected Board on February 7, 1971 was timely. (PR-2)

Witnesses called by the Morris Regional Board included the Superintendent of Morris Schools, the Business Administrator, the Board Secretary, and the President of the Board of Education. (R-1, R-9, R-10, R-11)

IV.

Statement of Issues

Having summarized the contentions of the parties in the dispute, *sub judice,* the hearing examiner deems it appropriate to pose certain broad questions herein which evolve from such contentions. These questions, when examined in the context of the arguments advanced at the hearing, will lead to the findings of fact and/or conclusions of law which follow: (Section VI)

1. Questions which require, or may require, conclusions of law:

   (a) How may the instant controversy be viewed in the context of *Jenkins, supra*?

   (b) Is there a *collateral* estoppel against action by the Harding Board herein by virtue of the total litigation in that matter?

   (c) Is there an estoppel against the Morris Regional Board's action herein because of the informal agreement made by the parties on November 18, 1971?

   (d) Does the instant controversy fall within the parameter of *N.J.S.A.* 18A:38-13, 14?

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2. Questions which may require a finding of fact:

(a) If the answer to 1. (d) above is affirmative, has the Harding Board provided the "good and sufficient reasons" mandated by *N.J.S.A.* 18A:38-13 as a necessary prerequisite to a decision by the Commissioner of Education to sever an existing sending-receiving relationship?

(b) Even if the Harding Board is found to have provided such reasons, are the facts herein pertinent to changes in racial balance which may be caused by the severance of such magnitude as to temper the judgment which must be made?

V.

Review of Certain Other Testimony and Documentary Evidence

Certain other testimony with respect to the "good and sufficient reasons" advanced by the Harding Board is set forth as follows:

(A) Re: Past and Present Relationships between Harding Board and Morris Regional Board

The Superintendent of the Harding Township School District testified that prior to 1956 Harding Township had sending-receiving relationships with various school districts dating back to at least 1923 (P-1) one of which was Morristown. In 1956, he stated, the contractual relationship between the Harding Board and the Morris Regional Board began, and this relationship continued unbroken from that year to the fall of 1972. There is no essential dispute with respect to such testimony.

Neither is it seriously disputed that the parties in this controversy are not, in fact, as the parties were found to be in *Jenkins, supra,* members of a "single community having no visible or factually significant internal boundary separation." While the two districts are contiguous with respect to one six-mile boundary, there is some evidence to suggest that the relationship is not otherwise a very close one. (See P-2(H).) There is little convincing evidence to support a finding for a contrary view. (Tr. V-156 *et seq.*)

In this regard, it is clear that the Madison Township School District shares an even smaller boundary with the Harding Township School District. (R-16) There is no evidence that the Madison Township District has a more significant relationship with the Harding Township District than the Harding Township District has with the Morris School District.

(B) Re: The Contention that Morristown High School is Overcrowded and that This Fact Occasions Expediencies which are Not Desirable

Certain calculations with respect to the rated building capacity of

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Morristown High School have already been set forth as determined by the Building Services Division of the State Department of Education. (Section II (9b), *ante*) However, the Morris Regional Board contests the validity of such capacity evaluations and sets forth its own evaluation based upon the rated capacity employed by the Court in *Jenkins, supra.* In that decision the Court said:

> "*** Morristown High School is an excellent educational institution and offers diversified and comprehensive courses of instruction***. It has a total of 150 courses in contrast to the State median of 80-89 courses ***.
>
> It accommodates 1950 students and by using a *nine-period day can accommodate 2450 students;* it is anticipated that the High School population will not reach this latter figure until 1974.***" (*Emphasis supplied.*) (at p. 489)

Relying upon the above-cited evaluation, the Morris Regional Board's witnesses testified, in general, that Morristown High School is not "overcrowded." (See specifically Tr. V-154.)

However, the Morristown County Superintendent of Schools testified as follows with respect to the alleged overcrowding:

> ***
>
> Q. "So that in your opinion as the County Superintendent of Schools, would you state that Morristown High School is overcrowded?***
>
> A. "Yes, with all the various methods of extending the capacity of the school; I still have the feeling that there is overcrowding, particularly in the support facilities.***" (Tr. III-25)

The testimony of Dr. Irving Peterson of the State Department of Education in this particular regard was as follows:

> ***
>
> A. "When I said the capacity [of Morristown High School] was 1363, our position is that as soon as the enrollment exceeds that figure you have to find other ways of accommodating the pupils. Now you can go into staggered sessions, extended school day, numerous ways of accommodating the additional pupils, increasing class size, for instance, going beyond what we would consider standard in that field.***
>
> Q. "And therefore any more students than set forth here would be overcrowding the schools, would it?
>
> A. "In our opinion, yes.***" (Tr. II-18)

(See also the testimony of Morris School District's Superintendent of Schools, Tr. V-82.)

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(C) Re: Use of Modular Schedule by Morristown High School

The Harding Board's complaints with respect to the Morris Regional Board's scheduling policies are not directed primarily to modular scheduling, *per se*, but to some concomitant corollary provision of the policies. The Harding Board particularly objects to the fact that its study indicates the day for its pupils in Morristown High School has been shortened in recent years to "a school day of five hours and 40 minutes, including lunch, gym and such electives as band." (P-2H-6) Additionally, however, the Harding Board strongly objects to the "open campus" program of the Morris Regional Board which forces its pupils to decide for themselves how their free time during the school day must be used. The Harding Board is concerned that its pupils from a small, traditionally scheduled district may not be properly prepared to "handle this new freedom." (P-2H-7)

In response to these complaints which comprise part of the Harding Board's "good and sufficient reasons" why the sending-receiving relationship should be severed, the Morris Regional Board offers the testimony of its Superintendent of Schools as follows:

> "*** The school day now begins at 7:40 A.M. and runs until 3:40 P.M. A high percentage of courses normally selected by 11th and 12th grade students are scheduled between 7:40 and 1:40, while those usually chosen by 9th and 10th grade students are predominate in the 9:20 to 3:40 period. However, no obstacle is placed in the way of any student selecting any courses appearing at either or both ends of the spectrum***." (R-1-6)

The Superintendent also testified that "***Freedom and responsibility are the key words in Morristown High School's approach to education.***" (R-1-7) In his judgment, therefore, the "open campus" policy and the freedom which pupils have to structure at least some part of their own school day is a desirable rather than a negative factor.

> (D) Re: Whether or Not the Harding Board's Pupils have a Greater Sense of Identity in Madison High School than in Morristown High School

The County Superintendent testified that, in his opinion, there was some value in the fact that pupils from the Harding Township School District would form a more significant percentage of the total enrollment in Madison High School rather than in Morristown High School. (Tr. III) His testimony was as follows:

> "*** The opportunity for them to have some self-identity would be more evident.***" (Tr. III-21)

and further,

> "*** Yes, it's a matter of self-image, whether I'm a part of a very

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> insignificant small part of a picture or really have some voice activity or influence.***" (Tr. III-21)

However, the Morris School District's Superintendent of Schools testified in this regard:

> "*** Past experience has indicated that Harding students come to Morristown High School fully prepared for the high school program and there is no evidence that they are experiencing any difficulty in succeeding at Morristown High School since the modular scheduling and open campus policies have become effective.***" (R-1-19)

VI.

Findings and Recommendations

Both principal parties to the instant controversy argue, in effect, that the final determination herein need not consider the merits of the resolution adopted by the Harding Township Board to sever its relationship with the Morris Regional Board, since the application of either the doctrine of collateral estoppel or the doctrine of estoppel will be dispositive of the issue of severance.

On the one hand, the Morris Regional Board argues that the doctrine of collateral estoppel, (defined by *Black's Law Dictionary* 327 (rev. 4th ed. 1968) as "the collateral determination of a question by a court having general jurisdiction of the subject") bars the Harding Board's action herein, since the Harding Board indicated in *Jenkins, supra,* that it wished to remain as a sending district to the Morristown High School and was allowed to withdraw from those proceedings on its offer of just such assurance. The Morris Regional Board argues that, since the Court in *Jenkins* affirmed the Commissioner's finding that Morristown High School was an excellent school, it is now collaterally estopped from challenging the validity of that finding. (Brief of Morris School District, at p. 13) The Morris Regional Board argues as follows:

> "*** It would be unconscionable to permit Harding now to disavow the facts adduced in the prior phase of the controversy and to ask the Commissioner to make new findings of fact with respect to the excellence of Morristown High School when Harding had every opportunity to dispute such findings the last time around.***" (Brief of Morris School District, at p. 14)

The hearing examiner finds no merit in such argument because, as the Harding Board correctly argues (Tr. I-34), the Appellate Division of Superior Court has remanded the instant matter to the Commissioner for a hearing on the merits at the request of the Morris Regional Board. Therefore, it cannot be logically argued at this time that the Harding Board is barred by estoppel from bringing forth all of its evidence and all of its arguments on this remanded issue.

Similarly, and in the context of all the circumstances in this case, the hearing examiner finds little logic in the argument by the Harding Board that the Morris Regional Board should be completely estopped at this juncture from

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contesting the Harding Board's determination to sever their sending-receiving relationship since on November 18, 1971, the parties mutually agreed that the Harding Board was free to do so. While it is clear that such an informal agreement was made, it is also clear that the Harding Board's formal resolution to this effect was not adopted until December 21, 1971, and until that date no other conclusive action had been taken by the Harding Board.

The hearing examiner does find that the agreements of November 18, 1971 between the parties herein were of a character which led the Harding Township Board to a conclusion that it could or should act expeditiously because school budgets had to be formulated promptly for the 1972-73 school year, and that having so acted, the Harding Board was entitled to expect as prompt an action by the Morris Regional Board in expressing its opposition.

Thereafter, however, the Morris Regional Board expressed no contrary opinion at all until February 7, 1972, after budgets for the 1972-73 school year had been completed and submitted to the voters. Therefore, in this respect at least, the hearing examiner finds that the Morris Regional Board's inaction between the dates of December 21, 1971, and February 7, 1972, with respect to the Harding Board's resolution to sever, clearly indicated that the Morris Regional Board had ratified the agreement the parties had made on November 18, 1971. This informal agreement never was repudiated by either of the Boards that made it. Instead, opposition to the severance, which is now contested, developed only when the reorganized Morris Regional Board came into office in February 1972.

It is, however, recommended that the doctrines of collateral estoppel and estoppel should not bar a consideration of the merits of the Harding Board's resolution, adopted December 21, 1971.

At this juncture, then, the "good and sufficient reasons" set forth by the Harding Board need not be assessed against the criteria established by the decisions of the courts and the Commissioner which were previously reviewed in part in Section I, *ante.* In this regard, the hearing examiner finds that:

1. The evidence adduced at the hearing in this matter leads to a firm conclusion that the Morristown High School is presently "overcrowded" and that its pupil population is increasing at a faster rate than the rate envisioned in *Jenkins, supra,* in 1971.

2. Overcrowding would be somewhat alleviated if Harding Township is severed as a sending district to Morristown High School.

3. There is an alternative designation for the Harding Board which, in the long view, will produce a better and more balanced configuration of school district alignment in the Morristown area.

4. This alternative is not barred by the facts with respect to the racial composition of the districts involved in this controversy.

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A discussion of these findings is now in order.

There can be no doubt that Morristown High School is an excellent school and that the Board of Education of the Morris Regional District and school administrators have developed a fine administrative plan for tailoring both their school plant and scheduling procedures to the needs of pupils. Four portable classrooms have been erected, two nearby houses have been acquired and parking facilities have been expanded. Modular scheduling and various other scheduling devices have been employed to minimize the impact of a large pupil enrollment. All of these facilities and the total scheduling program have, in their practical effect, increased the capacity of Morristown High School to provide an effective educational program.

Despite these efforts, however, there is ample evidence to support the judgments and testimony of the Morris County Superintendent of Schools and Dr. Irving Peterson of the State Department of Education, reported *ante,* that Morristown High School is "overcrowded." Of particular significance in this regard is the expressed opinion of the Morris County Superintendent that, while classroom space has been increased and various scheduling devices have been employed, "there is overcrowding, particularly in the support facilities." (Tr. III-25) (Section V, *ante*) (These support facilities include cafeterias, library, auditorium, gymnasium, etc.) Such facilities are especially needed in the middle part of the school day when all 2300+ pupils attending Morristown High School are present.

Additionally, the hearing examiner observes that the decision of the Court in *Jenkins, supra,* contained the prediction that "2450 students" would be enrolled in Morristown High School in 1974. (at p. 489) Actually, this expected enrollment was exceeded a year earlier than forecast if all pupils enrolled in grades nine through twelve from Harding Township are included in the calculation since (as noted in Section II (b), *ante*) in September 1973 there were 2385 pupils enrolled in Morristown High School, and another 88 pupils from Harding Township were enrolled in Madison High School. Such figures total 2473.

The hearing examiner has found adequate proof to substantiate the conclusion that such an enrollment constitutes "overcrowding." He also observes that this finding of overcrowding is not contrary to the judgment of the Commissioner or of the Supreme Court in *Jenkins, supra.* While those opinions stated the conclusion that Morristown High School could "accommodate" 2450 students, there was no finding that such accommodations would be comfortable or could be easily arranged. The finding herein is that the accommodation is not comfortable and that the arrangements which the Morris Regional Board has made have not altered this basic fact:

The Harding Board has been able to effectuate an arrangement with the Madison Board whereby its pupils may receive a quality education to the mutual advantage of all pupils in the two districts and, in the judgment of the hearing examiner, to the advantage of pupils in Morristown High School as well. The smaller pupil population in Madison High School will, in the judgment of the

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hearing examiner, be enlarged without excessive inconvenience, but with an enhanced opportunity for a variety of educational approaches, while the larger enrollment of Morristown High School will be slightly reduced and further measures of expediency will be less necessary.

Having found good and sufficient reason to justify a recommendation for the severance of the sending-receiving relationship controverted herein, the hearing examiner finds, additionally, that the facts regarding racial balance are no impediment to a recommendation for severance in this instance. The Morris Regional Board's own testimony reported in Section II-B(2), *ante,* discloses that the Harding Township pupils have an effect of less than one percent on the racial balance of Morristown High School, and there is authoritative opinion that even this small effect will be more than offset in future years by continued growth of the white population in Morris Plains and Morris Township. (Section II-B(2), *ante*) Such opinion receives some substantiation from certain other facts educed at the hearing which indicate that, even without the ninth and tenth grade pupils from Harding Township, the percentage of black pupils in Morristown High School has decreased from 17.7 percent to 15.92 percent in the last two years (PR-2-27a) (R-24a) even though an indeterminate part of this decrease may be due to redistricting.

Thus, the hearing examiner finds that no significant change will occur in the racial balance of Morristown High School if the severance herein proposed is approved. He further concludes that the small changes in this regard should not act as strictures against the "equitable determination" which *N.J.S.A.* 18A:38-13 empowers the Commissioner to make when "good and sufficient reasons" for a severance of a sending-receiving relationship have been determined to exist. A contrary opinion in this regard would appear to severely limit an exercise of judgment by the Commissioner in such matters and substitute for it an inflexible formula.

Finally, the hearing examiner believes that the findings set forth, *ante,* are the sufficient and primary ones herein and that no separate findings with respect to other "good and sufficient reasons" advanced by petitioner are required. The evidence pertinent thereto has been summarized, and the hearing examiner believes the net effect is to enhance the basic judgment which has been made and is set forth, *ante.*

In summary, the hearing examiner finds that "good and sufficient reason" has been established by the Harding Township Board of Education for the severance of its sending-receiving relationship with the Morris Regional Board of Education and recommends that such severance be approved by the Commissioner according to the schedule previously established by the Harding Board. (P-4)

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record in the matter, *sub judice,*

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including the report of the hearing examiner and the exceptions filed thereto by counsel for both the Madison Board and the Morris Regional Board in accordance with *N.J.A.C.* 6:24-1.16. The Commissioner finds the record replete with ample documentaty evidence, exhibits, testimony of reliable witnesses, and arguments of law to arrive at a final determination of the instant matter. Accordingly, he will order no further hearing or arguments of law but proceed to an adjudication of that which is herein controverted. The Commissioner accepts the findings of fact set forth in the hearing examiner's report and notes the arguments of law set forth therein.

The Commissioner acknowledges the existence of the informal agreement between the Harding Board and the Morris Regional Board on November 18, 1971, wherein it was stated that the Morris Regional Board would "*** not contest a request for a change of designation for Harding's secondary students beginning with sending next year's Ninth Grade pupils.***" (Affidavit of the Morris County Superintendent of Schools) (PR-24A) This declaration by the Morris Regional Board must be considered by the Commissioner. However, in the light of the numerous other weighty considerations set forth by the litigants herein, such an agreement may not be considered dispositive of the matter. The lapse of two and one-half months between the informal agreement date and the February 1972 reversal of the Morris Regional Board's position is, in the Commissioner's judgment, insufficient reason to bar by laches the Morris Regional Board from seeking to prevent the withdrawal of Harding Township pupils from Morristown High School. Nor may the doctrine of collateral estoppel properly be invoked against the Harding Township Board as a result of the Commissioner's Order in *Jenkins, supra.*

Counsel for the Morris Regional Board advances, not without logic, that the Commissioner is now compelled to protect and support the school district which was created as the culmination of *Jenkins, supra.* The Commissioner observes, however, that the Morris School District was created as a regional district composed of only Morristown and Morris Township. The rationale was that a close community of interest existed between the residents of Morristown and those of Morris Township which surrounds it. Indeed, it is shown that they had once existed as a single municipality. No such relationship had previously existed with regard to residents of Harding Township, therefore, the Township was dismissed as a party defendant in *Jenkins, supra.*

When the Commissioner created the Morris School District, he did not include therein either the Borough of Morris Plains or Harding Township. He merely directed the County Superintendent of Schools to:

> "*** meet with the Board of Education of the said regional district promptly upon its appointment, and with the Boards of Education of the Borough of Morris Plains and the Township of Harding, and to seek agreement among them: (a) as to the designation of a receiving district for the grade 9-12 students from the Township of Harding and the Borough of Morris Plains, and (b) as to a course of action for the study, consultation and investigation of the inclusion of the said two districts in

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> the all purpose regional district herein created.***" (Order of the Commissioner, filed July 28, 1971)

A clear reading of the above directive does not require the conclusion that the Commissioner either ordered or assumed that, at that time or at any subsequent time thereafter, Harding Township or the Borough of Morris Plains should be required to either join the newly-formed regional district or continue to send their grade nine through twelve pupils to Morristown High School. It is clear that the newly-appointed regional board did not expect either Harding Township or the Borough of Morris to join the regional district. Otherwise the appointed regional Board would not have made the informal agreement with the Harding Board on November 18, 1971. Therefore, in the instant matter, the Commissioner finds himself in no way fettered by prior commitment or directive.

The conclusion of the hearing examiner is that no well-defined community of interest does exist between Harding Township and the Morris School District area. It is his finding that none exists between Harding Township and any other municipality including Madison Borough.

There are, however, additional considerations stemming from the creation of the Morris School District that must be carefully weighed. The Morris School District was created as a regional district to prevent the establishment of two separate high school districts with disparate racial composition and to insure the continuance of a quality program of education. These were threatened by a proposed fragmentation into two smaller high schools, one with a predominately black pupil enrollment, and the other predominately white. In recognition thereof, the Commissioner, at the direction of the Supreme Court, ordered the formation of the Morris School District. *Jenkins et al. v. Township of Morris School District and the Board of Education,* 58 *N.J.* 483 (1971) It remains, herein, for the Commissioner to determine whether the proposed withdrawal of Harding Township tuition pupils from Morristown High School presents similar threats to thorough and efficient systems of education, or to racial balance that has thus far been successfully achieved; or, in the absence of such dangers, whether good and sufficient cause exists to approve the enrollment of Harding Township pupils in Madison High School.

The independent findings and conclusions of the County Superintendent, found true in fact by the hearing examiner, are that the elimination of Harding Township pupils from Morristown High School would have no significant measurable effect on the Morris School District program of studies at either the secondary or elementary levels. The County Superintendent concluded that the program of studies available to Harding Township pupils at Madison High School, with the exception of certain vocational programs, which are otherwise available at the County Vocational School, are parallel to those offered at Morristown High School. The additional findings in the record support the conclusion that the transfer of Harding Township pupils to Madison High School would neither enhance nor diminish the excellent educational opportunity available to either the Harding Township pupils or the other pupils of either school.

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Although the argument that a greater sense of self-identity of the rural Harding Township pupils is available at the smaller Madison High School may be accorded some relevance, the Commissioner is not disposed, in this day of highly mobile populations, to attach great significance thereto.

The total withdrawal of Harding Township pupils from Morristown High School would increase the proportion of black pupils enrolled in Morristown High School by less than one percent. While in no way disregarding the psychological importance of such an increase, the Commissioner concludes that such an increase is not sufficient to cause a disproportionate change in the racial composition of Morristown High School. This is particularly so in view of the anticipated population growth in predominately white Morris Township with its far greater geographic area available for further development. This growth may be reasonably expected to decrease the percentage of black pupils enrolled in Morristown High School in future years, regardless of the decision herein.

Conversely, it is shown that the assignment of all Harding Township pupils to Madison High School would decrease its proportion of black pupils (presently six percent) by only three-tenths of one percent. The Commissioner finds this an insignificant factor that would in no substantial way affect the opportunities available to Madison pupils to be educated in a racially integrated school atmosphere.

Counsel for the Morris Regional Board states in his *Exceptions and Objections to Hearing Examiner's Report* that:

> "*** The net effect of the transfer of Harding's white students from Morristown High School to Madison will be to increase the black enrollment percentage at Morristown High School by about 9% while serving to reduce the same at Madison by more than 13%.***" (at p. 10)

The Commissioner finds this expression of projected percentage changes of existing percentages of racial composition to be both misleading, subject to misinterpretation by the general public, and fraught with ambiguity.

The Commissioner concludes that the actual projected percentage changes of racial composition in either school which would result from a total withdrawal of Harding Township pupils from Morristown High School, would be less than one percent. In this instance, the Commissioner concludes that such a change in racial composition would not adversly affect either the Morristown High School or Madison High School.

The Commissioner, in examining the adequacy of existing educational facilities at Morristown and Madison High Schools finds that both structures presently accommodate pupil enrollments which exceed their rated functional capacities. Morristown High School, by virtue of an overlapping split schedule with modular scheduling, is able to accommodate its 2,385 pupils in a schoolhouse rated for a regular day functional capacity of 1,361. Madison High School, in turn, presently accommodates 1,180 in a schoolhouse with a functional capacity of 1,005. Both schools provide excellent programs of

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education, attesting to the wisdom of decisions by their respective boards of education in coping with these enrollment problems.

An examination of the straight-line projections, *ante*, shows that the Morristown High School enrollment, exclusive of Harding Township pupils, is expected to remain relatively stable for the next five years. It will, of course, expand in the event of continued additional housing construction. The Madison High School pupil enrollment on the basis of the same five-year enrollment projection, without Harding Township pupils, likewise shows no appreciable change through 1978. Madison High School is less subject to impact from continued housing construction because of limited open space for additional development.

The affirmative finding of the hearing examiner is that significant overcrowding does indeed presently exist in the Morristown High School, especially in the support facilities (*i.e.* library, cafeteria, gymnasiums) during the overlap portion of the nine-period day when over 2,300 pupils are present in the high school. Such serious overcrowding is of primary significance to the Commissioner. The withdrawal of Harding Township pupils would offer moderate relief from such crowded conditions. Also, the Commissioner determines that the addition of the approximately ninety Harding Township pupils not now attending Madison High School would not produce conditions requiring an extended school day or other major modifications by the Madison Board, and would enable the Madison Board to maintain what it considers an optimum enrollment in the Madison High School with a desirable balance of rural and suburban pupils. The Commissioner finds this good and sufficient reason pursuant to the statutory prescription (*N.J.S.A.* 18A:38-13) to approve the severance of the sending-receiving relationship herein controverted.

Having carefully weighed the facts and the arguments of law presented by the litigants, the Commissioner finds no strictures that would prevent the total withdrawal of Harding Township pupils which has thus far been partly accomplished on a *de facto* basis. He determines that such a withdrawal will be in the best interest of the orderly and efficient operation of educational systems in the Morristown area. It is therefore ordered that the termination of the sending-receiving relationship between the Harding Township School District and the Morris School District be effected in accord with the previously established schedule of withdrawal, so that the Harding Township seniors of 1974-75 will be the last group of pupils in attendance at Morristown High School. Thereafter, in June 1975, the sending-receiving relationship between the Harding Township School District and the Morris School District will terminate.

COMMISSIONER OF EDUCATION

April 29, 1974

You are viewing an archived copy from the New Jersey State Library.

Morris School District,

Petitioner-Appellant,

v.

Board of Education of the Township of Harding and Board of Education of the Borough of Madison, Morris County,

Respondents-Appellees.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 29, 1974

For the Petitioner-Appellant, Meyner, Landis & Verdon (Jeffrey L. Reiner, Esq., of Counsel)

For the Respondent-Appellee, Harding Board, Mills, Doyle, Hock & Murphy (John M. Mills, Esq., of Counsel)

For the Respondent-Appellee, Madison Board, Smith, Cook, Lambert, Knipe & Miller (Thomas P. Cook, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

November 6, 1974

Pending before Superior Court of New Jersey

You are viewing an archived copy from the New Jersey State Library.

Board of Education of the Township of Madison, Middlesex County,

Petitioner,

v.

Madison Township Education Association, John Batton, Jr. and Carl Johnson,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Mirabelli and Murray, Esqs. (Robert Emmet Murray and Thomas W. Alexander, Esqs., of Counsel)

For the Respondents, Rothbard, Harris & Oxfeld (Emil Oxfeld and Abraham L. Friedman, Esqs., of Counsel)

The Board of Education of the Township of Madison, hereinafter "Board," contests an arbitration award in favor of the Madison Township Education Association, hereinafter "Association," which directed the Board to reinstate two teaching staff members in employment positions which the Board had eliminated, and to make them whole for all losses resulting from their transferral.

This matter is submitted for adjudication by the Commissioner of Education on affidavits and Briefs of counsel, and the arbitration award is submitted also as part of the record. In addition, oral argument was heard on October 11, 1972, at the State Department of Education, Trenton. The report of the hearing examiner follows:

John Batton, Jr., and Carl Johnson, hereinafter "respondents," are two teaching staff members who were not reemployed in their former positions for the 1971-72 school year. Respondents formerly held positions as "Coordinator[s] of Pupil Personnel Services" in the school district, and were recognized by their titles by the Board in the "Agreement" between the Board and the Association, effective September 1, 1970 to and including August 31, 1971.

The Board avers that the controverted positions were established on an experimental basis and that it decided to abolish the positions after the defeat of the 1971-72 school budget and the subsequent reduction in its budget by the Madison Township Council.

The Board argues that it has the authority under the *New Jersey Constitution* and *Title 18A, Education,* to abolish positions or leave them unfilled, in order to accomplish its mandate to operate a thorough and efficient system of public schools, and to act consonant with public policy in abolishing positions for compelling economic reasons. The Board asserts that it also left other positions unfilled in its efforts to economize after the drastic reduction in its budget.

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Both parties stipulate that the alleged abolition of positions was for other than disciplinary reasons.

The Board's argument that it has a constitutional right to abolish the positions is based on its interpretation of the *New Jersey Constitution, Art.* VIII, *Sec.* IV, *Par.* 1, which, the Board avers, confers on it the authority to provide a thorough and efficient system of free public schools.

Specifically, the Board avers that it has the statutory authority to abolish positions pursuant to *N.J.S.A.* 18A:28-9 which reads as follows:

> "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."

Although the statute, *ante,* refers to tenured positions, in the hearing examiner's judgment, it follows logically that the same rationale can be followed in regard to nontenured positions. Therefore, if a board has the statutory authority to abolish a tenured position, it clearly has the authority to abolish a nontenured position.

Respondents contend that the Commissioner lacks statutory authority to review and vacate any arbitration award, and that he should dismiss the Board's appeal for lack of authority and jurisdiction.

Respondents aver that the Board, in fact, did not abolish the controverted positions prior to July 1, 1971, nor has it done so at any subsequent date. Respondents state that the positions were part of the terms and conditions of employment established in the Agreement which the Association negotiated with the Board. Respondents also argue that the unilateral action of the Board, in not filling the positions, is not only a violation of the terms and conditions of employment affecting respondents, but also affects those teaching staff members who have absorbed the educational duties and responsibilities of respondents.

The Board and respondents differ sharply on the educational need for the controverted positions and the resultant effect on the pupils and school personnel because respondents' positions remain unfilled.

The Board requests relief in the form of an Order by the Commissioner (1) vacating the arbitration award, and (2) declaring that the provisions of the Agreement which are contrary to *Title 18A, Education,* be declared null and void and that the Commissioner provide whatever other relief is deemed equitable and just.

Respondents argue that the Commissioner has no authority to review the arbitration award, which they state is a very normal outcome in labor relations

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disputes determined by arbitrators, and that all decisions respecting the "***Education Act rendered prior to July 1, 1968, are of no authority on this situation; because it was not until July 1, 1968, that Chapter 303 of the Laws of 1968, the 'New Jersey Employer-Employee Relations Act,' took effect.***" (Respondents' Brief, at p. 4)

The Commissioner must first determine the question of his jurisdiction in the matter, *sub judice.*

The authority of the Commissioner to "*** hear and determine *** controversies and disputes arising under the school laws ***" is not questioned. *N.J.S.A.* 18A:6-9

In the instant matter, the Board avers that it abolished the two disputed positions. The record does not support that contention; rather, it shows that the positions were occupied by respondents in the 1970-71 school year and simply not filled for the school year 1971-72. The salient question is: can a board make a determination not to fill a position pursuant to the school laws; or, as respondents claim, is such a determination a term and condition of employment which cannot be changed unilaterally by the Board?

Although the Board did not formally abolish the controverted positions pursuant to *N.J.S.A.* 18A:28-9, it has the statutory authority pursuant to *N.J.S.A.* 18A:16-1 and *N.J.S.A.* 18A:27-4 to make determinations governing the employment of teaching staff members. *N.J.S.A.* 18A:16-1 provides:

> "***Each board of education, subject to the provisions of this title and of any other law, shall employ and may dismiss a secretary or a school business administrator to act as secretary and may employ and dismiss a superintendent of schools, a custodian of school moneys, when and as provided by section 18A:13-14 or 18A:17-31, and such principals, teachers, janitors and other officers and employees, as it shall determine, and fix and alter their compensation and the length of their terms of employment."

and, *N.J.S.A.* 18A:27-4 provides:

> "***Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto."

Pursuant to *N.J.S.A.* 34:13A-1 *et seq.*, boards of education as public employers are required to negotiate with the majority representative organization of teachers and other employees concerning the terms and

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conditions of employment. The grievance procedure specifically is negotiable. *N.J.S.A.* 34:13A-5.3 However, *N.J.S.A.* 34:13A-8.1 reads as follows:

> "Nothing in this act shall be construed to annul or modify, or to preclude the renewal or continuation of any agreement heretofore entered into between any public employer and any employee organization, nor shall any provision hereof annul or modify any statute or statutes of this State."

The question raised, therefore, is whether or not any of the school laws in *Title 18A, Education,* are superseded by *N.J.S.A.* 34:13A-1 *et seq.* This issue was discussed in *Board of Education of the Township of Rockaway v. Rockaway Township Education Association and Joseph Youngman,* 120 *N.J. Super.* 564 (*Chan. Div.* 1972). The Superior Court held:

> "*** It cannot be argued, therefore, that *Title 18A, 'Education,'* insofar as it is concerned with relationship between boards, teachers *and* pupils, has been superseded. Even were this language eliminated from chapter 303, our Supreme Court has held that the general rule of statutory construction, in the absence of clear legislative direction to the contrary, requires a determination that a later statute will not be deemed to repeal or modify an earlier one, but all existing statutes pertaining to the same subject matter 'are to be construed together as a unitary and harmonious whole, in order that each may be fully effective.' *Clifton v. Passaic County Board of Taxation,* 28 *N.J.* 411, 421 (1958). Thus, the provisions of both *Title* 18A and Chapter 303 must be read together so that both are harmonized and each is given its appropriate role.***" (at p. 569)

The effect of this court ruling is that the placement and assignment of teachers is a matter that rests within the authority of the Board. *N.J.S.A.* 18A:27-4 and 18A:16-1

Absent an affirmative showing that this matter is distinguishable by its specific complaints, the hearing examiner is of the opinion that the issue, *sub judice,* is clearly a controversy which must be determined under the school laws of this State, and that this is a matter within the jurisdiction of the Commissioner.

Boards of education have broad statutory powers by which they are authorized to govern their school districts; however, nowhere has the hearing examiner found any statutory authority that would permit a board to give up or negotiate away a right conferred on it by the Legislature. In *Dunellen Board of Education and the Commissioner of Education of New Jersey v. Dunellen Education Association and the Public Employment Relations Commission,* 64 *N.J.* 17 (1973), the Court commented as follows:

> "*** Among the powers expressly vested by the Legislature in the local school boards was the traditional management power to employ, promote, transfer and dismiss and to adopt appropriate rules in connection

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> therewith, all subject of course to specific statutory provisions. *N.J.S.A.* 18A:11-1; *N.J.S.A.* 18A:16-1; *N.J.S.A.* 18A:27-4; *N.J.S.A.* 18A:28-9. In their relations with their employees the boards were clearly to be distinguished from private employers in private industry. The members of the boards were public officials charged with public responsibilities which they could not lawfully 'abdicate or bargain away.' *Lullo v. Intern. Assoc. of Fire Fighters,* 55 *N.J.* 409, 440 (1970)***." (at p. 23)

It is significant that no claim of tenure is made with respect to the coordinators' positions as described, and the record shows that the respondents have tenure in the school district.

In *Board of Education of the Township of Rockaway v. Rockaway Township Education Association, supra,* Joseph H. Stamler, J.S.C., commented as follows:

> "*** It is concluded, therefore, that if the contract is read to delegate to a teacher or to a teacher's union the subject of courses of study, the contract in that respect is *ultra vires,* and unenforceable. It must therefore follow that the American Arbitration Association cannot be the sub-delegee of the Board and of the teachers. Additionally, it is to be noted that the American Arbitration Association may be well qualified to 'arbitrate' compensation, hours of work, sick leave, fringe benefits and the like, but they and their panels possess no expertise in arbitrating the maturation level of a 7th grade student in the elementary schools of Rockaway Township.
>
> "However, defendants who are dissatisfied with the action of the superintendent and the Board are not without a remedy. *N.J.S.A.* 18A:6-9 provides that the Commissioner of Education 'shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws' ***" (at pp. 570-571)

Subsequent to this appeal to the Commissioner, and the court decisions cited herein, the most definitive analysis, to date, of "terms and conditions of employment," has been rendered in *Dunellen, supra.* One issue in *Dunellen* was whether or not the consolidation of two chairmanship positions into one newly created chairmanship position was arbitrable, or a determination which should be made by the local board.

The Court stated in *Dunellen* as follows:

> "*** In any event, the determination [of the Dunellen Board of Education] to consolidate was predominantly a matter of educational policy which had no effect, or at most only remote and incidental effect, on the 'terms and conditions of employment' contemplated by *N.J.S.A.* 34:13A-5.3. So far as our education laws are concerned, it is entirely clear that the Board had the statutory responsibility for such educational determinations. See, *e.g., N.J.S.A.* 18A:11-1; *N.J.S.A.* 18A:16-1; *N.J.S.A.* 18A:27-4; *N.J.S.A.* 18A:28-9. And so far as our education laws are

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concerned, it is equally clear that the Commissioner had an overall responsibility for supervising such educational determinations (*N.J.S.A.* 18A:4-23; *N.J.S.A.* 18A:4-25; *N.J.S.A.* 18A:4-28.3) and for hearing controversies and disputes with respect thereto as 'arising under the school laws' (*N.J.S.A.* 18A:6-9).

"Whatever may be the conflicting views on other subject matters, it would appear evident that the consolidation of chairmanships represents a matter predominantly of educational policy within management's exclusive prerogatives under the lines drawn in the decisions cited earlier in this opinion. See *School Dist. of Seward Education Association v. School District of Seward, supra,* 188 *Neb.* 772, 199 *N.W.* 2*d* 752; *Joint School District No. 8 v. Wisconsin Emp. Rel. Bd., supra,* 37 *Wis.* 2*d* 483, 155 *N.W.* 2*d* 78; *West Hartford Educational Association v. De Courcy, supra,* 162 *Conn.* 566, 295 *A.*2*d* 526.***" (at pp. 29-30)

and,

"***we are satisfied that the Dunellen Board could not legally have agreed to submit to binding arbitration, the soundness or validity of its determination that it would be educationally desirable to consolidate the Chairmanships of the Social Studies Department and the English Department into a newly created Humanities Chairmanship. We are further satisfied that, when nonetheless the issue was actually raised, it should have been presented to the Commissioner of Education for his determination as a dispute arising under the school laws and that, accordingly, the Chancery Division erred in dismissing the Board's action and in entering summary judgment for the Education Association. Strictly this holding relates only to arbitrability but all that has been said earlier in this opinion leads to the conclusion that the consolidation was not a proper subject of either arbitration or mandatory negotiation under *N.J.S.A.* 34:13A-5.3.

"The holding that the consolidation was predominantly a matter of educational policy not mandatorily negotiable does not indicate that the Board would not have been well advised to have voluntarily discussed it in timely fashion with the representatives of the teachers. Peaceful relations between the school administration and its teachers is an ever present goal and though the teachers may not be permitted to take over the educational policies entrusted by the statutes to the Board they, as trained professionals, may have much to contribute towards the Board's adoption of sound and suitable educational policies. Before the passage of New Jersey's Employer-Employee Relations Act (*N.J.S.A.* 34:13A-1 *et seq.*) it was recognized that public employees had the right to be heard through their representatives on their proposals and grievances. The Act significantly broadened that right and, with the goal of peaceful labor relations in mind, created fields of mandatory negotiation. It would seem evident that, when dealing in fields with which the teachers are significantly concerned though outside the fields of mandatory

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> negotiation, the end of peaceful labor relations will generally be furthered by some measure of timely voluntary discussion between the school administration and the representatives of its teachers even though the ultimate decisions are to be made by the Board in the exercise of its exclusive educational prerogatives.***" (at p. 31)

For the reasons stated and the cases cited herein, the hearing examiner recommends that the Commissioner determine that the matter, *sub judice,* is a controversy and dispute arising under the school laws, which is within the jurisdiction of the Commissioner, and not in the realm of an arbitrator. The hearing examiner also recommends that the Commissioner find that the Board properly exercised its statutory authority by not filling the contested positions.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the exceptions thereto, filed in accordance with *N.J.A.C.* 6:24-1.16.

The first specific issue to be decided is whether the instant matter is within the jurisdiction of the Commissioner as a controversy arising under the school laws of this State. In order to determine the issue of his jurisdiction, the Commissioner must first set forth his findings of fact in this matter.

The record before the Commissioner discloses agreement by the parties on the following facts. Respondents Batton and Johnson, both teaching staff members who had previously acquired a tenure status in the school district, were appointed approximately two years ago to the then, newly created positions entitled coordinators of pupil personnel services. Each was assigned to a separate middle school within the district. At a public meeting held during May 1971, the Board took formal action not to reemploy the two respondents as coordinators for the 1971-72 school year. Respondents were subsequently transferred to other teaching staff positions, presumably as guidance counselors, since both possessed a tenure status in their previous positions, although the record is somewhat obscure on this point.

The Commissioner need not describe the events which followed. It suffices to say that grievances were filed by respondents which ended in an Arbitration Opinion and Award.

A key point which requires clarification is whether or not these two coordinator positions were in fact abolished. The Briefs filed with the arbitrator, together with the Arbitrator's Opinion, have been made part of this record. In its Brief, the Board stated that it had simply not filled the two coordinator positions for the school year 1971-72. Respondents asserted that "***the Association maintains its position that the Board abolished or eliminated the positions***." (Respondents' Arbitration Brief, at p. 1) Respondents also asserted that, assuming *arguendo* the Board's assertion of not filling the positions

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described the situation, such an action would merely be a "disguise" to avoid a contractual obligation. The Arbitration Opinion made the following finding in regard to the question of whether or not the positions were abolished:

> "***Although there was considerable discussion at the hearings [arbitration] about the 'abolition' of the position, the fact is that it was not actually abolished at that time, nor has it been abolished since. What apparently occurred is that the position remains, but it remains unfilled.***
>
> "***What occurred was that the duties formerly performed by the Coordinators, in addition to their ordinary duties as Guidance Counsellors, were now divided among the Counsellors and administrative personnel in the schools.***" (Arbitrator's Opinion, at pp. 2-3) (Tr. 9)

Subsequent to the receipt of the Arbitrator's Opinion and Award, this matter was brought before the Commissioner by the Board.

In its Brief submitted to the Commissioner, the Board takes the position that the two positions were abolished, and respondents adopt the opinion of the arbitrator as stated above.

The record before the Commissioner discloses that the Township governing body had reduced the proposed school budget for the 1971-72 school year by approximately $800,000, following the rejection of the budget at the polls by the citizenry. The Board determined to reduce positions in the school district in order to operate the public schools during the 1971-72 school year within the amount of local taxation certified by the governing body. In its Brief before the arbitrator, the Board listed the eliminated positions as including the following (Petitioner's Arbitration Brief, at p. 8):

Two Coordinators of Pupil Personnel Services
Assistant Board Secretary
Director of Federal Funds/Adult School Director
Supervisor of Health, Physical Education and Safety
Twenty new teachers
Assistant Head Custodian
Director of Nurses

There is nothing in the record before the Commissioner to show that these staff reductions did not, in fact, occur; nor, do respondents challenge the fact of these staff reductions for the 1971-72 school year.

No testimony was presented before the hearing examiner during the oral argument in this matter. The hearing examiner found that the record does not support the Board's contention that the two disputed positions were not abolished (Hearing Examiner Report, at p. 5), presumably because of the Board's admitted action at the May 1971 Board meeting, wherein it took formal action not to reemploy respondents as coordinators for the 1971-72 school year.

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However, the circumstances of that action must be examined closely in order to determine the actual state of affairs which resulted.

As was previously stated, the arbitrator's finding, adopted by respondents in their Brief, states that the positions remain, but unfilled. The arbitrator's finding went on to describe the distribution of the coordinators' duties among the guidance counselors and school administrators, *ante.*

Given the facts of the budget defeat by the voters, and the subsequent reduction of twenty-seven positions by the Board as stated, *ante,* it must logically be concluded that the Board revised its 1971-72 school budget to absorb the $800,000 reduction. Therefore, the funds allocated to certain line items, particularly the funds tentatively budgeted for the salaries of the twenty-seven staff positions which were eliminated, had to be deducted from the 1971-72 school budget in the amount of $800,000. This was the only method by which the Board could balance its budgetary expenditures against anticipated revenues, and such a balance must be accomplished following a budgetary reduction by a governing body which is not appealed to the Commissioner. The end result of this ordinary process is that the funds for the abolished positions no longer exist within the revised school budget.

The finding that the duties of the coordinators were distributed among the guidance counselors and administrative staff members is not contested by either party. Clearly, this is the precise situation which occurs when positions are abolished. The coordinators' positions could not have been created without duties, otherwise the coordinators' salaries would have constituted a gift of public moneys for services not rendered, which is clearly prohibited by the laws of this State. *Joseph McKay v. Board of Education of the Borough of Red Bank, Monmouth County,* 1972 *S.L.D.* 606

The only way that the two positions of coordinators of pupil personnel services in the middle schools could remain unfilled would be under circumstances where: (1) the salary allocations for the positions remained in the 1971-72 school budget; (2) the duties were not performed, or in the alternative, were performed by someone else as an acting coordinator of pupil personnel services. Neither of these two conditions are present in the instant matter. Also, there is no evidence that positions were created under a different title for the purpose of assuming *in toto* the duties and responsibilities of the coordinators. Such an action by a local board of education was found by the Commissioner to be a subterfuge and was set aside in *Catano v. Board of Education of the Township of Woodbridge,* 1971 *S.L.D.* 448.

In the instant matter, the Board's error of procedure was that it did not formally act to abolish the two positions of coordinators, but instead merely did not reemploy respondents in those positions for the 1971-72 school year. But the substance of a situation and not its shape must control. *Board of Education of the Borough of Union Beach v. New Jersey Education Association et al.,* 53 *N.J.* 29 (1968)

Therefore, based upon the facts found in the record before him, and for

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the reasons expressed above, the Commissioner finds and determines that the Board did, in fact, abolish the two positions of coordinators of pupil personnel services for the 1971-72 school year.

It is clear that this matter concerns the abolition of teaching staff positions by a local board of education, and as such is cognizable by the Commissioner as a controversy arising under the school laws. *N.J.S.A.* 18A:6-9

In the Commissioner's judgment, 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 the two coordinator positions for reasons of economy as described, *ante,* and for reasons of educational efficiency which will be discussed *post.*

The elimination of positions by a local board of education is expressly provided for by *N.J.S.A.* 18A:28-9, which reads as follows:

> "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."

This statute specifically states that a local board of education's right to eliminate positions for the reasons stated therein cannot be limited, even if the person holding the position has acquired a tenure status in the position. For example, if because of a large reduction in enrollment, a local board of education determined to reduce its staff of elementary grade teachers by ten, the board would attempt, if possible, to dismiss ten nontenure teachers. But if only four elementary teachers had not acquired a tenure status, the board would then have to dismiss six elementary grade teachers who did possess a tenure status. The dismissals resulting from such a reduction could not be made for reasons of residence, age, sex, marriage, race, religion or political affiliation, but "***shall be made on the basis of seniority according to the standards to be established by the commissioner with the approval of the state board." *N.J.S.A.* 18A:28-10 Teachers with a tenure status, who are dismissed as a result of such reduction, must remain on a preferred eligibility list in the order of seniority for reemployment whenever a vacancy occurs in a position for which he/she is qualified. *N.J.S.A.* 18A:28-12 For an example of a case wherein a position of vice-principal was eliminated for reasons of efficiency and economy, but the board improperly dismissed a tenured vice-principal instead of a nontenured vice-principal, see *McKay v. Board of Education of the Borough of Red Bank, supra. Also Ross v. Board of Education of the City of Rahway,* 1971 *S.L.D.* 314; *Lascari v. Lodi Board of Education,* 1954-55 *S.L.D.* 83, affirmed 1954-55 *S.L.D.* 89, affirmed 36 *N.J. Super.* 426 (*App. Div.* 1955)

In the instant matter, affidavits of a middle school principal and the director of secondary education were submitted by the Board to explain the educational philosophy upon which the decision to eliminate the two

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coordinator positions was based. The director states in his affidavit (Exhibit R-1) that the reasons for the determination not to fill the positions of coordinators of pupil personnel services were as follows:

***

"(a) The 1971-72 school budget was defeated.
(b) The Madison Township Council made a large cut in the budget.
(c) The administration was asked to deliver educational priorities by examining areas for cost-cutting so as not to damage the educational program and to provide the most effective and meaningful program for the students, yet still cutting operating costs.***"

(Exhibit R-1, at p. 2)

There then followed three pages of detailed explanation of the educational philosophy and policy reasons supporting the director's recommendation to eliminate the coordinator positions. The affidavit of the principal of the Jonas Salk Middle School provided a detailed recitation of the educational philosophy and policy reasons supporting his recommendation to eliminate the coordinator positions. (Exhibit R-2)

The parties to this controversy have stipulated that the abolition of the positions was for other than disciplinary reasons.

The Board's argument is, in sum, that its determination not to reemploy respondents as coordinators for 1971-72, was a reasonable exercise of its discretionary authority pursuant to the provisions of *N.J.S.A.* 18A:28-9, for reasons of educational efficiency and economy.

Respondents' argument is from an entirely different point of view. Respondents contend that the agreement between the Board and the Association recognized the position of coordinator of pupil personnel services at a salary ratio of 1.20 times the appropriate training level and year of experience on the teachers' salary schedule. The Commissioner finds this to be true. Article I of the Agreement (Exhibit R-3), entitled Recognition, states that coordinators of personnel services in middle schools, are, *inter alia,* represented by the Association for purposes of collective negotiations. Also, schedule IV, at p. 38 of the Agreement, entitled Specialists Stipends, includes, *inter alia,* the director of pupil personnel services at a ratio of 1.20. From this point on, respondents rely upon the context of the Agreement and the opinion of the arbitrator in setting forth their contentions. These contentions are based upon several provisions of the Agreement as follows:

ARTICLE XXVI

"A. This Agreement constitutes Board policy for the term of said Agreement, and the Board shall carry out the commitments contained herein and give them full force and effect as Board policy.***"

"C. The Board will not make changes unilaterally in terms and conditions of employment.***" (Exhibit R-3 at p. 32)

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Article IV, Section G, also forms part of the basis of respondents' arguments. This section reads as follows:

> "G. The Board of Education reserves to itself sole jurisdiction and right, in compliance with the laws of the State of New Jersey and the rulings of the State Commissioner of Education to hire, assign, promote and direct employees covered by this agreement or to take disciplinary action against said employees (up to and including discharge) for just cause, to direct school operations, and to take whatever other actions may be necessary to accomplish the mission of the school district *except as may be specifically provided by the language of this agreement.****" (*Emphasis ours.*)
>
> (Exhibit R-3, at p. 11)

The arbitrator held that the removal of the two coordinators from their positions during the term of the Agreement (Exhibit R-3) was a demotion which constituted a unilateral change in a term and condition of employment, which the Board had specifically promised not to make. (Arbitration Opinion and Award, at p. 5) The following passage from the Arbitrator's Opinion summarizes his conception of the issue herein controverted:

> "***The question does not involve whether or not the Board may change the direction of a program, eliminate an experimental function, move in new directions educationally, economize where it has budgetary problems, or exercise its legal authority under the Education Law of the State of New Jersey. The Board retains all such rights, powers, privileges and prerogatives – with one exception. The exception is where it has legally bound itself by contract not to pursue a particular course, not to unilaterally change a term of employment, and not to remove work which belongs within the unit and assign it outside the unit. *That is what the Board has done in this case, despite Article IV, Section G, of the Agreement in which the Board agrees that its broad powers to accomplish the mission of the school district are limited by the terms of the Agreement.****" (*Emphasis ours.*)
>
> (Arbitration Opinion and Award, at p. 6)

Further on, the Opininion states that "***the fact is that the position [coordinator] has not been abolished. It remains in the Agreement.***" (at p. 7) The Opinion also states that, where the Board has unlimited authority under a statute, it may exercise it to the fullest; but when the Board decides, through negotiations, to limit its statutory power, it is bound by such a limitation.

The Commissioner has cited the above excerpts of the Arbitrator's Opinion, which is espoused by respondents, to show the type of conclusion which may result when matters of educational policy are construed within the context of *L.* 1968, *c.* 303, but contrary to the policies of this State for the provision of a system of free public schools. These policies were summarized by the Supreme Court of this State in *Dunellen Board of Education and Commissioner of Education of New Jersey v. Dunellen Education Association and Public Employment Relations Commission,* 64 *N.J.* 17 (1973), and need not be repeated here.

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The affidavits submitted by the Board, *ante,* clearly disclose that the two-fold problem confronting the Board was one of economy of operation and selection of the most appropriate and meaningful type of guidance program for the pupils. Such issues are the very essence of educational policy, and the Commissioner so holds.

The Legislature, through the provisions of *N.J.S.A.* 18A:28-9, recognized that local boards of education would from time to time be required to reduce the number of teaching staff members, for reasons which include the administrative or supervisory organization of the district, for reasons of efficiency or economy, or for "other good cause." By means of this statute, the Legislature guaranteed that the staff organization and function within the public schools would not become rigidly inflexible, thereby defeating, in part, the mandatory requirement for a thorough and efficient system of public schools for the benefit of all the pupils in this State.

Respondents' contention that a local board of education can bind itself, through negotiations and agreement, to "abdicate or bargain away" statutory obligations and prerogatives is wholly without merit. *Lullo v. Intern. Association of Fire Fighters,* 55 *N.J.* 409, 440 (1970) In *Dunellen, supra,* the Supreme Court stated the following:

> "***Surely the Legislature, in adopting the very general terms of *L.* 1968, *c.* 303, did not contemplate that the local boards of education would or could abdicate their management responsibilities for the local educational policies or that the State educational authorities would or could abdicate their management responsibilities for the State educational policies. See *Lullo v. Intern. Association of Fire Fighters, supra.* 55 *N.J.* at 440; *Bd. of Ed., Tp. of Rockaway v. Rockaway Tp. Ed. Ass'n.,* 120 *N.J. Super.* 564, 569 (1972); *cf. Porcelli v. Titus,* 108 *N.J. Super.* 301, 312 (1969), *certif. denied,* 55 *N.J.* 310 (1970).***" (at p. 25)

In regard to the question in *Dunellen, supra,* whether the board could legally submit the issue therein to binding arbitration, the Supreme Court stated the following:

> "***we are satisfied that the Dunellen Board could not legally have agreed to submit to binding arbitration, the soundness or validity of its determination that it would be educationally desirable to consolidate the Chairmanships of the Social Studies Department and the English Department into a newly created Humanities Chairmanship. We are further satisfied that, when nonetheless the issue was actually raised, it should have been presented to the Commissioner of Education for his determination as a dispute arising under the school laws and that, accordingly, the Chancery Division erred in dismissing the Board's action and in entering summary judgment for the Education Association. Strictly this holding relates only to arbitrability but all that has been said earlier in this opinion leads to the conclusion that the consolidation was not a proper subject of either arbitration or mandatory negotiation under *N.J.S.A.* 34:13A-5.3.***" (at p. 31)

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In their exception to the Hearing Examiner Report, respondents argue that the decision of the New Jersey Supreme Court in *Board of Education of the City of Englewood v. Englewood Teachers' Association,* 64 *N.J.* 1 (1973) is controlling in the instant matter. The Commissioner does not agree, because *Englewood,* which was concerned with questions of hours and compensation of individual teaching staff members, is distinguishable from the instant matter. In the Commissioner's judgment, the decision of the Supreme Court in *Dunellen, supra,* which concerned a matter of educational policy, controls and is dispositive of this case.

Accordingly, for the reasons hereinbefore stated, the Commissioner finds and determines that: (1) the matter herein controverted is within the jurisdiction of the Commissioner as arising under the school laws of the state; (2) the Board of Education of the Township of Madison did, in fact, abolish the positions of coordinators of pupil personnel services in the middle schools pursuant to *N.J.S.A.* 18A:28-9, for reasons of educational efficiency and fiscal economy; and (3) the provisions of the negotiated agreement which require the submission to arbitration of issues dealing with educational policy and the powers expressly vested by the Legislature in local education boards are *ultra vires.*

COMMISSIONER OF EDUCATION

April 30, 1974

**In the Matter of the Tenure Hearing of Walter Kizer,
School District of the Borough of Haledon, Passaic County.**

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Petitioner, Dominic Cavaliere, Esq.

For the Respondent, Saul R. Alexander, Esq.

Petitioner, a teacher with a tenure status employed by the Haledon Board of Education, hereinafter "Board," was suspended from his teaching duties by the Board on May 15, 1973. Subsequent to this act of suspension, the Board filed a determination with the Commissioner of Education that written charges against petitioner would be sufficient, if true in fact, to warrant his dismissal or a reduction in his salary. *N.J.S.A.* 18A:6-11 Four days of hearings on those charges were conducted by a hearing examiner appointed by the Commissioner. The submission of all documentary evidence in this matter was completed on October 24, 1973, and the decision of the Commissioner is now pending.

However, on October 30, 1973, petitioner moved that he be paid at his regular salary pursuant to *N.J.S.A.* 18A:6-14. Oral argument on this Motion was heard on November 19, 1973 at the State Department of Education, Trenton,

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by a representative of the Commissioner. The record of that argument is now before the Commissioner for his determination.

N.J.S.A. 18A:6-14, which was recently amended by *Laws* of 1971, *Chapter* 435, § 2, provides as follows:

> "Upon certification of any charge to the Commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. *Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary, from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension."* (*Emphasis supplied.*)

The Commissioner notices that there is no allegation by the Board that petitioner caused any delay in the proceedings of his tenure hearing. In fact, based on the record of the tenure matter before him, the Commissioner must conclude that if, in fact, a delay has occurred, it would not be attributable to petitioner.

Counsel for petitioner argues that by virtue of the time which has elapsed since his suspension on May 15, 1973, and in light of the provisions of *N.J.S.A.* 18A:6-14, the Board is required to pay his full salary as of September 12, 1973, the 121st day of his suspension, and until the Commissioner renders his decision.

At this juncture, the Commissioner believes it helpful to state the progenitor of *N.J.S.A.* 18A:6-14, as amended, which held:

> "Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without *pay,* pending final determination of the same, and if the charge is dismissed, the person shall be reinstated immediately with full *pay* as of the time of such suspension." (*Emphasis supplied.*)

Petitioner argues that through a comparison of the cited progenitor with the now-existing law, as amended, the amendment clearly provides that not only

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is he entitled to his full salary since September 12, 1973, but he is entitled to his full salary without mitigation. This is so, he asserts, because when the Legislature passed *Chapter* 435, *Laws* of 1971, it presumedly knew that the word "salary" was not included in the prior law. Therefore, in its wisdom and having knowledge of its prior actions, the Legislature deemed it appropriate to include the term "salary" for purposes of *N.J.S.A.* 18A:6-14. Petitioner avers that the definition of the term "salary" as opposed to "pay" or "compensation" was stated by the Appellate Division of the Superior Court in *Mullen v. Board of Education of Jefferson Township, Morris County*, 81 *N.J. Super.* 151 (*App. Div.* 1963). In that case, the Court differentiated between the terms "salary" and "compensation." At page 159, the Court held, *inter alia:*

> "*** by using the word 'salary' the Legislature intended that there should be no mitigation for sums earned or that could have been earned by the person dismissed. By adopting the word 'compensation,' rather than the word 'salary' *** the Legislature must be taken as having meant that all claims made by illegally dismissed persons *** be subject to the common law rule of mitigation of damages ***."

The statutes reviewed by the Court in *Mullen, supra,* were *N.J.S.A.* 18:5-49.1 (now *N.J.S.A.* 18A:6-30), *Compensation for persons illegally dismissed or suspended,* and *N.J.S.A.* 40:46-34, *Salary of employee illegally dismissed; recovery time for application.*

Petitioner, therefore, concludes that he is entitled to his salary now, and, in view of the Court's decision in *Mullen, supra,* such salary must be without mitigation. Petitioner asserts that the portion of *N.J.S.A.* 18A:6-14, which states that "***the board of education shall deduct from said full pay or salary any sums received by such employee*** by way of *** salary from any substituted employment assumed during such period of suspension ***" is applicable only to the first 120 days of suspension, and under the condition that the tenure charges are finally dismissed by the Commissioner and petitioner is ordered reinstated. Petitioner avers, therefore, that the portion of his salary for the first 120 days of suspension, which would be due him subsequent to reinstatement, is alone subject to mitigation. Petitioner maintains that such an argument is strengthened when one views the whole of the amendment to *N.J.S.A.* 18A:6-14 with *N.J.S.A.* 18A:6-30. The Commissioner notices that both of these statutes deal with reinstatement of employees who had been suspended and had their salaries withheld during such suspension. *N.J.S.A.* 18A:6-14 employs the terms "full pay" and "salary," while *N.J.S.A.* 18A:6-30 uses only the term "compensation." Petitioner contends that, because *N.J.S.A.* 18A:6-14 is the later 1971 expression of legislative intent, as opposed to *N.J.S.A.* 18A:6-30, enacted in 1948, the Legislature clearly mandated that salary payments pursuant to *N.J.S.A.* 18A:6-14 be made beginning with the 121st day and without mitigation.

The Board argues that *N.J.S.A.* 18A:6-14 is not clear on how the 120 days is to be computed under that law. It argues that the period of time which elapsed during the summer months must not be counted in the tolling of the 120

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days because petitioner, under a ten-month teaching contract, lost no real salary. Since petitioner was not employed as a teacher during the summer vacation, he cannot complain that he lost or would have lost his teaching salary for the months of July and August, says the Board. To the contrary, the Board states that the tolling of time must occur only during the months of September through June when school is in session. The Board asserts that to hold otherwise would be to contravene the expression of the Legislature that there must be 120 days of *penalty* imposed upon the suspended person.

The Board, relying on *In the Matter of the Tenure Hearing of Dale Miller, School District of the Borough of Manville, Somerset County,* 1973 *S.L.D.* 409, avers that if it were to begin paying salary to petitioner now, which according to the Board's calculations is prior to the expiration of the 120 days required by *N.J.S.A.* 18A:6-14, it would be setting its own penalty, which the Commissioner held to be *ultra vires* in *Miller, supra.*

The Commissioner, after reviewing arguments of counsel, determines that the precise language used by the Legislature in *N.J.S.A.* 18A:6-14 calls for a maximum of "***120 calendar days after certification of the charges***." The Legislature did not say "school calendar days" as it certainly could have done. In this regard, the Commissioner is mindful of the Court's admonition regarding statutory construction and interpretation articulated in *Caputo v. The Best Foods, Inc.,* 17 *N.J.* 259 (1955):

> "*** We are concerned here not with what the Legislature meant to say, but the meaning of what it did say.***" (at p. 263)

In *N.J.S.A.* 18A:6-14, the Legislature stated that a tenured person who is suspended by a board from his employment, pending disposition of charges preferred against him, shall be paid his full salary commencing with the 121st calendar day of his suspension if the Commissioner has not yet rendered his decision, providing that the delay, if any, is not attributable to the employee. The clear meaning of this provision is that 120 calendar days are 120 periods of 24 hours each of suspension, after which salary payment must resume. Accordingly, salary payment to petitioner should have resumed on September 12, 1973, the 121st calendar day of his suspension.

In regard to the matter of mitigation, petitioner fails to recite the entire legislative intention set forth in *N.J.S.A.* 18A:6-14. The Legislature expressly provided therein that the board shall deduct from any salary paid to the employee during his suspension any sums received by him from substitute employment. The Commissioner cannot agree that mitigation is intended only in instances where charges are dismissed and the employee is reinstated. In the Commissioner's judgment, the intent of the Legislature must be found in the whole of the statute. As the Court, in *Trugman v. Reichenstein,* 27 *N.J.* 280 (1958) stated:

> "*** The total context of a statute must be viewed in seeking the legislative intent.***" (at p. 288)

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In the judgment of the Commissioner, *N.J.S.A.* 18A:6-14 was amended by *Chapter* 435, *Laws* of 1971, in order to provide financial assistance to individuals who are suspended without pay from their employment with local boards of education, pending the determination of formal charges, and, consequently, find themselves in protracted legal proceedings. Nowhere is there any indication that the first 120 days of suspension was to be considered a penalty imposed upon the suspended employee by either the Legislature or the Commissioner in *Miller, supra.* The Commissioner has, on past occasions, set aside actions of local boards of education when they did impose their own penalties on tenured employees. *Miller, supra; In the Matter of the Tenure Hearing of Robert Beam, School District of the Borough of Sayreville, Middlesex County,* 1973 *S.L.D.* 157. However, the Board's argument that if it did pay petitioner now, instead of at the expiration of 120 school calendar days, it would be setting its own penalty, is wholly without merit.

Accordingly, the Board of Education of the Borough of Haledon is hereby ordered to pay to Walter Kizer his full salary as of September 12, 1973, pursuant to the terms of *N.J.S.A.* 18A:6-14, mitigated by all earnings from any substituted employment.

COMMISSIONER OF EDUCATION

December 27, 1973

In the Matter of the Tenure Hearing of Walter Kizer,
School District of the Borough of Haledon, Passaic County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board of Education, Dominic Cavaliere, Esq.

For the Respondent, Saul R. Alexander, Esq.

Charges of corporal punishment were certified to the Commissioner of Education by the Haledon Board of Education, hereinafter "Board," against Walter Kizer, hereinafter "respondent," a tenured teacher in its employ. Respondent denies the allegations herein and asserts that his actions were proper and necessary.

Hearings in this matter were conducted on September 17, 18, 19 and October 24, 1973 at the office of the Passaic County Superintendent of Schools by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

On May 15, 1973, the Board certified to the Commissioner six separate charges of corporal punishment preferred by the Superintendent of Schools

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against respondent, a teacher with twelve years' experience in the school district. By resolution of the same date, the Board also suspended respondent from his teaching duties without pay. However, on December 27, 1973, the Commissioner rendered a written Decision on Motion by which the Board was ordered to pay respondent his full salary, less mitigation as of September 12, 1973, pursuant to the terms of *N.J.S.A.* 18A:6-14 – Suspension upon certification of charge; reinstatement.

On August 6, 1973, respondent filed a Motion to Dismiss based upon an alleged failure of the Board to comply with the provisions of *N.J.S.A.* 18A:6-11 – Written charges; where made and filed; 18A:6-13 – Dismissal of charge for failure of determination by board; 18A:6-16 – Proceedings before commissioner; hearing and the rules of the New Jersey State Board of Education set forth at *N.J.A.C.* 6:24-3.2 – Format of certificate of determination. In a supporting affidavit filed with the Motion, counsel for respondent asserts that Charge No. 1 and Charge No. 2 contained within the Board's certification should be dismissed because the alleged incidents therein were said to have occurred on March 15, 1973. Because the Board did not make its determination to certify until May 15, 1973, more than 45 days thereafter, it specifically violated *N.J.S.A.* 18A:6-13 which provides:

> "If the board does not make *** a determination within 45 days after receipt of the written charge *** the charge shall be deemed to be dismissed***."

In regard to the remaining four specific charges of corporal punishment against respondent, counsel argues for dismissal because the Board, as part of its determination, failed to set forth the date, time, and place at which the meeting was held wherein such determination was made. Relying not only on the already cited statutes, *ante,* as support for this claim, counsel points specifically to *N.J.A.C.* 6:24-3.2 which provides:

> "The certificate of determination which accompanies the written charges shall certify that the board of education has determined that the charges and the evidence in support of the charges are sufficient, if true in fact, to warrant dismissal or a reduction in salary; the date, place and time of the meeting at which such determination was made; that such determination was made by a majority vote of the whole number of members of the board; and in the case of a charge of inefficiency, that the employee was given at least 90 days' prior written notice of the nature and particulars of the alleged inefficiency."

The Board, in opposing respondent's Motion to Dismiss, averred, through a Reply Affidavit filed by its Superintendent, that written charges were not filed with the Board until May 15, 1973. Furthermore, until that date, when the Superintendent submitted to the Board Secretary his specification of charges against respondent, no other charges had been made. Any action taken by the Superintendent, prior to that time, was purely administrative and/or investigatory.

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In regard to respondent's allegation that the Board violated *N.J.A.C.* 6:24-3.2, it is noted that the Board's original certification which accompanied the charges filed before the Commissioner reads as follows:

> *"CERTIFICATION*
>
> "I hereby certify that the attached charges, and the evidence in support thereof, were determined by the Haledon Board of Education, at a meeting held on May 15, 1973, to be sufficient, if true in fact, to warrant a dismissal or a reduction of salary.
>
> "I further certify that said determination was made by a majority of the full membership of the Board.
>
> [Signed]
> "Pearl F. Swordsma
> "Board Secretary"

However, on August 29, 1973, the Board filed an amended certification setting forth the exact time, date, and place of the meeting at which it adopted its resolution certifying the instant charges to the Commissioner.

The hearing examiner recommends that the Motion to Dismiss as to the first two charges be denied because, although the alleged incidents of corporal punishment were purported to have occurred on March 15, 1973, there is no evidence that the Board Secretary was in receipt of any charge against respondent until May 15, 1973. (Tr. III-3) That the Superintendent requested two pupils who were involved in these incidents to prepare a report in writing does not constitute "written charges" pursuant to *N.J.S.A.* 18A:6-13 as contemplated by the Legislature. Any statement which is to be considered a "written charge" is to be filed with the Board Secretary, as set forth in *N.J.S.A.* 18A:6-11. In this matter, it is clear that the Superintendent did not file his statement, which became later the statement of charges, with the Board Secretary until May 15, 1973. (Tr. III-3)

In regard to the remaining four charges, the hearing examiner recommends that the Motion to Dismiss be denied. The original certification filed by the Board in this matter meets the provisions of *N.J.A.C.* 6:24-3.2 although, admittedly, not with as much specificity as respondent argues is necessary. In the hearing examiner's view, such a position places form over substance. There is no showing that respondent was harmed by the omission of the precise hour and the precise location of the Board meeting when the certification of the charges was voted affirmatively.

A recitation of the evidence in support of the six charges of corporal punishment herein will now be presented, followed in each respective instance by the hearing examiner's findings and recommendations. A substantive portion in each of the following six alleged instances of corporal punishment is that such conduct was committed by respondent "*** in spite of having been previously instructed and cautioned not to use corporal punishment or force by the Board

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of Education on October 23, 1968." So that that portion of each of the following charges will not have to be discussed repeatedly, it is reported that on a cross-examination, respondent testified, over the objection of his counsel, that he had been instructed by the Board on October 23, 1968, "*** not to use force—rather instructed you that the New Jersey statute (sic) prevented teachers from using force ***." (Tr. III-109)

CHARGE NO. 1

> "Contrary to the provisions of N.J.S.A. 18A:6-1, Walter Kizer, a tenure teacher in the Marjorie Stansfield School, did on March 15, 1973, strike *** [D. T.], a student in his classroom, with a yard stick, and did also kick him twice, which conduct is unbecoming a teacher and illegal, in spite of having been previously instructed and cautioned not to use corporal punishment or force by the Board of Education on October 23, 1968."

D.T., a thirteen-year-old pupil, testified that while assigned to respondent's class, he needed a ruler which he did not have. However, he did see a ruler on his friend's desk, so he left his own seat to get that ruler. His friend, who had a yardstick in his hand at that time, swung the yardstick at him. D.T. asserted he became angry and went after his friend to hit him with the yardstick. At this point, he testified that respondent "*** yelled at me and kicked me out of the room with his foot." (Tr. I-8) He further testified that respondent kicked him twice "*** in the rear end ***" (Tr. I-8) and pushed him out of the classroom doorway.

Respondent testified, to the contrary, that at the beginning of the class period from which this charge emerged "*** [D.T.] began running around the room and annoying the other students to such an extent that I put him *** out of the room twice.***" (Tr. III-15) However, he [D.T.] ran back into the classroom on both occasions. (Tr. III-15) Respondent testified he then asked D.T. to take a seat in the back of the classroom so that individual instruction could be provided him on the project for that day. Because D.T. did not have a ruler, respondent testified, he [D.T.] went to another boy's desk and took his. Because the other boy did not like that, both of them "*** started battling furiously swinging punches at one another; and I was afraid that they might get hurt, so I *** separated them, and *** ordered *** [D.T.] *** out of the room *** he struggled and I put my hands on his shoulders *** when we got to the [classroom] door, I helped him out with the side of my foot, the side of my leg, without using any force and just shoved him out because I had papers in my hand *** I did call the office *** over the intercom to report I was sending him down. ***" (Tr. III-15-16)

Respondent explained that he did not order out of the room the other boy involved in the fight with D.T. because the other boy "*** is studious, he applies himself; and in this case, he was doing his job [his classwork]; he hadn't started this [the fight] at all and *** [D.T.] continually does this, annoying other students, pushing their books on the floor.***" (Tr. III-19).

D.T., after reporting to the Superintendent what had occurred and

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subsequently being asked to put it in writing, submitted the following initial report to the Superintendent on March 16, 1973: (P-1)

> "I was in Mr. Kizer's room 3/15/73 when I got up to look for a ruler. I saw one on *** [R.B.'s] [the other pupil combatant] desk. He [thought] I was going for the yardstick he hit me with it and Mr. Kizer kicked me out."

However, when P-1 was accepted into evidence at the time of hearing, the last sentence read:

> "he hit me with it and Mr. Kizer kicked me out *twice with his foot."* (*Emphasis supplied.*)

D.T. testified that when he handed the report (P-1) to the Superintendent, he was asked what he meant by "kicked me out." D.T. explained he meant he was kicked twice by respondent's foot. (Tr. I-21) After that explanation, the Superintendent crossed over the word "out" and inserted "twice with his foot." (Tr. II-84)

Respondent, too, was asked by the Superintendent to submit a written report regarding the incident (Tr. II-58) which he did. (P-6) This report was received by the Superintendent on April 19, 1973, and substantiates respondent's testimony regarding the circumstances of the incident. However, the last two sentences of respondent's report to the Superintendent asserted: (P-6)

> "*** He [D.T.] refused to stay out of my room so I booted him on the backside with the side of my foot. Then he left."

D.T.'s testimony corroborated respondent's version of the circumstances leading to the incident, *sub judice.* D.T. admitted he got into a fight in the classroom with the other pupil; he admitted the fight did not stop even after respondent tried to separate them; and D.T. admitted refusing to leave the classroom after being instructed to report to the office. (Tr. I-13, 15, 16)

Finally, in this instance, respondent testified that the alleged "kicks" he administered to D.T. were nothing more than an assist with the side of his foot to "*** help him [D.T.] out of the room without any force ***." (Tr. III-16) Furthermore, he testified that, in this instance, such an assist occurred just once and denied that he ever "kicked" him. (Tr. III-17-18) In respondent's view, a "kick" is a movement of the foot going forward with impact being made with the toe and accompanied by force, while a "boot" or "assist," as he admits administering, is done with the side of the foot (or instep) and not accompanied by force. (Tr. III-52-54) D.T. testified that he was uncertain whether respondent hit him with the toe of his shoe or the side of his shoe. (Tr. I-17)

The hearing examiner finds that the evidence is insufficient to support the

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charge that respondent struck D.T. "*** with a yardstick ***." The evidence is sufficient to support the essential charge that respondent did kick D.T., or "boot" as he admits, on the date specified in the charge.

In view of the attendant circumstances as presented earlier herein, the determination of whether respondent's action is conduct unbecoming a teacher, pursuant to *N.J.S.A.* 18A:6-1 is referred to the Commissioner.

CHARGE NO. 2

> "Contrary to the provisions of N.J.S.A. 18A:6-1, Walter Kizer, a tenure teacher in the Marjorie Stansfield School, did on March 15, 1973, push and kick *** [A.V.], a student in his classroom, which conduct is unbecoming a teacher and illegal, in spite of having been previously instructed and cautioned not to use corporal punishment or force by the Board of Education on October 23, 1968."

In its substantiation of Charge No. 2, the Board offered a written report (P-4) submitted to the Superintendent by A.V. The Superintendent testified that A.V. was confined to his home because of illness and was, therefore, unable to testify. (Tr. II-53) That report, in its entirety, states:

> "I [A.V.] was going to ask Mr. Kizer [respondent] for a ruler and he yeld (sic) at me and pushed me and kick (sic) me and I had to sit in the back of the room."

The Board argued this report (P-4) must be considered evidential in this matter under the general rubric of business entries. (Tr. II-53) The Superintendent testified that *generally* when a pupil conplains about a teacher striking him, a written report is requested. (Tr. II-54) As such, counsel for the Board argues, the report (P-4) properly must be considered evidential.

Counsel for respondent argued, however, that the general evidence rule in regard to business entries is limited in its scope and a report, such as that represented by P-4, is clearly outside the scope of that rule. Furthermore, this report (P-4) does not represent the records of the Board. It is a report made by someone else who is not presented for cross-examination on the contents of that report. (Tr. II-55)

In any event, respondent submitted a written report (P-5) to the Superintendent in regard to the allegations contained in A.V.'s report. (P-4, *ante*) The contents of respondent's report (P-5) are as follows:

> "*** [A.V.] seldom has his science book though he tries at all times to leave the class for any reason he can make up. He interrupts students and teacher alike whenever he feels like it. He is quarrelsome and tries to roam the room taking girls handbags and knocks books off desks when he gets paper from my desk.
>
> "In this instance, I put him out of the room several times so we could

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discuss our work and he made so much noise at the door that I booted him in the backside with the side of my foot and ordered him down to the office–this after some forty minutes of his continual class disturbance."

In direct testimony, respondent denied that A.V. came to him for a ruler (Tr. III-42); rather, he testified that A.V. was annoying other pupils that day and pushing books off other pupils' desks. (Tr. III-38-39) As a result of that disturbance, which lasted about 35 or 40 minutes, respondent ordered A.V. from the classroom which A.V. refused to do. Respondent then "*** helped him out the door with the side of my foot.***" (Tr. III-39)

Because A.V. in this instance did not testify regarding the allegations contained in Charge No. 2, and respondent did not have the opportunity for cross-examination, no finding as to the weight of the evidence in support of the charge will be made by the hearing examiner. Rather, the matter of the sufficiency of the evidence as found solely in A.V.'s report (P-4, *ante*) is referred to the Commissioner.

CHARGE NO. 3

"Contrary to the provisions of N.J.S.A. 18A:6-1, Walter Kizer, a tenure teacher in the Marjorie Stansfield School did, on April 16, 1973, grab *** [R.S.], a student in his classroom, by both arms and forcefully eject him from the classroom and while so doing did kick him three times, twist and pinch his left arm, causing the same to be bruised, which conduct is unbecoming a teacher and illegal, in spite of having been previously instructed and cautioned not to use corporal punishment or force by the Board of Education on October 23, 1968."

R.S., a fourteen-year-old pupil assigned to respondent's science and homeroom classes, testified that on April 16, 1973 during science class, he was sitting in his assigned seat, center row front, when a ruler was thrown over his head. (Tr. I-26, 29) R.S. testified that respondent accused him of throwing the ruler, which he denied, and although he was ordered from the classroom, he [R.S.] refused "*** to get out because *** I didn't throw the ruler and I didn't want to go down to the office and for no reason he took me by the arms and *** pinched me and kicked me with his knee three times.***" (Tr. I-26 - 27)

In support of the allegation that respondent did "*** twist and pinch his [R.S.'s] left arm, causing the same to be bruised ***" (Charge No. 3, *ante*), the Board offered a photograph (P-2) taken by counsel for the Board several days after the incident occurred which depicts what appears to be two small dark areas on the left bicep of the pupil's arm. (Tr. I-33 - 34)

Subsequent to the incident described above and after being removed from respondent's classroom, R.S. averred he went to the boys' room where he put a wet paper towel on his arm because it hurt. (Tr. I-29) He then went to his next regularly scheduled class period, mathematics, where he showed his arm to the mathematics teacher. That teacher instructed R.S. to go to the school nurse

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where an ice pack was put on his arm. (Tr. I-31) (Tr. II-65) R.S. then returned to his mathematics class.

Although R.S. was unsure who requested that he write a report of the incident (Tr. I-42), a report (P-3) was written by R.S. which states:

> "When Mr. Kizer threw me out [of the classroom] he kicked me and twisted my arm and pinched it."

The "kicking" allegedly committed by respondent was described by R.S. on cross-examination as being committed with respondent's knee up against R.S.'s backside. (Tr. I-39)

The Board presented several other pupil witnesses who testified they witnessed the incident between R.S. and respondent. Their versions, generally, were as testified by R.S. (Tr. I–120-127) (Tr. II–4-9; 20-26; 27-34; 35-43)

Respondent testified that this incident developed because R.S., when he appeared for class, was quarrelsome and made a mockery of saluting the flag. (Tr. III–21) Additionally, respondent testified that R.S. was running around the room, talking, and whistling to annoy him. After he cautioned R.S. several times about throwing paper airplanes, respondent testified, he then saw R.S. throw a yellow ruler at him. (Tr. III–21, 148, 153).

When the ruler was thrown, respondent testified, he immediately went to R.S. who was seated at his assigned desk and ordered him from the room because on several prior instances during the same class period he had requested R.S. to sit down, and R.S. had refused. (Tr. III–21-22) After R.S. refused to leave the room, respondent testified he went to "*** help him out of the room *** [by placing] *** my hands on his shoulders and he resisted me arguing and ***shoving against me *** I used just enough force to help him to the door *** I used the side of my knee to help him out the door. ***" (Tr. III–22) Furthermore, respondent denied kicking R.S. three times as charged, but admitted the pushing was "*** maybe *** a long push***." (Tr. III–24)

During cross-examination, respondent explained that R.S. was generally assisted by another pupil in the class who had a better grasp of the subject matter being studied. This work would generally be carried out in the back of the room while respondent was working with the rest of the class. (Tr. III–145) However, when R.S. became bored in the back of the room, he began going around to the other pupils and disturbing them. On the day in question, R.S. annoyed other pupils three or four times prior to his removal from the classroom. (Tr. III–147) Respondent filed a written report of this incident with the Superintendent. (P-7) Two female pupils, C.K. and K.H., both of whom witnessed this incident, testified in corroboration of respondent's recitation of this occurrence. Their testimony substantially supported that of respondent. (Tr. II–96, 101, 121, 134)

The hearing examiner finds the evidence sufficient to support the essential charge that respondent did grab R.S. by both arms and forcefully eject him from

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the classroom by kicking him with his knee. However, as in Charge No. 1, *ante,* the determination of whether such conduct on the part of respondent, in view of the attendant circumstances as presented herein, is conduct unbecoming a teacher by the use of corporal punishment pursuant to *N.J.S.A.* 18A:6-1 is referred to the Commissioner.

CHARGE NO. 4

> "Contrary to the provisions of N.J.S.A. 18A:6-1, Walter Kiser, a tenure teacher in the Marjorie Stansfield School, did on April 16, 1973, grab *** [D.M.], a student in his classroom by the shoulders, kick him, and throw him with such force out of the classroom that he struck the wall on the opposite side of the hallway, which conduct is unbecoming a teacher and illegal, in spite of having been previously instructed and cautioned not to use corporal punishment or force by the Board of Education on October 23, 1968."

D.M., a thirteen-year-old pupil assigned to respondent's homeroom and science class, testified that the incident in which he was involved occurred about five minutes after R.S. was removed from the classroom. D.M. testified he was in his seat after the R.S. incident. He got up, walked around the room, and was asking questions in regard to mathematics. He was told to sit down by respondent which he did. (Tr. I-56) However, he further testified he got back up again and walked to another pupil's desk and respondent once again told him to sit down. (Tr. I-56) Again, D.M. sat down at his desk with the warning from respondent that if he got up again he would be sent to the office. Within five minutes, according to D.M.'s own testimony, he again stood up and respondent walked quickly to D.M.'s desk. (Tr. I-57) D.M. sat "real fast" and respondent picked him up by the shoulder and twisted his arm behind his back, kicked him and threw him out. (Tr. I-57)

On cross-examination D.M. testified that respondent did not kick him with his foot because on the way out of the classroom they were too close together for respondent to use his foot. (Tr. I-69) However, D.M. does recollect receiving a hard boost (Tr. I-72) which probably was from respondent's knee. (Tr. I-58) D.M. testified that he and respondent got along well with each other (Tr. I-68) and that during this incident he [D.M.] was not frightened. (Tr. I-70) D.M. did contend that, when respondent opened the classroom door to send him to the office, with the force of respondent's boost (Tr. I-61) and D.M.'s own desire to leave the classroom, he began to run. (Tr. I-71) In so doing, he ran across the corridor outside the classroom and put his hands up to block himself from hitting the wall. Another pupil, T.S., testified on behalf of the Board that "*** [D.M.] said something to Mr. Kizer and Mr. Kizer came over, took him by both arms, pushed him towards the door and threw him out.***" (Tr. II-44)

Respondent testified that D.M. was annoying other pupils in the room and was told to sit down, which he refused to do. (Tr. III-29) He then told D.M. to leave the room and D.M. refused. Accordingly, respondent testified, he went to D.M.'s desk to help him out of the room. (Tr. III-29) This "help" consisted

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of respondent placing his hands on D.M.'s arms and pushing him out of the room. (Tr. III-30) Respondent denied, however, kicking or using his knees against D.M. (Tr. III-30, 138), and he testified that he did not see D.M. come in contact with the wall. (Tr. III-139) Respondent was not requested to file a report regarding this incident. (Tr. III-31)

The hearing examiner finds that the weight of the credible evidence does not support the allegation that respondent kicked D.M., nor that D.M. hit the opposite wall of the corridor because of respondent's action. However, it is clear that respondent did grab D.M. by the shoulders and push him from the classroom. As found in Charge No. 1 and Charge No. 3, *ante*, the determination of whether such action on the part of respondent, in view of the attendant circumstances, is conduct unbecoming a teacher by the use of corporal punishment pursuant to *N.J.S.A.* 18A:6-1 is referred to the Commissioner.

CHARGE NO. 5

"Contrary to the provisions of N.J.S.A. 18A:6-1, Walter Kizer, a tenure teacher in the Marjorie Stansfield School, did on April 17, 1973, grab *** [D.C.], a student in his classroom, by his hair, turn him around and kick him, which conduct is unbecoming a teacher and illegal, in spite of having been previously instructed and cautioned not to use corporal punishment or force by the Board of Education on October 23, 1968."

D.C., a pupil assigned to respondent's class, testified that on April 17, 1973, as the class was being dismissed for lunch (Tr. I-99), he was *running* (Tr. I-101) for the door when he knocked a chair over. (Tr. I-99) When D.C. reached the classroom door, respondent allegedly grabbed him by the hair of his head, spun him around, kicked him with either his leg or knee, and told him to pick up the chair. (Tr. I–100 - 101) After completing that task, D.C. then left the classroom. (Tr. I-101)

W.B., a thirteen-year-old fellow pupil of D.C., testified on behalf of the Board that, although he saw respondent "*** yelling and ***holding*** [D.C.], pulling his hair and kicking him ***" (Tr. I–112-113), he didn't hear respondent tell D.C. to go pick up the chair because he, W.B., "*** wasn't paying too much attention to it [the entire incident].***" (Tr. I–114) Furthermore, according to W.B., the alleged "kick" was committed by respondent with his knee. (Tr. I–118)

Respondent testified that in the first instance D.C. knocked over a desk, not a chair. (Tr. III-32) Secondly, on direct examination, he testified that he did not pull D.C.'s hair as alleged, nor did he kick D.C. in any manner. (Tr. III–32) However, under cross-examination respondent testified that while he was standing at the door excusing pupils for lunch, D.C. was running toward the door and didn't stop when he reached respondent. Respondent asserted he stopped D.C. by putting his arms around him and then grabbing the back of D.C.'s collar. (Tr. III–125) Furthermore, because D.C. always had "quite a growth of hair," respondent admitted he possibly could have pulled his hair. (Tr. III–127) This event occurred quickly, respondent testified, and while he denied

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using his foot at all on the pupil, he did testify he grabbed his arm to turn him around to go pick up the desk. (Tr. III–128) In this manner, respondent admitted it was possible he could have twisted D.C.'s arm as he grabbed it to turn him around. (Tr. III–129) Respondent further testified, however, that in his judgment, it was necessary to grab D.C. by the back of the collar and put his arms around him in order to stop him because "*** he was really speeding ***." (Tr. III-130) Another pupil, C.K., testified essentially in support of respondent's version of this incident. (Tr. II-101-120)

The hearing examiner finds the weight of credible evidence supports the charge that respondent grabbed D.C. by his hair and turned him around. The hearing examiner finds no credible evidence to support the charge that respondent in any way kicked D.C. Whether the finding that respondent's action of grabbing D.C. by the hair and turning him around to go back and pick up the desk or chair which was knocked over, is conduct unbecoming a teacher by the use of corporal punishment pursuant to *N.J.S.A.* 18A:6-1 is a determination referred to the Commissioner.

CHARGE NO. 6

> Contrary to the provisions of N.J.S.A. 18A:6-1, Walter Kizer, a tenure teacher in the Marjorie Stansfield School, did on May 15, 1973, grab *** [M.C.], a student in his classroom, and did throw him from the classroom across the hallway into the opposite wall, causing the said *** [M.C.] to receive a bump on his head, necessitating him to be treated by the nurse, which conduct is unbecoming a teacher and illegal, in spite of having been previously instructed and cautioned not to use corporal punishment or force by the Board of Education on October 23, 1968."

M.C., a thirteen-year-old pupil assigned to respondent's science class, testified that the events alleged in Charge No. 6 occurred near the end of the school day. (Tr. I–95) M.C. testified as follows:

> "*** This girl, [J.W. – another pupil assigned to the same class] started kicking me, so I started to chase her and then when I went back to my desk she did it again and I stood up, that time near her and Mr. Kizer grabbed me, took me by the door and I was telling him that she kept on starting [it] and he said he told me to get out of here and he pushed me across the hall.***" (Tr. I–85)

M.C. further testified that when respondent pushed him on his shoulders out of the classroom he [M.C.] was facing respondent. As the result of the push, he backed out the door, went across the corridor, and the back of his head hit the wall. (Tr. I–85-86) After his head hit the wall, M.C. testified, he reported the incident to the Superintendent (Tr. I–87), as he was ordered to by respondent (Tr. I–93), and the Superintendent instructed him to report to the nurse. This he did, and the school nurse reported that he sustained a small hematoma on the back of his head (Tr. II–66) to which she applied an ice pack. (Tr. I–87)

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On cross-examination, M.C. testified that J.W. made him mad and angry and, while he was trying to control his anger, he was about ready to hit J.W. when respondent first told him to sit down. (Tr. I–89) The pupil explained:

> "*** I kept saying [to respondent] you didn't even say anything to [J.W. – the female pupil who in M.C.'s opinion started the whole incident] and I was talking to him and he just *** stared and grabbed me *** and threw me out of the class. ***" (Tr. I-90)

M.C. further testified that, prior to the incident described above, he left his seat twice to chase or get J.W. because she had been bothering him. M.C. believed that respondent first saw him the second time he left his seat to go after J.W. M.C. also believed that respondent did not see what J.W. was doing, which is why M.C. tried to explain to respondent what had happened. (Tr. I–94)

Respondent testified that he observed J.W. and another female pupil, S.F., kicking M.C. Then he observed M.C. chase J.W. towards the back of the room and he, respondent, broke this up because now they were both kicking each other, and he was afraid one or both of them would get hurt. (Tr. III–33) Subsequent to separating the two, respondent asserted he told M.C. "*** you've got to leave the room, and *** he says [to me] I didn't start it, I didn't start it, and he was fighting me to the door and I shoved him, put my hand on his arms and I shoved him to get him to the door; and just as we got to the door, I was shoving him, *** I got the door open, he started to run.***" (Tr. III–33-34) Respondent further contends that M.C. "*** ran across [the corridor] into the wall ***" (Tr. III–34), a distance of about ten feet.

In regard to this pupil, the Superintendent testified that respondent was aware that M.C. was subject to petite mal epileptic seizures (Tr. III–63-64) and, in fact, respondent admitted he was aware of M.C.'s physical condition. (Tr. III–112)

On cross-examination, respondent asserted in answer to the query why M.C. was removed from the classroom and not the girls who kicked him:

> "*** he [M.C.] chased [J.W.] in the back [of the room] and he started to really lay it on her with his feet, he was kicking her pretty hard, and so, I thought I'd better go and get him out of the room and for his welfare to keep him out of the room for awhile until he calms down because if he [M.C.] gets all excited he gets into one of those fits or seizures of his.***" (Tr. III–118)

The hearing examiner finds the weight of credible evidence substantially supports Charge No. 6. The determination of whether respondent's action herein is conduct unbecoming a teacher by the use of corporal punishment pursuant to *N.J.S.A.* 18A:6-1 is referred to the Commissioner.

In reviewing the four days of testimony heard in this matter, the hearing examiner finds several points, not earlier reported herein, should be brought to the Commissioner's attention:

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1. Respondent found it necessary on several prior occasions to remove each of the named pupils in each of the six charges, *sub judice,* from the classroom for various reasons. (Tr. III–103-107)

2. On several prior occasions, respondent was requested to forward written reports in regard to incidents which occurred in his classroom (Tr. III–71, 95) and, during the course of the hearing on the instant charges, he testified (in response to a request on cross-examination why P-5, 6, and 7, *ante,* were written in his wife's handwriting) he "*** was getting fed up with writing these things [other incidents] out.***"

(Tr. III–71) However, he explained that that response meant he had much other clerical work to do and writing out such reports simply added to that task. (Tr. III–95)

3. The Superintendent testified that respondent herein was required by the Board, during the 1971-72 school year, to submit a written report of any incident in his class regarding pupil behavior and/or any pupil who was sent from respondent's classroom to the office. The hearing examiner allowed the Superintendent to testify that reports on pupil incidents were received from respondent on twenty-five separate occasions during the 1971-72 school year.

4. The Board, on March 20, 1973, adopted a resolution by which it withheld respondent's salary increment for the 1973-74 school year. (R-1) The Superintendent testified that, while the Board took this action on his recommendation, none of the charges herein were part of that recommendation. (Tr. II–69, 78-81)

5. The hearing examiner ordered into evidence the following documents:

C-1 *Teachers' Handbook* (for the 1973-74 school year in the School District of Haledon)

C-2 *Teachers' Handbook* (for the 1972-73 school year at the School District of Haledon)

C-3 Board Policy Manual for the Haledon Board of Education

During oral summation, the Board argued that although each of the six charges, *sub judice,* differ in degree, all the charges were sustained by the evidence. That this is so is admitted even by respondent, the Board argued, by his submission of the reports (P-5, 6, and 7, *ante*) in which he admitted illegal contact between himself and the pupils mentioned therein. (Tr. IV–38) Obviously, the Board contended, these actions were intended to be punishment by respondent upon the pupils and, in fact, establish a pattern of corporal punishment being inflicted upon pupils by respondent. (Tr. IV-40) The Board asserted that Charge No. 3 and Charge No. 6, in which physical injury occurred to the boys involved were particularly serious. Finally, respondent's record of

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having to file reports on pupil incidents occurring in his classroom was pointed to as the manifestation of a deficiency on his part which must preclude his return to the classroom. (Tr. IV–44)

Respondent argues that while the altercations with the six individual pupils are not denied, in each instance there were strong mitigating circumstances for their occurrence. (Tr. IV–45) In each instance, respondent contends, he acted only after there occurred direct defiance of his authority as teacher. That being so, respondent suggests, no one of the acts complained of herein nor admitted, constitutes corporal punishment under the purview of *N.J.S.A.* 18A:6-1.

Respondent strongly argues a definite distinction between a "kick" and a "boot" or "boost." Denying that he ever "kicked" a pupil, respondent maintains he may have "booted" or "boosted" a pupil from the room which connotes, in respondent's view, "*** propelling the pupil out of the classroom by this rather odd procedure of using the side of his foot.***" (Tr. IV–49)

Finally, respondent cautions the weight given to testimony of young pupils, as herein presented, and, in summary, asserts that at no time did respondent ever intend to punish or hurt the pupils involved.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter, the interlocutory decision of December 27, 1973, the report of the hearing examiner, and the exceptions thereto as submitted by the Board and respondent pursuant to *N.J.A.C.* 6:24-1.16.

With regard to the August 6, 1973 Motion to Dismiss for the alleged failure on the part of the Board to make a determination within forty-five days after the alleged incident of March 15, 1973, the Commissioner finds that the Board first received written charges as required by *N.J.S.A.* 18A:6-13 on May 15, 1973, and acted expeditiously by certifying those charges on that very day. Concerning the Board's omission in the statement of charges of the date, time, and place at which the determination was made, the Commissioner finds that the Petition was rendered defective thereby. However, this defect was not fatal and was, during the litigation on August 29, 1973, remedied by the filing of an amended certification of charges. Accordingly, the Motion to Dismiss is denied.

It is noted that a determination of the admissibility of Charge No. 2 is left to the Commissioner. The complete absence of sworn testimony of the alleged aggrieved party is deemed fatal to an equitable determination of the charge. Therefore, Charge No. 2 is dismissed.

The Commissioner notes that Charges Nos. 1, 3, and 6 are found substantially true, with an affirmative finding that respondent did variously kick,

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boot, knee, grab, pinch, and forcibly propel pupils within and from his classroom.

With respect to Charge No. 4, the hearing examiner's affirmative finding was merely that respondent grabbed D.M. by the shoulders and pushed him from the classroom in accord with his previous directive that D.M. leave the room. Such action does not, in the Commissioner's judgment, constitute corporal punishment within the intendment of *N.J.S.A.* 18A:6-1. Charge No. 4 is dismissed.

Charge No. 5 was found true to the extent that in seeking to restrain D.C.'s headlong rush for the door, respondent grabbed him by the hair and turned him about, directing him to pick up the item of furniture which he had toppled. Although, of itself, such action of grabbing D.C.'s hair may have been inadvertent, the finding will be considered in conjunction with those findings regarding Charges Nos. 1, 3, and 6, *ante.*

It remains for the Commissioner to determine whether respondent inflicted corporal punishment upon pupils or was otherwise guilty of conduct unbecoming a teacher.

Corporal punishment has been prohibited in New Jersey public schools since 1867. *N.J.S.A.* 18A:6-1 provides that:

> "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***."

The Commissioner has consistently held, as was said *In the Matter of the Tenure Hearing of David Fulcomer,* 1961-62 *S.L.D.* 160; remanded State Board of Education 1963 *S.L.D.* 251; decision on remand 1964 *S.L.D.* 142; affirmed State Board of Education 1966 *S.L.D.* 225; remanded 93 *N.J. Super.* 404 (*App. Div.* 1967); decision on remand 1967 *S.L.D.* 215; affirmed Appellate Division, Superior Court, December 13, 1967 (unpublished) that:

> " '***an individual has a right to freedom from bodily harm or any impairment whatever of the physical integrity of his person by the infliction of physical pain by another. There is also a right to freedom from offensive bodily touching by another altho no actual physical harm be done.' (*Teacher Liability for Pupil Injuries,* National Education Association of the United States, p. 8***." (1961-62 *S.L.D.*, at p. 162)

Additionally, the Commissioner pointed out in *Fulcomer:*

> "***that such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail, there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find

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> any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions. Nor can the Commissioner find validity in any defense of the use of force or violence on the ground that 'it was one of those things that just happened***.'*** While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control***." (at p. 162)

As was said *In The Matter of The Tenure Hearing of Frederick L. Ostergren, School District of Franklin Township, Somerset County,* 1966 *S.L.D.* 185:

> "***The Commissioner cannot condone punching, pushing, slapping or buffeting of pupils by their teachers as a means of punishment. It is the Commissioner's judgment that parents have a right to be assured that their children will not suffer physical indignities at the hands of teachers, and teachers who resort to unnecessary and inappropriate physical contact with those in their charge must expect to face dismissal or other severe penalty.***" (at p. 187)

It was likewise said *In The Matter Of The Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, Camden County,* 1972 *S.L.D.* 302:

> "***teachers***are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.***Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.***" (at p. 321)

The Commissioner in *Fulcomer, supra,* determined that the single established incident of improper conduct was insufficient to warrant dismissal of the teacher from his position. In *Redcay v. State Board of Education,* 130 *N.J.L.* 369, 371 (*Sup. Ct.* 1943), affirmed 131 *N.J.L.* 326 (*E. & A.* 1944), it was held that:

> "***Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents.***"

In the instant case, it is the Commissioner's finding that in a series of incidents respondent used unnecessary and inappropriate physical force in seeking to control and direct individual pupils in his charge. Such action did not arise from a necessity for the teacher to defend himself. That corrective action was called for is undeniable. Yet respondent chose not to follow the approved policies of the school in dealing with pupil misbehavior. Rather, it is shown that he acted in contravention of the previous warning by the Board on October 23,

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1968, that he should refrain from using corporal punishment or force on pupils. There is herein no convincing testimony that it was necessary to resort to physical force. As was said by the Commissioner *In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland, Cumberland County,* 1969 *S.L.D.* 159; affirmed State Board of Education 1970 *S.L.D.* 449; affirmed No. A-539-70 (*N.J. Super.*, March 14, 1972):

> "*** While the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance.***"
>
> (at pp. 172-173)

Herein, the Commissioner finds respondent's repeated use of his feet and knee against thirteen-year-old pupils to be coarse and unprofessional. The use of the foot and knee upon another in addition to being dangerous, is demeaning and cannot be conducive to the development of a healthy self-image in adolescents. Such behavior by a teacher within the classroom constitutes the very antithesis of example that we wish to teach pupils in regard to respect for their fellow man. In this regard, the Commissioner has recently spoken *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County,* 1974 *S.L.D.* 97 that:

> "*** Teachers are public employees who hold positions demanding public trust and in such positions they teach, inform and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully violates the law, as in this matter, and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.***"
>
> (at pp. 98-99)

Having found that respondent disregarded prior warning by the Board and demonstrated conduct unbecoming a teacher on March 15 and 16, 1973, by inflicting corporal punishment on certain pupils, the Commissioner directs that respondent be dismissed from his employment by the Board of Education of the Borough of Haledon as of the date of this decision. (*N.J.S.A.* 18A:6-14, as amended *L.* 1971, *c.* 435)

COMMISSIONER OF EDUCATION

April 30, 1974

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**In the Matter of the Tenure Hearing of Patrick Hill,
School District of the Township of Pemberton, Burlington County.**

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board of Education, Sever and Hardt (Ernest N. Sever, Esq., of Counsel)

For the Respondent, Starkey, Turnbach and White (Edward J. Turnbach, Esq., of Counsel)

A single charge of contributing to the delinquency of a minor was filed with the Commissioner of Education on November 28, 1973 against Patrick Hill, a tenured teacher, pursuant to *N.J.S.A.* 18A:6-11. The charge would be sufficient, if true in fact, to warrant dismissal of respondent. The Board of Education of the Township of Pemberton, hereinafter "Board," suspended respondent without pay pending final adjudication of the matter by the Commissioner.

Respondent avers that the Board acted arbitrarily, capriciously, and unreasonably in suspending him and prays for reinstatement in his position and restoration of all lost pay and privileges.

A hearing was held in this matter in the Burlington County Extension Service Building, Mount Holly, on January 18, 1974 before a hearing examiner appointed by the Commissioner. Briefs were thereafter filed by counsel. The report of the hearing examiner follows:

The testimony offered by the Superintendent of Schools and respondent's building principal was that respondent is a good teacher, as evidenced by his past evaluations, and his record has been unblemished since his employment by the Board.

This matter has been brought to the attention of the Commissioner solely because of an incident which occurred on March 8, 1972, and that incident alone is the basis for the Board's action.

On the evening of March 8, 1972, respondent was returning to his home after working late at his school on some extracurricular project. The record shows that respondent was very active in the school community, and that he coached sports activities, served on the executive board of the local P.T.A., and served as President of the Pemberton Township Police Athletic League, in addition to his regular teaching duties.

Respondent testified that it was a rainy night. On his way home he picked up a hitchhiker who told him that he had a job in north Jersey and was on his way to visit his father in the Tuckerton area (approximately thirty miles away).

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Because of the late hour and the poor weather conditions, respondent offered the hitchhiker a place to spend the night in his home and told him he would drop him off at the intersection of Routes #9 and #37 the next morning on his way to school. The hitchhiker accepted the offer and spent the night in respondent's home. Respondent testified that he also offered the use of his telephone so the hitchhiker could call his father, but that he refused saying he was not expected anyway. He testified further that nothing untoward happened that night, and that he dropped the hitchhiker off at the named intersection the following morning on his way to school. Respondent did not know that the hitchhiker was a minor; neither his appearance, nor his conversation about holding a job in north Jersey, nor having a drink and avoiding the police, lead respondent to conclude that the hitchhiker was a minor. (Tr. 19-22)

None of this testimony is refuted by the Board, nor were any witnesses presented by the Board to give any other version about what allegedly occurred on the evening of March 8, 1972. The Board, however, grounds its action against respondent on his subsequent arrest by the police and his later indictment by the Grand Jury of Ocean County. A change of plea to that indictment reads in pertinent part as follows: (P-1)

> "The State moved under Rule 3:74 to amend the third count of the Indictment to read 'did contribute to the delinquency of a minor by permitting him to remain overnight without parental consent'. The Court so ordered. Patrick Hill sworn. As a result of plea bargaining, the Defendant retracted his former plea of Not Guilty and entered a plea of Guilty to the amended third (3rd) count of [the Indictment].***"

In the hearing examiner's judgment, it would be wrong to speculate why Patrick Hill made the plea (P-1) rather than pursue some other defense of the original charges made against him. He testified that he made the change of plea because he did allow the youth to stay in his home overnight. Suffice it to say that he was represented by counsel and that the record must now speak for itself.

Respondent entered a plea of guilty (P-1) which the Commissioner must consider in making his determination. *N.J.S.A.* 2A:96-4 reads as follows:

> "A parent, legal guardian or person having the custody or control of a child, who by any continued negligence or willful act, encourages, causes or contributes to the child's delinquency, or any other person who by any willful act encourages, causes or contributes to a child's delinquency, is guilty of a misdemeanor."

The hearing examiner finds that the unrefuted testimony of respondent, and the absence of any proof of conduct unbecoming a teacher by the Board, leads to the conclusion that the only fact before the Commissioner is that respondent unknowingly permitted a minor to remain in his home overnight without the consent of the minor's parents.

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The hearing examiner recommends, therefore, that the Commissioner determine that the charge and the evidence are sufficient to warrant a dismissal or reduction in salary.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter, the report of the hearing examiner, and the exceptions filed thereto pursuant to *N.J.A.C.* 6:24-1.16.

The Board argues in its exceptions that the hearing examiner's recommendation (that the Commissioner determine the evidence to be insufficient to warrant a dismissal or reduction in salary) is at variance with the decision *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County,* 1974 *S.L.D.* 97. The Board further argues that the hearing examiner's recommendation is not in accord with *N.J.S.A.* 2A:96-4. The Commissioner does not agree.

In *Tordo, supra,* the teacher was found guilty of accepting a bribe which, in the Commissioner's opinion, involved "moral turpitude" which is defined in *Black's Law Dictionary* as:

> "*** an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man."

and,

> "Everything done contrary to justice, honesty, modesty, or good morals."

Herein there is no such showing of an immoral, vile, or base act.

N.J.S.A. 2A:96-4 reads as follows:

> "A parent, legal guardian or person having the custody or control of a child, who by any *continued negligence* or *willful act,* encourages, causes or contributes to the child's delinquency, or any other person who by willful act encourages, causes or contributes to a child's delinquency, is guilty of a misdemeanor." (*Emphasis supplied.*)

The Commissioner finds that respondent was not guilty of continued negligence. Nor was his offer of one night's shelter a willful act intended in any way to contribute to the delinquency of a minor. Rather, the record shows that respondent had reason to believe that the hitchhiker was other than a minor. The hitchhiker represented himself as returning from work in north Jersey and as having been drinking. That respondent's intentions were blameless is further shown by his offer to allow the hitchhiker the use of the telephone to call his family.

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That respondent did through nescience contribute to the minor's spending the night at a place other than his parent's residence is openly and forthrightly admitted. However, the Commissioner finds therein no violation of moral law nor of the intendment of the statute.

Accordingly, the Commissioner accepts and holds for his own the findings and conclusions of the hearing examiner. It is therefore ordered that the Board of Education of the School District of Pemberton restore respondent to his position as a teacher forthwith. It is further ordered that the Board restore such salary and other benefits as may have been withheld from respondent less mitigation of any moneys earned by him in employment during the period of his suspension.

COMMISSIONER OF EDUCATION

May 6, 1974

In the Matter of the Tenure Hearing of Carmine T. Perrapato, School District of the City of Garfield, Bergen County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Michael J. Mella, Esq.

For the Respondent, Calissi, Klinger, Cuccio & Baldino (Frank J. Cuccio, Esq., of Counsel)

Respondent is the secretary-school business administrator for the Board of Education of the City of Garfield, hereinafter "Board." He was employed as secretary of the Board on or about July 1, 1961, and was subsequently appointed as school business administrator on September 24, 1963; therefore, he has acquired a tenure status. The complainant Board took formal action at its regular meeting held July 12, 1973, by an affirmative vote of four members and with three abstentions, to certify to the Commissioner of Education five charges of conduct unbecoming an administrator and insubordination. These five charges were proffered by four members of the Board. The majority determined that the charges would be sufficient, if true in fact, to warrant dismissal or reduction in salary and suspended respondent without pay pending a final determination on the merits of the charges by the Commissioner.

Respondent filed an Answer to the charges and a Motion to Dismiss the charges without formal hearing, denying the charges in all particulars. At a pre-hearing conference of counsel, the Board advised that it intended to file supplemental charges, and was instructed to make such determination no later than October 5, 1973. At a special meeting of the Board held October 5, 1973,

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the Board determined by majority vote of the full membership to certify to the Commissioner three additional charges against respondent. Respondent filed an Answer denying these supplemental charges and a Motion to Dismiss without formal hearing. Thereafter, at a special meeting held January 8, 1974, the Board adopted a resolution withdrawing the three supplemental charges against respondent.

Oral argument on respondent's Motion to Dismiss was heard on February 28, 1974, and numerous items of documentary evidence were stipulated in evidence by the parties. During the oral argument, the Board submitted a Motion for Summary Judgment based on the record before the Commissioner, and respondent requested time to consider possible consent to submission of the entire matter to the Commissioner for summary judgment. By letter under date of March 4, 1974, counsel for respondent agreed that this matter be submitted to the Commissioner for summary judgment based upon the pleadings, evidence and arguments of counsel.

There being no dispute regarding the relevant material facts, the Commissioner will consider this matter for summary judgment as requested by the parties.

Counsel for respondent advised the Board by letter dated November 13, 1973 (Exhibit P-27) that 120 calendar days following the certification of the original charges against respondent had expired as of November 11, 1973. In accordance with the provisions of *N.J.S.A.* 18A:6-14, respondent demanded that he be paid his regular salary until final determination of the charges by the Commissioner. The Board resumed payment of respondent's salary beginning November 12, 1973, and respondent returned to his duties as secretary-school business administrator, which he has performed to this date. Counsel for respondent explained during the oral argument that respondent was advised he did not have to return to his duties pending the final determination of the charges. Respondent chose to return, with the Board's consent, because of the amount of work falling in arrears in his office. This procedure was obviously mutually agreeable to respondent and the Board. As a result of these arrangements, respondent's salary was actually withheld by the Board for only 120 days, which period terminated November 11, 1973.

In previous decisions the Commissioner has discussed the suspension of a teaching staff member with a tenure status by a local board of education, when charges are certified in accordance with *N.J.S.A.* 18A:6-14. *In the Matter of the Tenure Hearing of Dale Miller, School District of the Borough of Manville, Somerset County,* 1973 *S.L.D.* 409; *In the Matter of the Tenure Hearing of James C. MacDonald, School District of Middle Township, Cape May County,* 1973 *S.L.D.* 287; *In the Matter of the Tenure Hearing of Robert Beam, School District of the Borough of Sayreville, Middlesex County,* 1973 *S.L.D.* 157

The statute, *N.J.S.A.* 18A:6-14, provides in pertinent part as follows:

"Upon certification of any charge to the commissioner, the board may

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suspend the person against whom such charge is made, with or without pay, *** until such [final] determination is made.***"

In *Beam, supra,* the Commissioner held that the Board could not modify the precise requirements of *N.J.S.A.* 18A:6-14, which provides authority to suspend "*** with or without pay***" pending final determination of the charges. Accordingly, the Commissioner set aside the Board's action suspending Respondent Beam for the limited period of sixty days at one-half pay.

In *MacDonald, supra,* the Commissioner determined that the Board's action suspending respondent for three days without pay upon certification of charges was outside the authority granted by *N.J.S.A.* 18A:6-14, which requires that a suspension extend until final determination has been made of the charges by the Commissioner.

In *Miller, supra,* the Commissioner reviewed in detail the amendment of *N.J.S.A.* 18A:6-14 by *L.* 1971, *c.* 435, § 2, which added a provision for payment of full salary after 120 calendar days following the certification of charges to the Commissioner and suspension without pay, providing the final determination has not been made after the passage of said 120 calendar days. The Commissioner's interpretation of *N.J.S.A.* 18A:6-14, as amended, is applicable to the instant matter and reads in pertinent part as follows:

"*** The person charged, under these circumstances, still does not receive the full salary for said 120 days, pending a final determination by the Commissioner in his favor, or pending a final appeal in his favor from an adverse determination. The statute also makes provision for the mitigation of any earnings '*** from any substituted employment assumed during such period of suspension. ***' In sum, the thrust of the statute, as amended, provides that any tenured employee against whom charges are certified may be deprived of only full salary for a total of 120 days, regardless of the length of time of his suspension, pending determination of the original hearing or an appeal therefrom. Therefore, the removal from and amendment to *N.J.S.A.* 18A:6-14 by *L.* 1971, *c.* 435, § 2 did not empower local boards to set the length of time of the period of suspension with or without pay, and the Commissioner so holds. The suspension without pay will in every instance run for at least 120 calendar days if the matter is not decided, or if the charges are not withdrawn during that time. On the 121st day, full salary will be resumed for the suspended employee. *N.J.S.A.* 18A:6-14 In the judgment of the Commissioner, this construction of the statute is reasonable and comports with the true intent of the law.***

"In the instant matter, the Board action reinstating respondent after fifty days was outside the authority granted it by *N.J.S.A.* 18A:6-14, and was therefore *ultra vires.* A suspension, with or without pay, which is imposed following the certification of charges to the Commissioner clearly must extend to the final determination of the charges by the Commissioner or to an adjudication of an appeal therefrom.

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> "Sound educational policy supports this construction of the law. Local boards of education are not to utilize the suspension provisions of *N.J.S.A.* 18A:6-14 as a means for imposing their own penalties. This clearly occurs when a local board, as in the instant matter, first suspends a teacher without pay, and, after the passage of a period of days, fifty in this case, decides to lift the suspension and reinstate the charged teaching staff member with pay. The Commissioner alone is empowered to assess a penalty, after a finding which warrants a penalty.***" (at p. 414)

In *Miller, supra,* the Commissioner cited the decision of the Appellate Division of the Superior Court in the case of *In the Matter of the Tenure Hearing of David Fulcomer, Holland Township, Hunterdon County,* 93 *N.J. Super.* 404 (*App. Div.* 1967) wherein the Court thoroughly reviewed and clarified the provisions of the Tenure Employees Hearing Act. The Court pointed out that, under the new law, the Commissioner conducts the initial hearing and makes the decision, and that local education boards only exercise jurisdiction over the "*** preliminary review of the charge and the required certification to the Commissioner.***" (93 *N.J. Super.* at 412) In *Miller, supra,* the Commissioner concluded as follows:

> "*** This sound policy thus totally bars a local board from involvement which would constitute, in effect, the setting of its own penalties by imposing varying lengths of suspensions without pay upon different employees.***" (at p. 415)

In the circumstances of the instant matter, both respondent and the Board became concerned about the amount of school business functions which were not being performed or completed as the result of the Board's suspension of respondent without pay. When this suspension had reached 120 days, both parties concluded that it would be in the best interest of the school district that respondent return to his duties. Respondent was aware that he was not required to resume the performance of these duties, having been so advised by counsel, but he chose to do so. Respondent's decision benefited the Board and the school district as a whole, but the Board erred in its reinstatement of respondent. *Beam, supra; MacDonald, supra; Miller, supra.* These circumstances emphasize the crucial nature of the decision which a local board of education faces when it must decide whether or not to suspend a tenure employee, with or without pay, pending the determination of charges certified to the Commissioner. Faced with such a decision, a local board must consider with great care the consequences of a suspension, and if it decides to suspend, it must plan ahead in order that vital services and duties may be performed without interruption.

The charges against respondent will be considered *seriatim.*

CHARGE NO. 1

> "During 1969, Mr. Perrapato purchased $900.00 worth of steel without obtaining a prior authorization from the Board of Education, in violation of New Jersey law and in violation of his authority as directed by the Board."

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Respondent asserts that prior to March 1969, the Board discussed the advisability and feasibility of opening an area underneath the high school building to provide additional office space. A rough floor plan was prepared by the superintendent of maintenance (Exhibit P-10) of the area under consideration, and the maintenance superintendent, in consultation with a structural engineer, determined what size and type of steel I - beam would be required to carry the load of the bearing wall through which the proposed opening would be made. According to respondent's affidavit, the objective at the time was to make an opening in the wall of the high school basement area, reinforce the opening, and remove earth fill from the basement area through the opening. Following this, respondent avers, the next step was to be the preparation of plans and specifications for consideration by the Board and other administrative agencies of the State.

On March 14, 1969, a purchase order was issued by the secretary-business administrator (Exhibit P-1) for certain pieces of steel, in the amount of $900. Following the delivery of the steel, a question was raised by a citizen as to whether or not the Board needed or had obtained approval from the State Board of Education for the opening of the wall area. According to respondent, the Board discussed the question in an executive session, and since it was not known whether the aforementioned approval was required, the Board decided not to proceed with the project.

The agenda for the meeting of the Board held July 22, 1969 (Exhibit P-11) discloses that the first item listed for consideration by the Board was the "area under high school," and the bill for the steel was included on the list which required approval by the Board. (Exhibit P-1) Respondent asserts in his verified Answer that this item was submitted for consideration by the Board to either return the steel or approve payment of the voucher. According to respondent, one Board member requested that the steel voucher be temporarily withdrawn from the list of vouchers to be approved for payment, and this was done. Another Board member suggested that the Board meet with the Mayor and Council for the purpose of inspecting the site and determining whether the governing body would support the project, presumably by means of a bond issue.

By letter dated August 6, 1969 to all Board members from the secretary-business administrator (Exhibit P-12), a report was made regarding the inspection of the high school area in question. The Mayor, members of the Council, three Board members, the assistant superintendent and secretary-business administrator had made the inspection on Saturday, August 2, 1969, at 9:00 a.m. After the inspection and discussion, the Mayor recommended that the Board proceed to make the opening, erect the steel and remove the earth fill, pending a future determination of the specific use to be made of the area. (Exhibit P-12)

The agenda for the Board's executive session held on August 25, 1969 (Exhibit P-13), lists the area under the high school as an item for consideration. According to respondent, this matter was discussed at that time by the Board.

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The minutes of the regular meeting of the Board held August 26, 1969 (Exhibit P-14), indicate that the voucher in the amount of $900 for the steel reinforcements was included on the list of bills and claims which were approved for payment by five affirmative votes of the six Board members present.

The proposed project was discussed by the Board and its administrators in a conference with the Bergen County Superintendent of Schools (Exhibit P-26) held during the first week of October 1970, more than one year after the Board had paid for the steel. By letter dated October 19, 1970 to the Director of Facility Planning Services of the State Department of Education and signed by respondent, the Board requested permission to remove the earth fill under the high school. (Exhibit P-15) The body of this letter reads as follows:

> "We are requesting permission if permission is necessary to take away the dirt in the unfinished portion of our high school building which is outlined in red on the attached plan.
>
> "We would like to remove approximately 22 to 24 inches of dirt which would bring the floor level 4 inches below the top of the footings. We would have to make an opening in one of the walls approximately 6 ft. by 7 ft. in order to get the dirt out. After the dirt is removed, the board would then like to survey the situation and make definite plans for future use of this area.
>
> "All we are asking at this time is for permission to level off the floor area by carting the dirt out through an opening in the wall. Before we do anything else, we will submit the necessary plans and request the necessary permission.
>
> "Your prompt reply will be greatly appreciated."

In reply to the Board's letter, a letter dated October 22, 1970, was sent to the Board by the architectural supervisor of the Facility Planning Services for the State Department of Education. (Exhibit P-16) This reply reads as follows:

> "This will acknowledge your inquiry of October 19, 1970 relative to excavation work at the above school. I see no conflict with existing regulations, therefore you may proceed to remove dirt from the outlined existing crawl space. However, the 6 x 7′ opening must be shored up to prevent any structural damage to the load bearing exterior wall. The services of a structural engineer should be obtained to advise you concerning the size and strength of any steel that may be required for this opening.
>
> "Extreme care must be exercised to make certain that dirt is not removed from beneath any footing and that nothing is done to disturb or weaken any of the several existing column footings located in the crawl space."

Respondent states that during 1972 the Mayor and Council approved a

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bonding ordinance appropriating the sum of $19,000 for the improvement of the area in question beneath the high school.

These factual contentions are not seriously contradicted by the Board. In the judgment of the Commissioner, the record fails to support the Board's contention as set forth in this charge, that respondent's actions were contrary to existing law in 1969, or that respondent acted in violation of existing Board policy. The record clearly discloses the Board's continued involvement in the project, and the Board's affirmative action, approving payment of the voucher for the steel, ratified respondent's actions. The Board could have ordered the steel returned and could also have abandoned the proposed project. Instead, the Board continued to pursue all necessary steps for completion of the project. There is no proof in the record that respondent acted improperly as charged.

For the reasons stated above, the Commissioner dismisses Charge No. 1.

CHARGE NO. 2

"During November, 1970, Mr. Perrapato purchased four pianos, the Board paying for two at a cost of $1,198.00, without first obtaining a proper authorization from the Board, in violation of the New Jersey law and in violation of his authority as directed by the Board."

Respondent asserts that at some point in time after June 1970, a member of the Board informed that body that a piano at one of the schools was in a deplorable condition. Respondent was requested to investigate this situation. Approximately one month later, respondent avers, the question of the condition of school pianos was again brought up by a Board member. Respondent had not made his inquiries at the time, but he informed the Board that he would do so in the near future. Respondent states that he consulted each of the elementary school principals to determine the needs of the schools in regard to pianos. As a result of the survey, it was determined that schools Three, Seven, Eight and Nine were in need of new pianos and that other pianos needed refurbishing. Respondent states that quotations were solicited for the purchase of four pianos. These quotations, dated September 29, 1970 (Exhibit P-19) and October 1, 1970 (Exhibit P-18) together with the Board's purchase order dated October 5, 1970, and bills of lading, were marked in evidence. (Exhibit P-2)

Respondent avers that, during the course of his investigation concerning the condition of school pianos, it was determined that certain individual schools had raised funds through various activities and were desirous of purchasing pianos by means of these funds. The total of such funds was sufficient to pay for two pianos. According to respondent, he ordered two pianos on behalf of the principals of two schools which had raised such funds, and those pianos were paid for directly by the two schools from their individual school accounts.

Two pianos were ordered by respondent for the schools, at an aggregate cost of $1,198, in accordance with the quotations previously received. Respondent asserts that one of the two pianos was for a kindergarten, and therefore the aggregate sum of $1,198 did not fall within the requirements of

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N.J.S.A. 18A:18-5, which permits authorization for the purchase of kindergarten supplies without prior advertisement. Respondent admits that prior to this purchase he had been advised that the school statutes concerning bidding, as construed by the courts, included furniture and equipment as supplies.

Respondent asserts that the list of bills and claims requiring approval for payment by the Board, including the bill for the two pianos, was discussed by the Board at its executive session held prior to the regular meeting of November 24, 1970. The minutes of that meeting disclose that the bill for the two pianos was included among those which the Board voted to approve for payment. (Exhibit P-17)

Respondent avers that, as the result of inquiries made concerning the purchase of the pianos, the question of that purchase was referred to the office of the Bergen County prosecutor in December 1970. Respondent asserts that he furnished data concerning the purchase to representatives of the prosecutor's office in accordance with their request, and he was subsequently informed that the prosecutor's office had determined there was no basis for any claim of impropriety.

The Board does not dispute respondent's version of the facts regarding this charge. The Board's position is that funds from individual school accounts should not have been used to purchase the pianos, and the purchase of the total number of four pianos should have been preceded by public bidding.

Respondent addressed a letter, dated December 23, 1969, to the State Department of Education regarding the proper accounting procedures for, and presumably the use of, funds in individual school accounts. A reply under date of January 15, 1970 (Exhibit P-28), was addressed to respondent by the chief auditor for the State Department of Education. This letter advised respondent that the Department had not formulated specific guidelines on intraschool fiscal activities, and suggested that respondent consult the chart of accounts, particularly for the #1700 and #1800 series of line items contained therein.

The Commissioner agrees with the Board's position that the best procedure for the purchase of the four pianos would have been to advertise for and receive bids. The facts in this particular instance do not, however, prove the charge that respondent violated the statutory requirements. Proposals were received and the pianos were purchased from the vendor offering the lowest quotation. Although respondent's procedure did provide competitive prices, the procedure of advertising for bids may have resulted in even greater competition and a resultant lower price, which is a major objective of the bidding procedure. It is uncontested that one of the two pianos purchased by respondent was for a kindergarten. Therefore, the aggregate sum expended did not exceed the limitations set forth in *N.J.S.A.* 18A:18-5.

The Commissioner is aware that many individual schools do maintain a fund which serves both as a clearing account for deposits which are subsequently paid out for specific expense purposes, and as a repository for moneys raised by means of various school enterprises. In many instances the individual school

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chooses to purchase a gift for use in the schoolhouse, as a memorial to a graduating class of pupils. Such practices can be salutary in developing a sense of pride and accomplishment for the pupils. This practice should never be permitted to deteriorate to the point where pupils are expected to raise moneys for the purchase of items which should properly be provided by the local board of education. To this end, school administrators must exercise careful control over the purchase of gifts for a school by pupils, as well as over the general management of the individual school fund. In the instant matter, no evidence was presented to indicate that the purchase of two pianos by means of moneys from the funds of two respective schools constituted an improper or abusive practice.

The Commissioner does not deem it necessary at this point to reach a determination whether or not the provisions of *R.S.* 40A:11-3, setting a limitation of $2,500 for purchases without public bidding, supersede the limitation of $1,000 set forth in *N.J.S.A.* 18A:18-5.

The Commissioner finds that the evidence does not support the allegation contained in Charge No. 2, and he therefore dismisses this charge.

CHARGE NO. 3

"During the year of 1972 (summer - fall) Mr. Perrapato purchased four air conditioners for $1,250.00, without first obtaining a proper authorization from the Board in violation of the New Jersey law and in violation of his authority as directed by the Board."

Respondent avers that during the fall of 1972, the Superintendent of Schools requested that he purchase four air-conditioning units for certain areas in the high school building. Respondent states that funds for this purpose were appropriated within a bonding ordinance enacted by the Mayor and Council of the municipality. Respondent therefore instructed the maintenance superintendent to determine the size and capacity of the air-conditioning units required for two administrative offices, the nurse's office and the faculty dining room. When respondent received this information, he instructed the maintenance supervisor to secure three price quotations for the two sizes of air-conditioning units required for the aforementioned locations. Three quotations were received from Two Guys from Harrison store, Goodman Appliances, and Mrs. G's store. (Exhibit P-3) Respondent states that the purchasing clerk was then instructed to issue a purchase order for the four air-conditioning units in the aggregate sum of $1,250, in accordance with the lowest proposal received of the three, which was from Mrs. G's store. The four units were delivered and held in a storeroom until maintenance employees could install them.

The bill for this purchase was included in the list of bills and claims presented for the Board's approval at the regular meeting held February 15, 1973. According to respondent, a member of the Board questioned this bill at the meeting, on the grounds that it may have constituted a violation of the bidding statute, since the total price was in excess of $1,000. Respondent asserts

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that the Board's attorney was present at the meeting held February 15, 1973, and was asked to render an opinion on the question. Respondent avers that the Board's attorney rendered an opinion to the entire Board to the effect that the school bidding statute (presumably *N.J.S.A.* 18A:18-5) had been amended by *L.* 1971, *c.* 198, which raised the dollar limit for purchases authorized without public bidding to $2,500. According to respondent, the Board member who had raised the question stated that he was satisfied and thereupon seconded the motion authorizing payment of the bills and claims, which was then carried by the unanimous vote of the Board. The minutes of the regular meeting held February 15, 1973 (Exhibit P-20), disclose that the list of bills and claims, including the bill from Mrs. G's in the amount of $1,250, was approved by a unanimous vote of the seven members of the Board.

The above-stated facts are not in dispute. The Board contends that, at the time of the purchase, the statute *N.J.S.A.* 18A:18-5 permitted purchases without competitive bids only to the amount of $1,000. Both counsel concede that the present existence of conflicting limitations on purchases without bidding, $1,000 in *N.J.S.A.* 18A:18-5 and $2,500 in *R.S.* 40A:11-3, has caused a situation wherein attorneys do disagree as to which limitation should be observed by local boards of education.

The Board points out that a Board policy regarding purchasing procedures was adopted January 26, 1971, (Exhibit P-8), which required that the statute, *N.J.S.A.* 18A:18-5 "*** shall be strictly adhered to ***" for any purchase exceeding $1,000. Respondent argues that there is no evidence that this policy was readopted by the succeeding Board either for 1972 or 1974. Respondent cites *Skladzien v. Board of Education of the City of Bayonne et al.,* 12 *N.J. Misc.* 602 (*Sup. Ct.* 1934), affirmed 115 *N.J.L.* 203 (*E. & A.* 1935) as authority for his argument that a local board must readopt its policies upon reorganization annually, and failure to do so vitiates those policies.

In *Skladzien, supra,* the Court held as follows:

> "*** a new board comes into being each year since, as here, the term of three members expires each year and, whether new persons are appointed to complete the board or the personnel remains the same, in fact and in law it is a new board of education. Such board is not therefore a continuous body for that reason. It has all of the indicia of non-continuous bodies. It organizes in February of each year, adopts rules for its own administration each year, is completed each year by the selection of three new members in the place and stead of those three whose terms have expired.***" (at p. 604)

In the judgment of the Commissioner, board policies must be readopted each year by each succeeding board of education. The instant matter provides an excellent example of a circumstance which may result if this practice is not followed. The purchase policy was based upon *N.J.S.A.* 18A:18-5. After the adoption of the policy on January 26, 1971, the provisions of *L.* 1971, *c.* 198, including the purchase limitation of $2,500 in *R.S.* 40A:11-3 thereof, became effective July 1, 1971. The Board's counsel rendered the opinion on February

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15, 1973, that the provisions of *R.S.* 40A:11-3 superseded those found in *N.J.S.A.* 18A:18-5, by raising the limitation from $1,000 to $2,500. Had the Board followed the necessary procedure of readopting its policies annually, it would surely have come to grips with this dichotomy at its 1972 reorganization meeting. In any event, the Commissioner holds that the policy (Exhibit P-8) ceased to exist following the annual reorganization meeting in 1972 because the new Board failed to readopt it.

It is clear that the Board accepted its counsel's interpretation that the provisions of *R.S.* 40A:11-3 superseded the limitation found in *N.J.S.A.* 18A:18-5. The Board unanimously approved the bills and claims, including the bill for the two pianos, at its meeting of February 15, 1973. Therefore, the Board cannot at this point in time charge respondent with wrongdoing. If the actions of respondent were wrong, then the entire Board at that time shared the wrong, since its actions clearly supported and ratified respondent's acts. *Sophie Barkus v. Emil J. Sadloch, Mayor of the City of Garfield et al.*, 20 *N.J.* 551, 556 (1956)

CHARGE NO. 4

"During the year 1970, Mr. Perrapato allegedly entered the Board's offices late in the evening with a woman for purposes other than Board business, such conduct constituting conduct unbecoming an administrator."

Respondent submitted affidavits of four persons who were members of the Board at the time of the alleged incident. The affidavits provide the facts that seven Board members and one Board member designate discussed this allegation with respondent at a conference held on or about February 22, 1970, and as a result of this conference all had agreed there was no basis for a complaint against respondent.

Counsel for the Board informed the Commissioner by letter dated January 11, 1974, that the Board did not intend to present any evidence in furtherance of this charge.

The charge is therefore dismissed.

CHARGE NO. 5

"In the prior two years Mr. Perrapato neglected to perform his duties of office by paying Miss Cecelia DeSalvo a full weekly pay, although he knew she was reporting to work at least 2 hours late each day. Mr. Perrapato was neglectful in his duties to the Board by allowing the DeSalvo condition to continue so long without the proper Board approval."

An extensive amount of documentary evidence was entered into the record regarding this charge. The facts are summarized from this evidence. Miss DeSalvo has been an employee of the Board for approximately twenty-six years. She serves as secretary to the present Superintendent of Schools and was the secretary for the preceding Superintendent. According to respondent, at some time during the latter part of 1971 this secretary had a family crisis which made

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it difficult for her to report for her duties at 8:30 a.m., the beginning of her regular office hours. The record is obscure regarding the specific date the problem originated. At that time the present Superintendent was the Assistant Superintendent of Schools. During June 1973, the Superintendent, respondent, the Superintendent's secretary, and the Board's counsel submitted reports to the Board regarding this problem. According to the Superintendent's report (Exhibit P-23), the secretary was reporting to work at approximately 11:00 a.m. each day. Both the Superintendent's report (Exhibit P-23) and respondent's report (Exhibit P-22) state that this problem was discussed at least once and possibly twice during informal conferences with the Board. The Superintendent states that he also discussed the problem with a new member of the Board on one occasion. Respondent and the Superintendent agree that the discussions produced the suggestion that the secretary's lost time be charged to sick leave, but this idea was abandoned because the illness was that of the secretary's parents and not her own. Respondent states that informal agreement was reached that the lost time was to be made up in any way possible. Both respondent and the Superintendent state that the secretary worked during her lunch hour and coffee breaks, thereby making up one and one-half hours each day, and also performed work at home and sacrificed personal leave days and vacation time in order to make up the remaining lost time.

The Superintendent states that a reduction in the secretary's pay was made for June 1973, equivalent to thirty-five minutes per day, at the insistence of several Board members. The payroll records for the 1972-73 school year (Exhibit P-5) disclose that the secretary received a pay deduction amounting to $51.03 for the month of June 1973.

Respondent points out in his statement (Exhibit P-22) that four Board employees including himself also perform extra duties outside of regular working hours for which they receive extra compensation. Both the Superintendent and respondent agree that the secretary is a diligent, efficient and dedicated employee. Respondent states that for many years this secretary devoted extra hours during early mornings and during evenings securing substitute teachers for the school system, without receiving extra compensation in the form of pay or time.

The secretary submitted a report to the Board dated June 21, 1973 (Exhibit P-24), to reconcile the amount of hours served in recompense for the time lost by her late arrivals. Her calculations indicate a daily loss of one hour for 430 working days during a two-year period. Against this loss of 430 working hours she balances time worked in lieu of personal leave days, vacation days, plus an average of three hours per week of overtime work at the office and during evenings at home. The sum of these calculations shows an approximate credit of fifty-four hours in favor of the secretary for the two-year period. (Exhibit P-24) (Also, see secretary's report dated June 5, 1973.) (Exhibit P-6)

At the regular meeting of the Board held July 12, 1973, the meeting at which these charges were certified to the Commissioner, the Board adopted the following resolution with respect to the employment schedule for the Superintendent's secretary:

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"WHEREAS, at this time, Miss Cecelia De Salvo has serious personal hardships which prevent her from arriving at work before 11:00 A.M. each day;

"THEREFORE, BE IT RESOLVED, that the Garfield Board of Education shall allow the following temporary employment schedule for Miss De Salvo:

"A. Her daily hours in attendance at the school building shall be from 11:00 A.M. until 4:00 P.M.;

"B. She shall be assigned daily work to be performed outside the school building by the Superintendent of Schools to sufficiently make up for the daily time lost;

"C. In order to insure that she is fulfilling her daily contractual obligations during this temporary period, she shall be required to log all extra time spent on Board of Education work, and said log shall be under the supervision of the Superintendent of Schools.

"This Resolution has been agreed to by the union shop-steward, Mr. Charles Rigolosi, prior to its adoption; and

"IT IS FURTHER RESOLVED, that this Resolution is not to be construed as an approval of any past practices regarding Miss De Salvo's scheduling; and

"BE IT FURTHER RESOLVED, that this Resolution shall be reviewed by the said Board within ninety (90) days."

The total record before the Commissioner fails to prove any neglectful or improper action by respondent in regard to this charge. The record supports the conclusion that the Board was apprised of the problem regarding the secretary's working hours, and the Board did not direct any change in the arrangement during the period beginning September 1, 1971 until June 1973, when it directed its attorney to investigate the problem. The report submitted to the Board by its attorney, dated June 18, 1973, does not contradict the facts stated by both the Superintendent and respondent, but does arrive at entirely different conclusions regarding the responsibilities of these two officials. (Exhibit P-21)

It was the judgment of both respondent and the Superintendent that the secretary was fulfilling her total responsibilities in terms of hours devoted to her duties, and her work was evidently satisfactory. Had the Board desired to alter the time schedule the secretary was following, it could have done so after having discussed the problem with the Superintendent and respondent. When the Board finally did act on July 12, 1973, the resolution it adopted did not substantially alter the work schedule which the secretary had been following for the previous two-year period. Given these total circumstances, the Commissioner cannot understand the Board's certification of this charge against respondent, or the

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Board's letter of reprimand to the Superintendent regarding the secretary's work schedule, as was stated in the course of the oral argument.

The Commissioner finds and determines that the evidence does not prove the allegations contained in Charge No. 5; therefore, the charge is dismissed.

In summary, the Commissioner finds, for the reasons hereinbefore stated, that the record does not support Charges Nos. 1, 2, 3 and 5. No evidence was presented in furtherance of Charge No. 4. The Commissioner therefore has dismissed all of the charges against respondent.

Accordingly, the Commissioner hereby orders the Board of Education of the City of Garfield to remunerate respondent in the total amount of salary withheld during the 120 days of his suspension without pay at the next regular payroll period. Respondent is to receive all other benefits withheld during his suspension, if any. The Commissioner affirms respondent's reinstatement to his position as secretary-school business administrator, as of November 12, 1973, the date he resumed those duties.

COMMISSIONER OF EDUCATION

May 10, 1974

Colonia Colony Associates, Inc.,

Petitioners,

v.

Board of Education of the Township of Woodbridge, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

This matter having been opened before the Commissioner of Education (Joseph F. Zach, Deputy Assistant Commissioner, Division of Controversies and Disputes) by Michael V. Camerino, Esq., attorney for petitioner, on a Notice of Motion for Interim Relief dated May 7, 1974, requesting temporary restraint against the Board of Education of the School District of the Township of Woodbridge to prevent said Board from proceeding with the acceptance of bids, the award and execution of contracts, and the construction of the athletic facilities which constitutes the project at the Colonia Senior High School, Stewart M. Hutt, Esq., counsel for the School District of the Township of Woodbridge; and,

The arguments of counsel having been heard regarding the allegation by petitioner that irreparable harm may result if Respondent Board is not restrained

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from proceeding with the aforementioned project pending the final determination by the Commissioner of the merits of the Petition of Appeal;

And the Commissioner having considered the criteria set forth by the courts for the exercise of discretion in the issuance of a *pendente lite* restraint (*United States v. Pavenick*, 197 *F. Supp.* 257, 259-60 (*D.N.J.* 1961) and *Communist Party of the United States of America v. McGrath*, 96 *F. Supp.* 47, 48 (*D.D.C.* 1951));

And the Commissioner having balanced the interests of the pupils and parents and the community at large against the interests of petitioners; the Commissioner having found that no permanent irreparable harm will result by permitting the Board to continue with the project which the Board has determined to be in the public interest and which action is entitled to a presumption of correctness (*Thomas v. Board of Education of Morris Township*, 89 *N.J. Super.* 327 (*App. Div.* 1965)); therefore,

It is ORDERED that petitioners' request for interim relief, *pendente lite*, is denied; and

It is ORDERED that this matter proceed to final determination as expeditiously as possible.

Entered this 14th day of May 1974.

COMMISSIONER OF EDUCATION

Motion for Leave to Appeal and for Stay denied by Superior Court of New Jersey, May 29, 1974

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Colonia Colony Associates, Inc.,

Petitioners-Appellants,

v.

Board of Education of the Township of Woodbridge, Middlesex County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Order of the Commissioner of Education, May 14, 1974

For the Petitioners-Appellants, Ozzard, Rizzolo, Klein, Mauro & Savo (Michael V. Camerino, Esq., of Counsel)

For the Respondent-Appellee, Hutt, Berkow & Hollander (Stewart M. Hutt, Esq., of Counsel)

The application for stay of the Decision of the Commissioner of Education is denied.

September 11, 1974

Case dismissed November 6, 1974

John Gilliam,

Petitioner,

v.

Board of Education of the Toms River Regional School District, Ocean County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Schneider, Solomon & Aronson (David Solomon, Esq., of Counsel)

For the Respondent, Hiering, Grasso, Gelzer & Kelaher (Milton H. Gelzer, Esq., of Counsel)

Petitioner, a school janitor employed by the Board of Education of the Toms River Regional School District, hereinafter "Board," alleges that he was

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dismissed without just cause and in violation of his contract with the Board. He prays that he be reinstated in his position and made whole for all benefits lost as a result of his discharge.

The Board asserts that petitioner was not a tenured janitor, and that he was dismissed for just cause pursuant to statute, case law, and the negotiated Agreement for 1971-1972 (P-1), between the Board and the Amalgamated Food and Allied Workers Union Local 56, hereinafter "Union," of which petitioner was a member.

Testimony and documentary evidence were adduced at a hearing held October 15, 1973 at the office of the Ocean County Superintendent of Schools, Toms River, by a hearing examiner appointed by the Commissioner of Education. Briefs were thereafter filed, and several additional exhibits were made part of the record. The report of the hearing examiner follows:

Petitioner argues that he was originally employed for three fixed terms but was later included in the negotiated Agreement (P-1) without a fixed term, and, therefore, enjoys a tenured status. The question of tenure is paramount in this matter. An examination of the documentary evidence reveals petitioner's employment record is as follows:

Petitioner was employed by Board resolution (P-3) from September 18, 1968 to June 30, 1969 at a salary rate of $4,500. He was thereafter so notified in writing by the Superintendent of Schools.

For the next two years, petitioner signed notices accepting employment offered by the Board. These notices read as follows:

(a) "Dear Mr. Bennett [Superintendent]:
"I wish to continue as a member of the staff at the Toms River Schools for the period beginning July 1, 1969 to June 30, 1970 at $5000.
"Date [*June 10, 1969*] Signed [*John M. Gilliam*]

(b) "Dear Mr. Bennett:
"I wish to continue as a member of the staff at the Toms River Schools for the period beginning July 1, 1970 to June 30, 1971 at $5,500.
"Date [*April 28, 1970*] Signed [*John M. Gilliam*]"
(Respondent's Brief, Schedule C)

These notices are forms prepared by the Board which require the employee's signature, date of signing, and the Board's salary offer for each year.

The minutes of the Board meeting held October 7, 1969, include the following motion regarding janitorial staff salaries for 1969-70:

"***A motion was made by Mr. Kennedy, seconded by Mr. Knoeringer and carried that the 1969-1970 Salary list as attached hereto be approved.

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"All Members present voting Aye. Mr. Gelburd was absent.***" (P-3)

The attached list contains columns for the name, years of experience, salary for 1968-69, and suggested salary for 1969-70. An additional column is provided for remarks.

An examination of the minutes of the Board meeting held July 21, 1970, discloses the following action taken in regard to the employment of janitorial employees for the 1970-71 school year:

> "***A motion was made by Mr. Gelburd, seconded by Mr. Hodges and carried that the Salary Book for 1970-71 showing the names of the employees with their salaries set beside their respective names be approved.
>
> "All Members present voting Aye. Mr. Tilton was absent.***" (P-3)

The attached list, labeled "SALARIES OF CUSTODIANS," contains the name of each employee, a cross mark following the name if the employee holds a black seal boiler license, a column listing of the 1969-70 salary, a column listing the 1970-71 salary, and three additional columns for date of employment, date left, and the last column marked "Other."

The minutes of the Board meeting held January 18, 1972, disclose the adoption of a similar resolution for 1971-72 as follows:

> "***A motion was made by Mr. Hodges, seconded by Mr. Stone and carried that the attached list of 1971-72 salaries be approved by the Board.
>
> "All Members present voting Aye. Mr. Essig was absent.*** (P-3)

The form of the attached 1971-72 list is similar to that described for 1970-71, *ante.*

The minutes of the Board meeting held August 1, 1972, record the following action for 1972-73:

> "***A motion was made by Mr. Hodges, seconded by Mr. Sierveld and carried that the attached list of 12 month salaries for the 1972-1973 School Year be approved.
>
> "All Members present voting Aye. Mr. Stone was absent.***" (P-3)

The attached 1972-73 list appears to be a computer print-out which lists the names of the employees and their respective annual salaries for the 1972-73 school year.

There is no additional evidence of any offer of employment by the Board or the acceptance of an offer by petitioner, *per se;* however, petitioner

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continued in his employment with the Board until his dismissal on December 4, 1973.

N.J.S.A. 18A:17-3, regarding tenure of janitorial employees, reads as follows:

> "Every public school janitor of a school district shall, *unless he is appointed for a fixed term,* hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title." (*Emphasis supplied.*)

The Agreement (P-1) signed by the Board and the Union was effective between the dates July 1, 1971, and June 30, 1973, a period of two years. The Board grounds petitioner's employment from July 1, 1971 to December 4, 1972 on the Agreement (P-1) and asserts that "***[s]alary lists were voted upon by the Board of Education in each of the consecutive years of Mr. Gilliam's employment.***" (Respondent's Letter Memorandum of Law, at p.2)

The Board avers, therefore, that the dated Agreement (P-1) and subsequent Board resolutions approving salaries for all janitors named thereon, constitute an offer of employment by the Board for a fixed term. More specifically, the Board avers that the annual approval of a list of names of all janitors at individually specified salaries is further proof of the fixed term of employment offered petitioner. The Board concludes, therefore, that petitioner was at all times employed for a fixed term and is not entitled to a tenure status.

The employment of janitors is authorized by *N.J.S.A.* 18A:16-1 which provides in part that:

> "Each board of education, *subject to the provisions of this title* *** shall employ *** janitors ***." (*Emphasis supplied.*)

Also, *N.J.S.A.* 18A:17-41 provides that:

> "The board of education of every district shall make such rules and regulations, not inconsistent with this title, as may be necessary for the employment, discharge, management and control of the public school janitor, janitor engineers, custodians or janitorial employees of the district."

The Board also has the authority to negotiate the terms and conditions of employment pursuant to *Chapter* 303, *Laws* of 1968. Therefore, the Agreement (P-1), after being signed by the Board, contains provisions which become the Board's adopted policy on matters that are not *ultra vires. Norman A. Ross v. Board of Education of the City of Rahway, Union County,* 1968 *S.L.D.*

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26; *Doris Van Etten and Elizabeth Struble v. Board of Education of the Township of Frankford, Sussex County*, 1971 *S.L.D.* 120; *Margaret White v. Board of Education of the Borough of Collingswood, Camden County,* 1973 *S.L.D.* 261

In the instant matter, the rules and regulations are found in Article XIV of the Agreement (P-1) and read in part as follows:

> "A. No custodian shall be discharged except for just cause. The following offenses may result in discharges without warning notices:
>
> > "1. Conviction of a felony, dishonesty, theft, insubordination, intoxication, drinking, or possession of intoxicating liquor, use of the (sic) possession of drugs or narcotics on school property, willful destruction of school property, removal from the premises of school property without permission, misrepresentation with intent to defraud the Board of Education of monies, falsification of application, sexual activity or the suggestion of sexual activity in the presence of or with children. The above shall be binding without any warning notice being given.
>
> "B. Any custodian employed after July 1, 1971 will serve a six (6) month probationary period. Any custodian may be dismissed during the probationary period without prior warning.
>
> "C. No custodian who has served his probationary period shall be dismissed without just cause***." (at pp. 15-16)

In the instant matter, the Board avers that petitioner was discharged for just cause and states that he willfully falsified his overtime worksheets "with intent to defraud the Board of Education of monies." (R-1)

The hearing examiner finds that the above rule A is not outside the parameters set by *N.J.S.A.* 18A:17-41, to the degree that rule A constitutes "just cause." Therefore, it must be given full consideration if petitioner does *not* have a tenured status.

As was previously stated, the Agreement between the Board and the Union (P-1) was adopted by the Board for the two-year period beginning July 1, 1971 through June 30, 1973. It is well established that a board of education is a non-continuous body whose authority is limited to its own official life and whose actions can bind its successors only in those ways and to the extent expressly provided by statute. *Cummings v. Board of Education of Pompton Lakes et al.*, 1966 *S.L.D.* 155; *Skladzien v. Bayonne Board of Education,* 12 *N.J. Misc.* 603 (*Sup. Ct.* 1934), affirmed 115 *N.J.L.* 203 (*E. & A.* 1935); *Evans v. Gloucester City Board of Education,* 13 *N.J. Misc.* 506 (*Sup. Ct.* 1935), affirmed 116 *N.J.L.* 448 (*E. & A.* 1936) *N.J.S.A.* 18A:29-4.1 provides boards with the authority to adopt a *salary* policy for two years for teaching staff members. *N.J.S.A.* 18A:17-15 provides boards with authority to appoint a superintendent

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of schools for a period of time not exceeding five years. No authority can be found, however, for a board of education to enter a two-year agreement with a unit of its employees which is not specifically authorized by statute. The hearing examiner concludes that the provision for a two-year life of the policy is improper and accordingly recommends that the Commissioner determine the application of the policy for the second or 1972-73 school year was *ultra vires. Luther McLean v. Board of Education of the Borough of Glen Ridge et al., Essex County,* 1973 *S.L.D.* 217 No individual written agreement existed between petitioner and the Board that set forth any termination clause or limited the period of time of his employment.

The matter of *Carmine Giannino v. Board of Education of the City of Paterson, Passaic County,* 1968 *S.L.D.* 160 is similar in some respects to the issue involving the tenure rights of petitioner in the matter, *sub judice.* Giannino was employed initially for a fixed term by the Board of Education of Paterson from May 1, 1962 to January 31, 1963. Thereafter, he continued to be employed after the original term until November 1967, although the Paterson Board took no action to reappoint him *either with or without term.* The Commissioner stated in *Giannino* as follows:

> "***The tenure rights of school employees in a janitorial or custodial position have been considered in numberous decisions of the Commissioner, the State Board of Education, and the courts. These decisions have given judicial meaning to what is sometimes called the Janitors' Tenure Law, originally enacted as *Chapter* 44, *Laws* of 1911, § 2. The invariable interpretation of this *Chapter* and its subsequent revisions and amendments (R. S. 18:5-67 as amended) [now *N.J.S.A.* 18A:17-3] has been that when a janitorial employee is appointed for a definite term, his employment rights do not extend beyond that term, but when the appointment is for an indefinite term, the protection afforded by the law continues indefinitely. *DeBolt v. Board of Education of Mt. Laurel Township,* 1932 *Supplement to School Law Decisions of* 1928, page 930, at 931 See also *Calverley v. Board of Education of Landis Township,* 1938 *S.L.D.* 706, affirmed State Board of Education 709; *Lynch v. Board of Education of Irvington,* 1938 *S.L.D.* 703, affirmed State Board of Education 705; *Ratajczak v. Board of Education of Perth Amboy,* 1938 *S.L.D.* 709, affirmed State Board of Education 711, affirmed 114 *N.J.L.* 577 (*Sup. Ct.* 1935), 116 *N.J.L.* 162 (*E. & A.* 1936); *Whitehead v. Board of Education of Morristown,* 1949-50 *S.L.D.* 65; *Mignone v. Board of Education of West Orange,* 1965 *S.L.D.* 104; *Olley v. Board of Education of Southern Regional High School* *** [1968 *S.L.D.* 20]; and see *N.J.S.* 18A:17-3.***" (at pp. 162-163)

The Commissioner concluded that Giannino was appointed for an indefinite term and, therefore, acquired a tenure status in the district. The hearing examiner finds the matter concerning petitioner's appointment very similar to *Giannino, supra.*

In the instant matter, the hearing examiner finds that petitioner was

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continued in employment by the Board from July 1, 1971 until his dismissal on December 4, 1972 without any *individual* janitor's contract defining the dates of his employment. The minutes of the Board, *ante,* disclose that he was employed without a fixed term. The Agreement which was allegedly applicable in all respects to all janitorial employees speaks only of salaries (P-1, Schedule A, at p.22) and "Dismissal and Disciplinary Action." (Article XIV, *ante*) The notices signed by petitioner each year which specify his annual salary for each school year, *ante,* do not constitute formal actions by the Board employing petitioner for a fixed term as required by the statute *N.J.S.A.* 18A:17-3. For these reasons, the hearing examiner recommends that the Commissioner find that John M. Gilliam acquired a tenure status as a janitor in the Toms River Regional School District.

Assuming now that petitioner is a tenured employee, he may only be dismissed by the Commissioner pursuant to the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 *et seq.* which requires, *inter alia,* that the Board certify charges for dismissal to the Commissioner. No such charges were filed because the Board believed that petitioner had not acquired a tenure status.

The hearing examiner recommends, however, that the Commissioner consider this matter on its merits even though it has been brought as a Petition of Appeal and not as a certification of tenure charges pursuant to the Tenure Employees Hearing Law. In the hearing examiner's judgment, the evidence and the argument of the parties concerning the "just cause" for dismissal would be precisely the same; therefore, a further filing of charges and a subsequent hearing would be inordinately time consuming, expensive, unnecessary, and would not affect in any way the evidence adduced on behalf of the opposing parties.

The Board avers that petitioner was discharged for just cause because he prepared a statement for four and one-half hours overtime pay for himself and two subordinate employees for which none of them actually worked. Petitioner does not deny that he prepared a statement for overtime pay for time he did not work, but he avers he worked three of the four and one-half hours claimed in the statement. In any event he avers that his dismissal is too harsh a penalty and prays for reinstatement in his position and restitution of all lost benefits during the period of his discharge.

The testimony and evidence reveal the following series of events:

"1. On the morning of December 2, 1972, at 12:20 A.M., Mr. Walter Kennedy and Mr. Edmund Altieri, custodial supervisors of the respondent school district, made a routine check at Toms River High School North. As they approached the high school building, they noticed that the petitioner, who was the 'lead' night custodian, and two other custodians were leaving the building.

"2. After entering the building it was noticed that a statement from the petitioner was left for the custodial supervisor, which indicated that the petitioner and the two subordinate employees were to receive 4-1/2 hours overtime for the work that they were to perform on that night.

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"3. The petitioner and the two subordinate employees were to perform duties of 4-1/2 hours overtime, bringing the end of their working time to 3:30 A.M..

"4. Mr. Kennedy, the Custodial Supervisor, and Mr. Altieri, remained in the building until 1:30 A.M., during which time the petitioner and the other custodians did not return to work, although it had been asserted that they were to be paid overtime for the period in which they were absent.***" (Board's Answer, at pp. 1-2)

Petitioner admits leaving the building with the two other custodians on December 2, 1972 at 12:20 A.M. as charged. He further admits preparing a note (P-5) and a voucher (P-2) four and one-half hours overtime pay as follows:

"Ed,

"The kids broke the lock on one of the front doors. We had to chain it.

"Jim, John, Bill 4 1/2 hours each for J.W. and Charlie." (P-5)

However, he avers that he worked for three hours of the four and one-half hours he claimed. He further avers that his action was an established practice and procedure which was used whenever janitors were required to work overtime because of the absence of one or more regularly employed janitors. Joseph Roberts, a janitor, corroborated this contention by testifying that it was established procedure to put in for four and one-half hours overtime pay when janitors had to do extra work because of another janitor's absence. (Tr. 100-104) He asserted that his regular shift required him to work from 3:00 p.m. to 11:00 p.m. and that he was entitled to lunch and coffee breaks which he did not take and that those breaks totaled one and one-half hours. Petitioner counts this time and the time from 11:00 p.m. to 12:20 a.m. as the three overtime hours he actually worked. The hearing examiner notes that these hours counted by petitioner actually add up to two hours and fifty minutes, leaving one hour and forty minutes of overtime which petitioner readily admits that he did not work.

His claim of working two hours and fifty minutes overtime as he described it, *ante,* was not denied or challenged by the Board either in the testimony of its witnesses or in its Brief filed subsequent to the hearing. Therefore, the hearing examiner accepts as fact that petitioner actually charged the Board for one hour and forty minutes of overtime pay for himself and two other janitors which time he admittedly did not work.

Petitioner states, also, that he did not attempt to defraud the Board because he followed an established procedure. (Tr. 74-77) He testified further that he once worked for more than four and one-half overtime hours but was paid only for four and one-half hours because of the established, but unwritten, policy. (Tr. 77)

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Some Board witnesses testified that there was no established procedure or policy allowing pay for time not actually worked. The Assistant Superintendent of Schools testified that there was no procedure approved by the Superintendent or the Board which permitted pay for time that was not actually served. However, one Board witness, Walter Kennedy, the Custodial Supervisor, testified that he knew of a procedure to allow four and one-half hours to do the job whenever another janitor was absent. (Tr. 24-25) He testified also that four and one-half hours pay for overtime work was the maximum allowed even if the janitor worked five hours. (Tr. 25) However, contradictory testimony was elicited from Edmund Altieri, the Head Custodian, who testified that there was no limit on the overtime hours worked and that janitors were paid for actual time spent on the job. (Tr. 42-47)

A Board member testified that petitioner had a hearing before the Board prior to his dismissal and made no representation at that hearing of any policy or understanding of pay for time not served. (Tr. 58) He testified that petitioner's dismissal was not too severe considering the circumstances, since petitioner was the "lead" (supervising) janitor of the night shift and, therefore, had a greater responsibility than the other two janitors who were temporarily suspended. (Tr. 59) The Board introduced a letter addressed to petitioner which reads as follows:

> "It is my understanding that you left the building on Monday evening, October 26th, during a period of time when you were supposedly working overtime. Your explanation that you left only for a short time 'to get a hamburger' does not condone your leaving.
>
> "When an employee is being paid to work overtime, that employee is expected to be ON THE JOB the entire overtime period. The Board of Education not only EXPECTS this but has the RIGHT to demand this." (P-4)

The Board member testified that all the foregoing events were considered by the Board. It nevertheless decided to dismiss Petitioner Gilliam.

In the hearing examiner's judgment, there was an "understanding" among the janitors, not necessarily known by the Board, that four and one-half hours was allowed for working overtime to do the work of absent janitors. However, the hearing examiner cannot conclude from the conflicting testimony, that this "understanding" permitted janitors to charge the Board for the overtime when the work was completed, irrespective of the length of time necessary for its completion.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter, the report of the hearing examiner, and the exceptions filed thereto by respondent pursuant to *N.J.A.C.* 6:24-1.16.

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The Commissioner finds that John Gilliam was employed by the Board from July 1, 1971 through December 4, 1972, as a janitor on conditions other than for a fixed term and was therefore on December 4, 1972, a tenured employee of the Board, pursuant to *N.J.S.A.* 18A:17-3. Therefore, absent the certification of charges by the Board, pursuant to *N.J.S.A.* 18A:6-10 *et seq.*, he was improperly discharged in violation of the provisions of the Tenure Employees Hearing Law.

However, for the reasons set forth in the report of the hearing examiner, the consideration of the merits of the Board's complaints against petitioner may properly be adjudicated as though charges had been certificated in the prescribed manner by the Board to the Commissioner. The Commissioner proceeds, on his own Motion, with such adjudication.

The Commissioner determines that the Board's action of entering into a two-year contract effective from July 1, 1971 through June 30, 1973 with its custodial employees was without statutory authorization. Therefore, those provisions of the agreement which applied to the period July 1, 1972 through June 30, 1973, were *ultra vires.* A board of education is a corporate body whose authority is limited to its own official life and may bind its successors only in ways expressly provided by statute. *McLean, supra*

The Commissioner finds in the record no evidence of ameliorating circumstances that would in any way justify the certification by petitioner, for himself or for his two subordinates, of overtime hours worked that were in fact not worked. Working provisions by the Board which provide for paid coffee breaks and lunch periods may not properly be substituted as work periods in lieu of working the hours of an overtime shift. To hold otherwise would allow for greater than double compensation for certain periods of time on petitioner's regular shift. Accordingly, it is viewed as unbecoming conduct, and the Commissioner so holds.

The violation must likewise be viewed within the context of his disregard for the prior warning wherein petitioner was admonished by letter of October 30, 1970, as follows:

> "***When an employee is being paid to work overtime, that employee is expected to be ON THE JOB the entire overtime period. The Board of Education not only EXPECTS this but has the RIGHT to demand this."

Petitioner's contention that it was customary when other custodial personnel were absent to put in for four-and-one-half hours, whether or not it was necessary to work the entire period, in no way justifies the falsification of the report of overtime hours worked. Such practices are to be condemned.

The Commissioner has weighed the offense as herein admitted, or otherwise found true in fact, against petitioner's past record of satisfactory work performance for the Board. He determines that dismissal would constitute too harsh a penalty. It is therefore ordered that John Gilliam be restored by the

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Board of Education of the Toms River Regional School District to his position of employment forthwith. It is further ordered that John Gilliam be deprived of the benefit of his salary from the date of his improper dismissal by the Board on December 4, 1972 through June 30, 1973. Additionally, it is ordered that the Board pay John Gilliam his salary less mitigation in the amount of his earnings, if any, for the period from July 1, 1973 until the date of his reinstatement.

COMMISSIONER OF EDUCATION

May 14, 1974

Pending before State Board of Education

Cecil E. Ortholf,

Petitioner,

v.

Board of Education of the Township of Hopewell, Cumberland County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Cecil E. Ortholf, *Pro Se*

For the Respondent, Kleiner, Moore & Fisher (Steven Z. Kleiner, Esq., of Counsel)

It appearing that petitioner appealed to the Commissioner of Education on May 22, 1973, that she was not given proper notice of her non-reemployment by the Board of Education of the Township of Hopewell, hereinafter "Board"; and it appearing that petitioner demands reinstatement in her position pursuant to *N.J.S.A.* 18A:27-10 (b); and it appearing that counsel formerly retained to represent petitioner died in late summer 1973; and it appearing that petitioner has not secured the services of another attorney; and it appearing that attempts to reach petitioner by telephone have been unsuccessful; and it appearing that four letters mailed to petitioner dated September 13, 1973, January 28, 1974, February 13, 1974, and April 2, 1974, have not been answered; and it appearing that petitioner was further notified by registered mail (No. 144,802) that this matter would be dismissed by the Commissioner for failure to prosecute; and it further appearing that petitioner has expressed no intention to continue this matter, nor has she given the Commissioner any notice whatever; now therefore

IT IS ORDERED on this 17th day of May 1974, that the Petition of Appeal in this matter is dismissed with prejudice.

COMMISSIONER OF EDUCATION

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Louis and Helene Chiriaco et al.,

Petitioners,

v.

Board of Education of the Borough of Hawthorne and John B. Ingemi, Superintendent of Schools, Passaic County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Beattie and Padovano (Ralph J. Padovano, Esq., of Counsel)

For the Respondents, Jeffer, Walter, Tierney, DeKorte, Hopkinson & Vogel (Reginald F. Hopkinson, Esq., of Counsel)

Petitioners, parents of pupils attending Jefferson Elementary School, allege that the policy of the Board of Education of the Borough of Hawthorne, hereinafter "Board," which denies certain pupils the use of the Jefferson Elementary School facility for lunchroom purposes, is an arbitrary and unreasonable policy.

Petitioners pray that the Board be directed to modify its policy so that all pupils attending Jefferson Elementary School be permitted to remain on the school premises during lunch period if they so desire.

The Board denies that its lunchroom policy is arbitrary or unreasonable and avers that it is uniformly applied to all five elementary schools in the district.

This matter is submitted on separate Stipulations of Facts, exhibits, and Briefs. Additionally, oral argument was held on February 1, 1974 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner follows:

The respective Stipulations of Facts are essentially the same, differing only on minor points that have no bearing on the major issue in the instant matter. At issue is whether the Board's established lunch policy requiring, with certain exceptions, all pupils in its five elementary schools who live closer than five-tenths of one mile to go home for lunch, is a proper and legal policy with respect to the rights of petitioners and others similarly situated. The facts in the instant matter are summarized as follows:

There are five schools located throughout the district which serve as neighborhood schools.

There are no cafeteria facilities in any of the schools. Pupils permitted to

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remain in school during the lunch period bring their own lunches and are accommodated in "all-purpose rooms."

Eligibility to remain for lunch is determined by the following policy:

> "***The elementary school lunch policy for the 1973-74 school year shall provide lunchroom facilities in the respective elementary schools for children in grades one through eight who are eligible to remain in school for lunch.
>
> "Basically, all children who reside 5/10 of a mile or beyond from the school which they attend, shall be eligible to remain at school during the lunch period.
>
> "Parental requests for permission to have children remain at school during the lunch period who live within 5/10 of a mile from school shall be submitted to the school principal in writing for consideration. The school principal, with the approval of the Superintendent of Schools, may grant other children special permission to eat lunch at school for a specified period of time due to extenuating circumstances which warrant that an exception be made.
>
> "This policy shall be in effect at all elementary schools in the district beginning September 1, 1973.***" (Exhibit A)

Prior to the 1973-74 school year the distance set for eligibility for lunchroom privilege was seven-tenths of a mile, for *four* of the elementary schools. The former policy did not apply to the Jefferson Elementary School.

This exception allowed all pupils in the Jefferson School to remain for lunch and was based on the fact that the school enrollment was comprised of pupils residing in a newly-developed district in which no sidewalks were provided on main thoroughfares.

During the 1972-73 school year, sidewalks were installed along all main thoroughfares in the Jefferson School area. There are no sidewalks on certain interior residential streets in all five elementary neighborhood school areas. Thus the five elementary school areas are now essentially the same.

The changes in the 1973-74 lunchroom policy, therefore, (a) diminished the eligibility requirement for lunchroom privilege from seven-tenths of a mile to five-tenths of a mile, and (b) are applied to all five elementary schools without exception.

Petitioners do not dispute the Board's statutory authority to establish a lunch policy; however, petitioners aver that the policy, *sub judice,* constitutes an abuse of discretion by the Board primarily because of the numbers of pupils involved. (Tr. 4, 25)

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Petitioners argue, *inter alia,* that the facilities at Jefferson School are more than adequate to accommodate all pupils who desire to stay on the school premises during the lunch period; the pupils who are required to go home for the lunch period are unnecessarily exposed to numerous travel hazards; parents of pupils who go home for lunch are unreasonably restricted because they must remain at home at noontime to receive their children; and it is unreasonable that the school principal is the final arbiter in determining whether a pupil may remain at the schoolhouse during the lunch period.

The following table indicates the numbers of pupils involved in this controverted matter:

School	Pupils residing within 5/10 of a mile from school	Pupils excused from compliance under exception provisions
Franklin	204	11
Jefferson	63	32
Lincoln	241	34
Roosevelt	287	13
Washington	214	9

The Board argues that its policy is applied uniformly to the pupils enrolled in all five elementary schools and that street crossings and intersections are controlled by school crossing guards.

The hearing examiner notes from the table, *ante,* that only thirty-two Jefferson School pupils must go home for lunch because of the Board's policy; therefore, petitioner's argument may be more succinctly stated as whether or not the Board is abusing its discretion by requiring these thirty-two pupils to walk home for lunch.

The statutory authority for a local board of education to establish rules such as the lunchroom rules, *ante,* is set forth in *N.J.S.A.* 18A:11-1(c) in pertinent part as follows:

> "Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district***."

The question of traffic hazards encountered by pupils walking to and from school has been addressed in prior decisions of the Commissioner. In *Concerned Parents of Howell Township School Children v. Board of Education of the Township of Howell,* 1972 *S.L.D.* 600, the Commissioner quoted from *Trossman v. Board of Education of the Borough of Highland Park,* 1969 *S.L.D.* 61 as follows:

> "***The words 'remote from the shoolhouse' should mean 2 1/2 miles or more for high school pupils and 2 miles or more for elementary pupils,

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> except for pupils suffering from physical or organic defects. State aid for shorter distances for the sole reasons of traffic hazards should not be given, inasmuch as traffic hazards are a local responsibility.'***" (*Emphasis supplied.*) (at p. 64)

This statement is applicable to the issue controverted herein.

In *Read et al. v. Board of Education of the Township of Roxbury,* 1927 *S.L.D.* 763, the Commissioner stated:

> "*** Boards of education are not authorized by law to provide for the safety of children in reaching school. While a board should be concerned as to the safety of children and should report to the State Police or local officers reckless use of highways, it is not directly responsible for the danger to pedestrians because of automobile traffic any more than it is responsible for sandy or muddy highways. Highways and street dangers demand parental concern and care of children to avoid accidents and also a civic enforcement of traffic laws rather than larger expenditures of public funds to provide transportation.***" (at p. 765)

Also, in *Trossman, supra,* the Commissioner said:

> "*** This position has been reaffirmed in numerous subsequent decisions. See, for example, *Iden v. Board of Education of West Orange,* 1959-60 *S.L.D.* 96; *Schrenk v. Board of Education of Ridgewood,* [1960-61 *S.L.D.* 185]; *Frank v. Board of Education of Englewood Cliffs,* 1963 *S.L.D.* 229; *Livingston v. Bernards Township Board of Education,* 1965 *S.L.D.* 29; *Peters v. Washington Township Board of Education,* 1968 *S.L.D.* 42; *Friedman v. Board of Education of South Orange and Maplewood,* 1968 *S.L.D.* 53, affirmed State Board of Education, February 5, 1969. ***" (at p. 65)

See also *Locker et al. v. Board of Education of the Township of Monroe,* 1969 *S.L.D.* 178; *Rosenman v. Board of Education of the Township of Howell,* 1969 *S.L.D.* 124; *Frieman et al. v. Board of Education of the Borough of Haworth,* 1970 *S.L.D.* 113; *Tolliver et al. v. Board of Education of the Borough of Metuchen,* 1970 *S.L.D.* 415; *Bocco v. Board of Education of the City of Camden,* 1971 *S.L.D.* 71; *Concerned Parents of Howell Township, supra.*

Although none of the aforementioned decisions deal with a lunchroom policy, the determinations in regard to safety and traffic hazards are applicable to the instant matter.

In *S.J. Marcewicz et al. v. Board of Education of the Pascack Valley Regional High School District,* 1972 *S.L.D.* 619, the Commissioner discussed the question of the equity of a school assignment plan as follows:

> "*** The charge of petitioners that the Board's redistricting plan is inequitable, lacking in rationale, and discriminatory is also without merit

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> in the Commissioner's judgment. While it is true that some inequity may exist at the present time, the question may also be posed – Is there ever an enrollment assignment plan that is perfectly balanced, a plan where no iota of inequity exists? While it is clear that the answer to such a question is a negative one, it is equally clear that every situation which involves the assignment of pupils to one school or another requires careful and constant scrutiny to avoid the possibility of an imbalance which is clearly detrimental to the interests of all.***" (at p. 626)

The hearing examiner finds that petitioners' allegations of safety hazards cannot be supported in light of prior decisions of the Commissioner, *ante,* nor are petitioners' allegations of improper political considerations supported by any facts.

The sole question to be determined by the Commissioner, therefore, is whether the Board's lunchroom policy as applied to the specific set of circumstances of the instant matter, is a proper exercise of its discretionary authority despite the small number of pupils affected in the Jefferson School. This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, the report of the hearing examiner, and the exceptions filed by counsel pursuant to *N.J.A.C.* 6:24-1.16.

The matter of the formulation of policy for its luncheon program is clearly a management prerogative of the Board. *N.J.S.A.* 18A:11-1 While the Commissioner is vested with quasi-judicial powers to hear and decide disputes and controversies that arise under the school laws (*N.J.S.A.* 18A:6-9), such powers are not without limits. As has been said before:

> "*** it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions.***" *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E. & A.* 1948)

The Commissioner finds no evidence of arbitrary or capricious action on the part of the Board in adopting or enforcing its luncheon policy for each of its five elementary schools, including the Jefferson School. The limitation of numbers of pupils in no way alters the reasonableness of the Board's policy.

For the reasons set forth in the report of the hearing examiner, the

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Commissioner once again reaffirms that municipal authorities rather than boards of education bear the responsibility for the safety and protection of pupils on their way to and from school. *Read, supra* There is no showing herein that the Board did not act over a period of time with due concern for the safety of its pupils. Rather, the converse appears to be true.

Absent a finding of abuse of discretionary authority and with no clear showing of statutory violation by the Board, the Commissioner finds no reason to restrain the Board from enforcing its luncheon policy. *Boult and Harris, supra*

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

May 20, 1974

Board of Education of the Town of Montclair,

Petitioner,

v.

Mayor Peter J. Bonastia and Richard I. Bonsal, Ralph F. D'Andrea, Theodore MacLachlan and William B. Grant, Individually and as Commissioners of the Town of Montclair, Essex County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, McCarter & English (Andrew T. Berry, Esq., of Counsel)

For the Respondents, Robert B. Shepard, Jr., Esq.

In the spring months of 1973 the Board of Education of the Town of Montclair, hereinafter "Board," appealed an action of the Mayor and Commissioners of the Town of Montclair, hereinafter "Town," which proposed to reduce the amount to be raised by local taxation for school purposes for the 1973-74 school year by $150,000. The Board's appeal with respect to the requested restoration of this sum was specifically set forth under the first and second causes of action therein contained, and the Commissioner of Education determined to go forward with an adjudication concerned with such restoration although he dismissed, without prejudice, the third, fourth, and fifth causes of action which completed the appeal. (see *Board of Education of the Town of Montclair v. Mayor and Commissioners of the Town of Montclair, Essex County,* 1974 *S.L.D.* (decided November 9, 1973.) These latter three causes of action, specifically pertinent to the Board's plan to racially integrate the schools

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of its district, are now submitted a second time for consideration by the Commissioner. The Board has presented a Notice of Motion for Summary Judgment on the pleadings and on a Stipulation of Facts. The Town has filed a separate Motion to Dismiss the Petition of Appeal. Briefs in support of, and opposed to, each of the Motions have been filed by respective counsel and an oral argument in the matter was conducted by a hearing examiner appointed by the Commissioner on February 15, 1974 at the State Department of Education, Trenton. The transcript of the oral argument, the Stipulation of Facts, and Briefs of Counsel are presented directly to the Commissioner for his determination at this juncture.

The Stipulation of Facts is recited in its entirety as follows:

"The parties hereto, through their counsel, stipulate as true, for the purposes of this action, the following facts:

"1. In September, 1961, Glenfield Junior High School was picketed by black parents.

"2. Since September, 1961, there have been many proposals for reorganization of the Montclair schools.

"3. The first of these proposals, which provided for sending all Glenfield Junion High pupils to the other three then-junior high schools, was sustained in *Morean v. Board of Education of Montclair*, 42 N.J. 237 (1964).

"4. Since September, 1961, three bond issues to finance capital improvements in the Montclair schools have been proposed by the Board of Education and put to referendum, namely $3.4 million in 1963, $4.3 million in 1966, and $9.9 million in 1970. All three bond issues were defeated in referendums.

"5. Since September, 1961, Petitioner has been consistently involved in legal proceedings pertaining in one way or another to its pupil assignment policies.

"6. Montclair High School was closed because of racial problems at least once in each of three successive school years during the period 1968-1971.

"7. The allegations of Paragraphs 12 through 19 of the Petition are true, but the full decision in the Rice case [Rice v. Montclair Board, 1967 *S.L.D.* 312] speaks for itself.

[Paragraphs 12-19 of the Petition of Appeal are recited in their entirety as follows:

"12. On November 8, 1967, the Commissioner of Education issued his decision in *Rice v. Board of Education of the Town of Montclair*, 1967 SLD 312 (hereinafter referred to as '*Rice*'). in which decision much of the foregoing history is set forth.

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"13. As the Respondent in *Rice*, Petitioner proposed a 5-3-4 plan, which called for the assignment of pupils in grades K-5 to nearby neighborhood schools.

"14. The Commissioner found that Respondent's plan, if fully effectuated, 'would eliminate racial segregation in grades 6 to 12 but would not affect the racial balances in grades K-5.'

"15. In *Rice*, the Commissioner also found that:

'The Board admits that this latest plan will not eliminate racial imbalance in the lower elementary grades and that there will continue to be a particular concentration of Negro pupils in grades K-5 at the Nishuane and Glenfield Schools.***

'Any consideration of the issues herein must begin with the admitted fact that certain schools under respondent's jurisdiction are attended by a preponderance of Black pupils. It is well established that such conditions incontrovertibly constitute a deprivation of equal educational opportunity for children of the minority race, that persistence of such circumstances is unlawful, and that the respondent has an affirmative duty to eliminate or alleviate such conditions to the extent that it is reasonable, practicable and educationally sound to do so.***

'The present plan satisfactorily achieves acceptable racial balances in all grades above the fifth but fails to remedy the preponderance of Black pupils in two of the schools.***

'Yet, despite the exceptional efforts made by respondent, the fact remains that it has not produced a plan which fulfills its obligation to provide equal educational opportunity to all the children of the district. Its present proposal ameliorates the undesirable conditions to a large degree but still permits racial imbalances in the lower grades, notably in the Glenfield and Nishuane Schools. Until that condition is corrected, it cannot be said that the school district of Montclair is meeting its legal duty to all of its children. Therefore, to the extent that respondent's plan falls short of discharging its legal responsibility to all of the pupils of the school district, it cannot be endorsed or approved.***

'For the reasons stated, the Commissioner finds and determines that the 5-3-4 plan proposed by respondent is insufficient and therefore unacceptable.'

"16. Having so found, the Commissioner of Education, in *Rice*, then issued the following order: *'the Commissioner directs the Montclair Board of Education to formulate a plan which will effectively achieve the goal of racial dispersal enunciated by the Court as the law of New Jersey.'* (Emphasis added.)

"17. In April 1968, Respondent submitted to the Commissioner,

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pursuant to his order in *Rice*, two plans referred to as the 'Preferred Plan' and the 'Alternate Plan.'

"18. On August 19, 1968, the Commissioner approved these proposals and authorized their implementation.

"19. On February 6, 1969, the State Board of Education affirmed the Commissioner's approval of the Preferred and Alternate Plans and directed the Commissioner to retain jurisdiction."]

[The Stipulation of Facts continues:]

"8. A construction program to enlarge and renovate two middle schools, Mt. Hebron and Hillside, at a cost of $9.9 million was rejected on November 3, 1970, by the Montclair voters at a referendum.

"9. On January 11, 1971, both the Alternate Plan and the Preferred Plan were set aside by Petitioner in favor of a plan referred to as the 'Interim Plan,' the purpose and effect of which was to desegregate grades 5 and 6, beginning in September 1971 and to be effective for one year.

"10. The allegations of Paragraphs 23 through 28 of the Petition are true, but the full decision of the Commissioner and the decision in the Rice case speak for themselves.

[Paragraphs 23-28 of the Petition of Appeal are recited in their entirety as follows:

"23. Implementation of the Interim Plan was challenged before the Commissioner by certain Montclair citizens in proceedings known as *Capen v. Board of Education of the Town of Montclair*.

"24. On July 1, 1971, the Commissioner denied the request of said citizens to restrain implementation of the Interim Plan.

"25. On July 16, 1971, the New Jersey Superior Court likewise denied the application of said citizens to restrain implementation of the Interim Plan.

"26. Said citizens thereafter again applied to the Commissioner to reconsider his decision of July 1, 1971. On September 8, 1971, the Commissioner reaffirmed his earlier decision and again refused to restrain implementation of the Interim Plan. In doing so, the Commissioner said:

> 'The Plan has the virtue of totally integrating the 5th and 6th grades, thereby achieving complete integration of the Montclair School System from the 5th through the 12th grades. A step toward integration of the entire system is better than no step at this point, and, under the circumstances, the extra time provided for community participation in the working out of the important and delicate details of arriving at an

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acceptable plan to integrate grades K-4 is warranted and can be put to good use.'

"27. In such decision, the Commissioner also stated that it was implicit in his earlier decision in *Rice* 'that there was a continuing obligation on the part of the Board to take further steps toward the alleviation of racial imbalance in the Montclair School System . . . '

"28. On April 12, 1972, the State Board of Education affirmed the Commissioner's approval of the Interim Plan."]

[The Stipulation of Facts continues:]

"11. Throughout 1971, a citizens' committee studied the problem of racial desegregation in the Montclair schools, as well as the steps necessary to improve the quality of education in the schools generally. This committee was referred to as the Citizens Committee for Educational Planning (C.C.E.P.).

"12. The C.C.E.P. issued its final report on November 30, 1971, putting forth two alternative plans for reorganization of the school district, neither of which was adopted.

"13. The allegations of Paragraph 31 of the Petition are true.

[Paragraph 31 of the Petition of Appeal reads in its entirety as follows:

"31. On January 2, 1972, Dr. James A. Adams became Superintendent of Schools of Montclair."]

[The Stipulation of Facts continues:]

"14. Dr. Adams published to the community a proposal for the reorganization of the Montclair schools.

"15. On February 28 and 29, 1972, Petitioner held two evenings of public hearings with respect to the proposal. At such hearings, approximately 70 citizens expressed their views with respect to the proposal, every citizen who wished to address the Board being given full opportunity to do so.

"16. The allegations of Paragraphs 37 through 40 of the Petition are true.

[Paragraphs 37 through 40 of the Petition of Appeal are recited in their entirety as follows:

"37. On March 6, 1972, Petitioner approved the proposal, but directed Dr. Adams to re-study four particulars thereof.

"38. On March 16, 1972, Dr. Adams, at a public meeting, reported his recommendations with respect to these four items, and Petitioner followed Dr.

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Adams' recommendations in approving certain minor modifications in the proposal.

"39. The proposal as so revised is herein referred to as the 'Plan of Action.'

"40. The Plan of Action was duly submitted to the Commissioner of Education and was approved by him on April 24, 1972 for implementation in September, 1972."]

[The Stipulation of Facts continues:]

"17. The allegations of Paragraph 43 of the Petition are true.

[Paragraph 43 of the Petition of Appeal is recited in its entirety as follows:

"43. The Plan of Action was implemented in September, 1972."]

[The Stipulation of Facts continues:]

"18. On May 9, 1972, two months after adoption of the Plan of Action by Petitioner, Respondents were elected Town Commissioners following a municipal campaign in which the five Commissioners, then candidates, took a hard stand in favor of neighborhood schools and against the busing required by the Plan of Action.

"19. The allegations of Paragraphs 47 through 58 of the Petition are true.

[Paragraphs 47 through 58 of the Petition of Appeal are recited in their entirety as follows:

"47. On or about May 16, 1972, Peter J. Bonastia, who was chosen Mayor of the newly-inducted Board of Commissioners, publicly called upon Petitioner to change the Plan of Action 'so that busing any elementary grade pupils will be eliminated, and the quality of education in all schools will be such that no one would need to leave his neighborhood.'

"48. On or about June 5, 1972, referring to the Plan of Action, Commissioner William Grant publicly stated, 'we have to get rid of this plan.'

"49. On or about June 2, 1972, at a public meeting of the Town Commissioners, Mayor Bonastia publicly stated:

> 'The Commission is determined to carry out the mandate it received on May 9 to see to it that the busing of little children is eliminated*** We will use all means at our disposal to compel the board of education to discontinue its questionable plan. It is our responsibility as Commissioners to leave no stone unturned in preventing possible harm to Montclair through the board's policies.***

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'There is no question about this Commission having received a clear mandate from the community to do its utmost to eliminate the busing of little children.

'The Newark Evening News flatly stated on May 10, 'In the first municipal election in the State clearly based on the issue of busing, Montclair voters said no.'

'All five of us who had expressed strong opposition to the board's new plan won election easily.***

'The Town of Montclair is now overwhelmingly on record as being opposed to the busing of little children. We five Commissioners, who were swept into office on pledges to work to eliminate this busing, have deep convictions that busing is harmful and serves no useful purpose.*** We are resolved to correct this serious problem that has been so disruptive to our community.***

'We are convinced that it is only a question of time until the busing of little children in Montclair will be eliminated. As Mayor, I can appoint new Board members to fill any vacancies. The Commissioners can also increase the number of Board members from 5 to 7. Sooner or later the composition of the board will be changed to reflect the prevailing sentiment on the busing question.

'Why wait the year such changes will take? For the good of Montclair and all of its people, we ask that you change your plans now and refrain from implementing the new plan this September as it will cause great harm and is virtually certain to be rescinded at a future date.***

'An aroused public will not be denied in its determination to eliminate busing.'

"50. On or about June 28, 1972, Mayor Bonastia publicly announced that he planned to introduce an ordinance to increase the number of members of the Board of Education from 5 to 7.

"51. On or about July 6, 1972, Mayor Bonastia publicly stated:

'The residents of this town are opposed to busing and want to preserve neighborhood schools. The five people currently serving on the school board do not share the views of the majority of the people.***

'We want to appoint board members who will reflect the true feelings of the community on the issues.***

'We hope to be able to appoint the new board members by the end of August. We will have another appointment in January when one board member's term expires. By 1974, we hope to be in control of the board and get rid of the plan.'

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"52. On or about July 11, 1972, Mayor Bonastia introduced an ordinance to increase membership on the Board of Education from 5 to 7. In so doing, the Mayor publicly stated:

> 'The Commission is determined to carry out the mandate it received on May 9 to see to it that the busing of little children is eliminated and the quality of education in all schools is improved so that no one would need to leave his neighborhood.
>
> 'We will use all means at our disposal to compel the board of education to discontinue its questionable plan. It is our responsibility as Commissioners to leave no stone unturned in preventing possible harm to Montclair through the board's policies.'

"53. On or about July 11, 1972, at the same public meeting of the Commissioners, Commissioner Richard E. Bonsal publicly stated that the Mayor and other Commissioners would welcome suggestions of candidates for the two new Board of Education seats 'who are four-square for neighborhood schools.'

"54. On or about August 8, 1972, the Commissioners unanimously adopted an ordinance to increase the size of the Board of Education from 5 to 7 members.

"55. At the public meeting at which such ordinance was adopted, Mayor Bonastia public stated, 'The adoption of the ordinance to increase the board of education from five to seven members represents an important step toward the fulfillment of this commission's pledge to restore the neighborhood schools to Montclair. As mayor, I will add two new members to the board of education. I will be most pleased to have anyone submit to me the names of qualified candidates for the board who are willing to serve and who are decisively opposed to the forced busing of little children.'

"56. At said public meeting held on or about August 8, 1972, Commissioner Bonsal publicly stated, 'People of that persuasion should be given a right to bus their children. It's the compulsory character of this busing plan which rubs me the wrong way.'

"57. On or about August 16, 1972, the Commissioners publicly stated:

> 'It is outrageous for the School Board and School Superintendent to persist in the implementation of an unacceptable busing plan that sooner or later will be rescinded by a reconstituted Board of Education. The Board of Education is both ill-advised and short-sighted to continue to flout the mandate of the Community which it is obligated to serve and which finances its operations.
>
> 'The Montclair Board of Commissioners again urges the Board of Education to abandon the reorganization plan before it is compelled to do so and develop a new plan that will eliminate the forced busing of little children.'

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"58. On or about August 23, 1972, the Commissioners publicly stated:

'In the Commission election of May 9, the Town of Montclair clearly decided in favor of equal education for everyone and against the forced busing of little children. The Board of Commissioners is totally committed to the implementation of that decision.***

'The Board of Commissioners wishes to resolve the lingering doubts that the school superintendent seems to have about the reason for increasing the Board of Education from 5 to 7 members. We wish to give assurance that every care will be taken so that the two new members and subsequent members, to make at least a majority, are deeply committed to the propositions that all children are entitled as a matter of right to equal educational opportunity in their own neighborhoods and that the busing of little children will be eliminated.' "]

[The Stipulation of Facts continues:]

"20. The allegations of Paragraphs 59 and 60 of the Petition are true.

[Paragraphs 59 and 60 of the Petition of Appeal are recited in their entirety as follows:

"59. Shortly thereafter, on September 7, 1972, the Plan of Action was implemented with the start of the 1972-73 school year.

"60. On or about September 28, 1972, Mayor Bonastia publicly announced appointment of two new members to the Board of Education to fill the seats created by expansion of the Board from 5 to 7 members."]

[The Stipulation of Facts continues:]

"21. The allegations of Paragraphs 62 through 67 of the Petition are true.

[Paragraphs 62 through 67 are recited in their entirety as follows:

"62. On or about October 25, 1972, the Town Commissioners publicly called for the immediate resignations of the five school Board members 'who support the school superintendent's Plan of Action. These five members of the Board of Education have heedlessly pursued a bankrupt policy of forced busing for racial balance at the expense of common sense and the common good.*** The greatest service the Board of Education President and the other four like-minded board members can now render to Montclair parents and taxpayers will be to resign immediately so they can be replaced by persons who will educate all children, stop forced busing and reestablish neighborhood schools for those who wish them.'

"63. On or about October 31, 1972, at a meeting of the Town Commissioners, Commissioner Bonsal stated:

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'Last May 9, the citizens of Montclair elected this Commission to see to it that forced busing was stopped and neighborhood schools were restored. The issue couldn't have been more clearly drawn. It is outrageous that these five Board of Education members have ignored the message of the election. Regrettably the powers of the Commission are limited in educational matters. However, we intend to use to the utmost the powers we do have to carry out our mandate. One of our important powers is the power of the purse. We intend to examine very thoroughly the school board's utilization of taxpayers' funds.***

'Compulsory racial balance isn't worth the heavy monetary cost. It also isn't worth the incalculable human cost. Busing is a prime candidate for elimination.'

"64. On January 8, 1973, Mayor Bonastia made his third appointment to the Board of Education. Such appointment took effect on March 1, 1973.

"65. On January 30, 1973, the Board of Education unanimously adopted a proposed budget for the school year beginning July 1, 1973 and ending June 30, 1974.

"66. Said Budget called for $10,072,111 to be raised by local tax levy for current expenses, exclusive of debt service, and nothing to be raised by local tax levy for capital outlay.

"67. In February and March 1973, Respondent Commissioners reduced Petitioner's budget, adopted as aforesaid, by $150,000 by levying a sum for school purposes, exclusive of debt service, of $9,922,111 in lieu of the $10,072,111 requested by Petitioner."]

[The Stipulation of Facts continues:]

"22. Respondents publicly suggested that their reduction of $150,000 should be applied as follows:

(a)	Administrative costs	$ 40,000
(b)	Evaluation Department	20,000
(c)	Public Relations Department	15,000
(d)	Reduction of two teachers	25,000
(e)	Busing	50,000
	Total Budget Cut	$150,000

"23. The allegations of Paragraphs 69 through 72 of the Petition are true.

[Paragraphs 69 through 72 of the Petition of Appeal are recited in their entirety as follows:

"69. With respect to the aforesaid cut of $50,000 for busing, Mayor Peter J. Bonastia publicly stated on or about February 14, 1973, 'We felt that we

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owed it to the people to eliminate money for forced busing in the first four grades.'

"70. At a public meeting of the Board of School Estimate on February 15, 1973, Mayor Bonastia further stated, 'The reduction of $50,000 for busing will leave an $18,000 budget which will permit parents of children attending the first four grades to request busing on a voluntary basis for these pupils.'

"71. Petitioner transports no typical students in grade 1.

"72. All typical students transported in grades 2 through 4 are transported pursuant to the Plan of Action.]"

This concludes a recital of the Stipulation of Facts. The Board and the Town ground their respective Motions for Summary Judgment and Dismissal in whole or in part of this Stipulation. A review of each of these Motions is now appropriate.

Motion for Summary Judgment

The Board avers that there are no material facts remaining in dispute herein and, therefore, it is entitled to the relief it seeks; namely, an order that any action by the Town "***designed to, or which would have the effect of, abandoning or reversing in whole or in part the racial desegregation that has been accomplished in the Montclair public schools to date would constitute *de jure* racial re-segregation***" contrary to the constitutional and statutory prescription in this regard. (Petition of Appeal, at p. 25) Further, the Board seeks "***other and further relief as may be appropriate in the circumstances.***" (Petition of Appeal, at p. 25) These two primary prayers for relief are the only ones contained in the Petition of Appeal. However, the Notice of Motion filed by the Board on or about February 3, 1974, also requests an order by the Commissioner to the effect that the Town's actions as recited in the Stipulation of Facts, *ante*, have constituted "interference" with the Board's desegregation plan and an order declaring that no change may be made in the Board's approved pupil assignment pattern without prior approval.

In support of such requests, the Board advances five principal points: (1) there is a controversy herein which arises under the school laws; (2) the Town's actions are designed to accomplish an illegal end; (3) a summary judgment is required in the circumstances herein; (4) an order is required which would declare the Town's actions both illegal and improper; and (5) the Commissioner should expedite an early decision in order that uncertainty and doubt may be removed. It is noted here that the focal point of the Board's argument is the "Plan of Action" which, as stated in the Stipulation of Facts, was implemented for the first time during the 1972-73 school year. In the Board's view this "Plan of Action" has represented, and still represents, a well-grounded and developed plan which emerged from a long period of litigation which began with *Rice, supra,* and was designed to comply with the obligations which the Commissioner imposed on the Board in that decision in

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A reversal of this "Plan of Action" and a return to segregated elementary schools, which the Board asserts is the Town's goal, would represent, in the Board's judgment, a violation of the prior Order of the Commissioner, requirements of the education laws (*N.J.S.A.* 18A), the New Jersey Constitution, and the Fourteenth Amendment to the Constitution of the United States. In support of this view, the Board cites *Jenkins v. Township of Morris,* 58 *N.J.* 483 (1971); *Booker v. Board of Education of Plainfield,* 45 *N.J.* 161 (1965); *Morean v. Board of Education of Montclair,* 42 *N.J.* 237 (1964); *Bradley v. Milliken,* 433 *F.* 2*d* 897, 902-904 (6th *Cir.* 1970); and *Oliver v. Kalamazoo Board of Education,* 346 *F. Supp.* 766, 780-82 (*W.D. Mich.* 1972), aff'd 488 *F.* 2*d* 635 (6th *Cir.* 1971). The Board further asserts that every relevant court decision "***has held illegal the goals which Respondents [the Town] seek by their actions.***" (Brief of Board, at p. 13)

Accordingly, the Board maintains, the Commissioner must exercise his authority to enter a summary declaratory judgment in favor of the Board herein since he is responsible "***for fulfillment of the educational and racial policies embodied in our State Constitution and in its implementing legislation***" (*Jenkins, supra,* at p. 501) and has "broad supervisory powers.***" (*Jenkins, supra,* at p. 505) The Board also maintains that a summary judgment is warranted where there are no outstanding issues with respect to material facts and that it is entitled to relief as a matter of law. In this regard it cites *Judson v. Peoples Bank & Trust Co., of Westfield,* 17 *N.J.* 67, 73-75 (1954); *Eisen v. Kostakos,* 116 *N.J. Super.* 358, 370-371 (*App. Div.* 1971); *Rego Industries v. American Modern Metals Corp.,* 91 *N.J. Super.* 447, 453 (*App. Div.* 1966); and *Trustees of Rutgers College v. Richman,* 41 *N.J. Super.* 259, 284 (*Chan. Div.* 1956).

Further, the Board argues that the Commissioner should expedite the matter herein promptly since it involves a matter of intense public interest and since, in the past, such interest has prompted the Commissioner to act quickly to settle such disputes in order that disruption might be averted. *James Moselle v. Newark Board of Education,* 1973 *S.L.D.* 197; *"S.T." v. Neptune Board of Education,* 1972 *S.L.D.* 555

The town argues that, although it has entered into an agreement to stipulate certain facts, there are many allegations of the Petition of Appeal which are directly at issue, as evidenced by its Answer to the Petition of Appeal and affidavits submitted by both the Board and the Town. Specifically, the Town cites six paragraphs of the Petition of Appeal which it regards as containing allegations of material fact which are directly at issue and denied by the Town. These paragraphs–60A, 20, 29, 36, 92 and 77A–recited in their entirety as follows:

> "60A. As indicated in public statements of Commissioner William Grant made on or about December 11, 1973, Respondents prior to the appointment of the new members to the Board of Education, attempted

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to extract a commitment from their proposed appointees with respect to pupil assignment patterns. [The Town disputes this assertion and avers it is denied in the affidavit of Mayor Bonastia.]

"20. Essential to the Preferred Plan was a construction program to enlarge and renovate two middle schools, Mt. Hebron and Hillside, at a cost of $9.9 million. [The Town asserts that this is a material issue but denies the allegation and offers two affidavits in support of its denial.]

"29. Throughout 1971 a citizens' committee drawn from all segments of the Montclair community studied the problem of social desegregation in the Montclair schools, as well as the steps necessary to improve the quality of education in the schools generally, This committee was referred to as the Citizens Committee for Educational Planning (C.C.E.P.). [The Town maintains this recital of Paragraph 29 is material but is at issue as shown by the affidavit of Mayor Bonastia.]

"36. During such hearings, [with respect to the adopted Plan of Action] the following community groups, in addition to many individual citizens, expressed support for the proposal:

"(a) Montclair Association of School Administrators

"(b) Montclair Board of Realtors

"(c) Montclair Chapter, National Association for the Advancement of Colored People

"(d) Montclair Clergy Club

"(e) Montclair Education Association

"(f) Montclair Ministerial Association

"(g) Montclair Urban Coalition

[The Town asserts this paragraph is material yet fails to list opposing groups as shown by its affidavits.]

"92. Based on exposure to large numbers of citizens, Petitioner and its administrative staff believe that citizens throughout the community, including many of those who originally opposed desegregation efforts, are now calling for continuation of the present structure in the hope that the schools can be taken out of politics and continue to improve. [The Town asserts that this paragraph is both material and at issue.]

"77A. In a public statement made on or about December 11, 1973, Commissioner Grant suggested that the entire matter of 'busing' and pupil assignment patterns could be resolved promptly through litigation. [The Town

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maintains that this paragraph must be regarded as material by the emphasis given it by the Board but that it is directly denied by Commissioner Grant.] "

Finally, the Town also asserts that certain statements of the Board with respect to the educational aspects of the Plan of Action are contested and, in fact, directly controverted by the Town.

Accordingly, in the Town's view, the Motion for Summary Judgment must be denied since genuine issues of material fact do exist and since, in such event a summary judgment may not properly be made. It cites *Judson, supra,* in support of its view. Further, the Town maintains that the Motion must be denied because the relief it requests is substantially different from that set forth in the Petition of Appeal and because, in any event, the relief requested is to vague that no meaningful order can be framed. The Town also avers that the Motion must be denied because the Commissioner of Education can employ no means nor enforce any rule to insure that the Town's Commissioners will refrain from talking about the Montclair school system, and thus an Order by the Commissioner would be futile.

Notice of Motion to Dismiss

For the purpose of this Motion, the Town concedes that the principal substance of the Petition of Appeal is true in fact while at the same time it reasserts its noted disagreements with certain of the Petition's allegations. However, the Town argues that the Commissioner has no jurisdiction in this matter since in the Town's view the instant controversy is not a controversy under the school law (Title 18A, Education) and since the Commissioner has no jurisdiction with respect to the actions of the named respondents, members of the governing body of the Town of Montclair. Further, the Town maintains that the Petition of Appeal is conjectural and vague and fails to state a cause of action on which relief may be granted.

The Board argues that the Commissioner does have jurisdiction herein since the Town has the authority and power to "*** achieve indirectly what they cannot achieve directly***" (Memorandum of the Board in Opposition to Respondent's Motion to Dismiss, at p. 3) and since the named respondents have publicly stated their goals, namely the abolition of the Board's plan of Action. In the Board's view the authority and power of reference are derived from the budgetary provisions of the statutes (*N.J.S.A.* 18A) and from the fact that Board members are appointed to office rather than elected. Further, the Board argues that where, as here, a constitutional mandate is the issue the Commissioner has jurisdiction even over the action of municipal government. In this regard the Board cites *Board of Education of the City of Elizabeth v. City Council of the City of Elizabeth,* 55 *N.J.* 501 (1970). The Board also asserts that a municipal action is improper where such action exceeds valid municipal powers and in support of this assertion it cites *In re Public Service Electric and Gas Co.,* 35 *N.J.* 358 (1961).

Finally, the Board argues that administrative declaratory relief is analogous to judicial declaratory relief and that such relief is appropriate and required in

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the matter, *sub judice,* in order to thwart the alleged unconstitutional ends of the Town, namely, a return to pupil assignment policies which constituted *de jure* segregation.

The Board cites a number of cases in support of this view: *Empire Trust Co. v. Board of Commerce,* 124 *N.J.L.* 406 (*Sup. Ct.* 1940); *Thrillo, Inc. v. Scott,* 15 *N.J. Super.* 124, 130 (*Law Div.* 1951); *Weissbard v. Potter Drug & Chemical Corp.,* 6 *N.J. Super.* 451, 455-456 (*Chan. Div.* 1949); *Township of Ewing v. Trenton,* 137 *N.J. Eq.* 109, 110, and asserts that relief must be granted herein before harm has been done.

The Commissioner has considered such arguments in the context of the stipulated facts, and it is noted that despite the lengthy and complicated recital, *ante,* the Petition of Appeal, *sub judice,* is, in its essential form, a simple one. It sets forth the efforts of the Board, over a long period of time, to achieve a racially integrated program of education and, in effect, requests the Commissioner to protect the program it established–to save it from harm–and to restrain the Town from meddling with that which the Board has created. However, in the judgment of the Commissioner, such requests are not occasioned by a pressing and immediate need to correct present harm but by fear; fear that the expressed views of officials of the Town will be implemented, that future appointees to the Board will be responsive to these views, and that such appointees will not act responsibly in conformity with law but irresponsibly with respect to interests other than those of the school pupils in the Town of Montclair. The Commissioner cannot share so cynical a view. Indeed, the very fact of what has occurred with respect to the attitudes of appointees to the Board would appear to negate the Board's reasoning in this regard, since the Board's membership has changed but its Plan of Action remains intact.

Accordingly, in the Commissioner's judgment, the instant Petition of Appeal is not correctly grounded in a factual situation which presents the possibility of relief which the Commissioner can or should afford and, thus, it is not properly before the Commissioner as a controversy under the school law. (*Title* 18A, Education) The Commissioner so holds.

A ruling to the contrary in this regard and a restraint by the Commissioner, against a conjectured action by some future Board in Montclair, would have in the Commissioner's opinion, a stultifying effect which is unwarranted and unnecessary. Boards of education are not continuous bodies; each board may exercise all the powers granted to it by the Legislature, and one board may not preclude its successor from the exercise of such powers. *Skladzien v. Bayonne,* 1938 *S.L.D.* 120, affirmed State Board of Education 1938 *S.L.D.* 123, affirmed 12 *N.J. Misc.* 602 (*Sup. Ct.* 1934), affirmed 115 *N.J.L.* 203 (*E. & A.* 1935) It is well established that the Commissioner will not substitute his judgment for that of a local board of education in matters that lie within its discretionary authority, or intervene in its affairs unless there is a clear showing that discretion has been abused.

"***When an administrative agency created and empowered by legislative

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> fiat acts within its authority, its decision is entitled to 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 Township Board of Education,* 89 *N.J. Super.* 327, 328 (*App. Div.* 1965)

Further, the Board's Plan of Action is not immune to change within the parameters of law.

This holding does not leave present members of the Board or any citizen of the Town of Montclair defenseless in the event that at some future date an action of the Montclair Board with respect to its pupil assignment policies is thought to be in violation of statutory or constitutional mandate. The contrary is true, for the State's firmly stated and long established policy is against segregation in the public schools of the State and the Commissioner's powers to act with respect to it has been affirmed on many occasions. Such policy has been clearly stated. In *Paulsboro Community Action Committee v. Board of Education of the Borough of Paulsboro, Gloucester County,* 1969 *S.L.D.* 51 a policy summary is set forth as follows:

> "***The law is well settled that racial segregation in public schools creates conditions of unequal educational opportunity and tends to affect adversely the learning of pupils so deprived. *Brown v. Topeka,* 374 *U.S.* 473 (1954); *Booker v. Plainfield Board of Education,* 45 *N.J.* 161 (1965) Similarly, the duty of a New Jersey school district board of education to take affirmative action to prevent, eliminate or at least mitigate such an undesirable and unlawful situation cannot be denied. *Fisher v. Orange Board of Education,* 1963 *S.L.D.* 123; *Morean v. Montclair Board of Education,* 42 *N.J.* 237 (1964) Nor can there be any question of the power of the Commissioner of Education to order the formulation and implementation of a plan to remedy the condition where a local district has neglected to take appropriate action. *Byers v. Bridgeton Board of Education,* 1966 *S.L.D.* 15, affirmed State Board of Education 1967 *S.L.D.* 341, affirmed Superior Court, Appellate Division, December 18, 1967, cert. denied 51 *N.J.* 179 (1968); *Elliott v. Neptune Township Board of Education,* 1966 *S.L.D.* 52, affirmed State Board of Education 54, affirmed 94 *N.J. Super.* 400 (*App. Div.* 1967); *Booker v. Plainfield, supra****" (at p. 53)

and in *Booker,* the Supreme Court of New Jersey said:

> "***Our own State's policy against racial discrimination and segregation in the public schools has been long standing and vigorous, and our Commissioner of Education has been vested with broad power to deal with the subject; indeed, his power in this regard may fairly be viewed as no less comprehensive in nature than that possessed by New York's Commissioner and exercised by him in *Vetere. Cf. Blumrosen, Security Equality: The Operation of the Laws of New Jersey Concerning Racial Discrimination,* 71 *et seq.* (1964); *Blumrosen, 'Anti-discrimination Laws in Action in New Jersey: A Law-Sociology Study,'* 19 *Rutgers L. Rev.* 189, 261 (1965). As

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early as 1881 there was legislation in New Jersey declaring it unlawful to exclude a child from any public school because of his race (*L.* 1881, *c.* 149) and this appears in broadened form in our current statutes. *N.J.S.A.* 18:14-2. When called upon, our courts have not hesitated to strike down direct and indirect efforts to circumvent the legislative direction. See *Pierce v. Union District School Trustees,* 46 *N.J.L.* 76 (*Sup. Ct.* 1884), aff'd 47 *N.J.L.* 348 (*E. & A.* 1885); *Raison v. Bd. of Education, Berkeley,* 103 *N.J.L.* 547 (*Sup. Ct.* 1927); *Patterson v. Board of Education,* 11 *N.J. Misc.* 179, 164 *A.* 892 (*Sup. Ct.* 1933), aff'd 112 *N.J.L.* 99 (*E. & A.* 1934); *Hedgepeth v. Board of Education of City of Trenton,* 131 *N.J.L.* 153 (*Sup. Ct.* 1944).

"New Jersey's strong policy against racial discrimination and segregation in the public schools finds further expression in *Article* 1, *paragraph* 5 of the 1947 *Constitution* which provides that '[n]o person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, * * * nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.' In 1949 the Legislature broadened its earlier law against discrimination (*L.* 1945, *c.* 169) to embody provisions against discrimination in places of public accommodation. *L.* 1949, *c.* 11. See *Levitt & Sons, Inc. v. Div. Against Discrimination, etc.,* 31 *N.J.* 514, *appeal dismissed,* 363 *U.S.* 418, 80 *S. Ct.* 1257, 4 *L. Ed.* 2*d* 1515 (1960); *Jones v. Haridor Realty Corp.,* 37 *N.J.* 384 (1962).***" (at pp. 173-174)

In *Jenkins, supra,* the Supreme Court characterized the Commissioner's authority to deal with such problems as comprising an "arsenal of powers." However, the Commissioner holds that this authority is not unlimited and may not, and should not, be employed in instances wherein there is no evidence to attest to the existence of a clear and pressing wrong. There is no such evidence herein, and no showing that a real controversy exists or that injury or harm has been done to justify the requested relief. In these specific circumstances relief must be denied. See *Cochran v. Planning Board of Summit,* 87 *N.J. Super.* 526, 534 (*Law Div.* 1965); *Newark Twentieth Century Taxicab Association v. Lerner,* 11 *N.J. Super.* 363, 366 (*Chan. Div.* 1951).

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

May 21, 1974

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In the Matter of the Tenure Hearing of Norman Lanchart, School District of the Township of Ridgefield Park, Bergen County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Ridgefield Park Board of Education, Parisi, Evers and Greenfield (Irving C. Evers, Esq., of Counsel)

For the Respondent, Saul R. Alexander, Esq.

A charge of conduct unbecoming a teacher was filed on June 6, 1973 against Norman Lanchart, a tenured teacher in the Ridgefield Park School System, hereinafter "respondent." The Board of Education of the Township of Ridgefield Park, hereinafter "Board," certified that the charge would be sufficient, if true in fact, to warrant dismissal or reduction in salary. Respondent has not been suspended from his teaching position.

A hearing was conducted on January 30, 1974 in the office of the Union County Superintendent of Schools, Westfield, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner begins with the Board's charge quoted in its entirety as follows:

> "Pursuant to the provisions of *N.J.S.A.* 18A:6-10, *et seq.*, the following charge of conduct unbecoming a teacher is hereby preferred against NORMAN LANCHART, a teacher under tenure in the Ridgefield Park School System, to wit:
>
> "That on or about the 16th day of April, 1973, the said Norman Lanchart, while under obligation to perform teaching duties for the Ridgefield Park Board of Education, did in violation of said obligation utilize the contact his teaching position afforded to give private driving lessons to a student for a fee; the said Norman Lanchart knowing full well that it was in contract violation as well as violation of his duties and responsibilities as a teacher to seek or exact a fee from a student of the Ridgefield Park High School for giving driver instructions during a period of time when it was the obligation and duty of the said Norman Lanchart to render full time and service to the Ridgefield Park Board of Education.
>
> "That the Said Norman Lanchart has previously been reprimanded for having made charges to students of the Ridgefield Park High School for driver education and had in fact been directed to return moneys received as donations from said students."

Respondent admits that he gave private driving lessons to a student for a fee but denies the other specified violations as set forth, *ante*, and asserts that the instructions were given during his "free" period.

The record shows that a hearing was conducted for respondent by the

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former Superintendent of Schools in May 1971 on a charge of using the Board's driver education car and the solicitation of donations from students. (J-1) On May 28, 1971, respondent was directed to appear before the Board's Faculty and Program Committee as a result of the hearing, *ante*. (J-2) The record does not disclose any further disciplinary action against respondent by the Board because of that hearing and meeting, and respondent asserts that the Board has already punished him for the charge now under consideration by depriving him of extra-classroom employment to coach interscholastic football and basketball with a resultant loss of honoraria; therefore, he asserts the Board is now precluded from further disciplinary proceedings. Respondent asserts, also, that the Board's complaint is procedurally defective pursuant to statute and the rules of the State Board of Education and is therefore invalid.

Respondent testified that he was paid $1,525 as honoraria for coaching during the 1972-73 school year. He testified further that he used his own car for the instruction given in the current charge, *ante*, and that this instruction occurred during and after an unassigned teaching period which occurred after 2:20 p.m. on the day in question. Respondent testified, also, that he received between $6.00 and $8.00 per lesson. (Tr. 47-48)

The hearing examiner notes that an "unassigned teaching period" traditionally has been described as a period during the school day in which no classroom teaching or extra-classroom teaching has been assigned, and is a period set aside for teaching preparation, professional duties, and other school related professional matters.

The Board does not deny that the driver training instruction occurred after 2:20 p.m.; however, the record shows that the school day ended officially for teachers at 3:30 p.m. (Tr. 48) Therefore, there is no question that some of the instruction given, for which pupils were charged, occurred during the regular school day.

With regard to respondent's argument that he has already been punished by being denied coaching assignments, and therefore, the Board is precluded from further disciplinary proceedings, the hearing examiner observes that tenure is not permissible or possible for any extra-classroom coaching position and that coaching assignments are made annually at the Board's discretion. Also, the Commissioner will not substitute his judgment for that of the board on matters which are by statute delegated to local boards except where unreasonableness clearly appears. *Frank Monaco v. Board of Education of Hanover Park Regional High School District et al.*, 1973 *S.L.D.* 272

The Commissioner commented in *Nello Dallolio v. Board of Education of the City of Vineland*, 1965 *S.L.D.* 18, as follows:

> "*** In this instance petitioner has been relieved of an assignment which he was offered annually by the employer and which he accepted voluntarily. It must be noted that his duties as coach were not permanently engrafted on his duties as a teacher, either by rule or by the terms of his employment. The Board was not obligated to make the offer

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> or to continue it each year. In fact, the Board is without authority to make such an assignment for more than a year under the well-established principle that a board of education is a non-continuous body which cannot bind its successors except in matters specifically permitted by statute. *Skladzien v. Bayonne,* 1938 *S.L.D.* 120, affirmed State Board of Education 123, affirmed 12 *N.J. Misc.* 602 (*Sup. Ct.* 1934), affirmed 115 *N.J.L.* 203 (*E. & A.* 1935)***" (at p. 20)

In *Joseph J. Dignan v. Board of Education of the Rumson-Fair Haven Regional High School,* 1971 *S.L.D.* 336, the question of reassignment of teachers to extra-classroom duties was discussed as follows:

> "*** Under these circumstances, the Board had no obligation to give reasons for not reassigning petitioner or in fact to grant petitioner a hearing. In *Zimmerman v. Board of Education of Newark,* 38 *N.J.* 65 (1962) at p. 70, the Court reaffirmed the long established precedent of prior decisions in New Jersey involving nontenure employment by citing People *ex rel v. Chicago,* 278 *Ill.* 160, *L.R.A.* 1917 *E.* 1069 (*Sup. Ct.* 1917) as follows:
>
> > " 'A new contract must be made each year with such teacher as [the board] desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. *The board has the absolute right to decline to employ or to re-employ any applicant for any reason whatever or for no reason at all.****' " (*Emphasis ours.*) (at p. 344)

It is not the proper function of the Commissioner to question the wisdom of the Board's decision not to reappoint respondent to an extra-classroom coaching position. The Board has the statutory right to assign teachers as it sees fit, subject of course to the limits of certification and reasonableness. *Tinsley v. Lodi Board of Education,* 1938 *S.L.D.* 505; *Greenway v. Camden Board of Education,* 1939 *S.L.D.* 151, affirmed State Board of Education 1939 *S.L.D.* 155, affirmed 129 *N.J.L.* 46 (*Sup. Ct.* 1942), affirmed 129 *N.J.L.* 461 (*E. & A.* 1943); *Cheeseman v. Gloucester City Board of Education,* 1938 *S.L.D.* 498, affirmed State Board of Education 1938 *S.L.D.* 500, affirmed 1 *N.J. Misc.* 318; *Downs v. Hoboken Board of Education,* 12 *N.J. Misc.* 345 (*Sup. Ct.* 1934), affirmed 113 *N.J.L.* 401 (*E. & A.* 1934); *Dallolio v. Vineland Board of Education, supra; Joseph J. Dignan v. Rumson-Fair Haven Regional Board of Education, supra; Boney v. Board of Education of Pleasantville,* 1971 *S.L.D.* 579

The hearing examiner finds, therefore, that there is no defect in the Board's non-reemployment of respondent as a coach and its further determination to certify charges to the Commissioner. Nor does the hearing examiner find any procedural defect in the certification of this charge to the Commissioner.

Therefore, the Commissioner must determine whether or not respondent used his unassigned period improperly by charging pupils for driver training instruction lessons, and whether or not such an arrangement is proper or

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improper if conducted after school hours. The Commissioner must determine also whether the admitted action, if improper, is sufficient to warrant any penalty pursuant to *N.J.S.A.* 18A:6-10 *et seq.*

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the matter, *sub judice*, and the report and findings of the hearing examiner. It is noted that counsel have expressed no exceptions to the hearing examiner report pursuant to *N.J.A.C.* 6:24-1.16.

The Commissioner finds no validity to respondent's argument that the Board's decision not to extend a coaching contract with stipend to respondent for the 1973-74 school year may be considered a punishment for the acts herein admitted or found otherwise to be true in fact.

The Commissioner determines that the use by respondent of his scheduled preparation period to provide behind-the-wheel driver education instruction for pay was an improper act. Such preparation periods are precisely for the purpose of lesson preparation, conferences, and clerical duties attendant upon teaching requirements. The preparation period is provided during the regular school day, and respondent is compensated for this time by the Board. For respondent to receive or solicit additional monetary compensation from pupils for the utilization of a preparation period for private instruction constitutes unprofessional conduct. Also, he is depriving the Board of his services, for which he is compensated, during this time period. This improper conduct by respondent is the very antithesis of example that is required of public school teachers. As such it is conduct unbecoming a teacher.

The solicitation and instruction of pupils in one's own automobile or in the driver education car of the school during any period which overlaps or is contiguous to the school day provides an undesirable intermixture of private enterprise and professional functions and must be scrupulously avoided.

It remains to determine the penalty which justly may be imposed for the unbecoming acts of respondent. This question must be considered in view of the fact that respondent was previously warned by the Board to refrain from making charges to pupils for driver education instruction, but with no further evidence of other than exemplary service to the Board.

It was said *In The Matter of the Tenure Hearing of William H. Kittell, School District of the Borough of Little Silver, Monmouth County,* 1972 *S.L.D.* 535:

> "***respondent has suffered the mental anguish of *** a hearing which could result in the loss of his livelihood. In addition, respondent's professional reputation has been damaged, and he will be required to exert

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himself to reestablish his reputation and standing because of his error.***"
(at p. 542)

The above-cited statement pertains similarly herein.

After careful consideration the Commissioner concludes that dismissal of respondent would be an inordinately harsh penalty and is not warranted herein. It is determined that respondent shall remain in the employ of the Board of Education of the Township of Ridgefield Park but shall forfeit for a period of one school year beginning July 1, 1974, the right to any employment increment or adjustment which may be granted to the Board's teaching staff members, and shall be paid a salary during that period equal to that which he is receiving during the current 1973-74 academic year.

COMMISSIONER OF EDUCATION

May 21, 1974

**In the Matter of the Tenure Hearing of Norman Lanchart,
School District of the Township of Ridgefield Park, Bergen County.**

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 21, 1974

For the Respondent-Appellant, Saul R. Alexander, Esq.

For the Appellee, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein, with the following clarification and interpretation of the penalty imposed: That Respondent-Appellant Norman Lanchart be denied an employment increment and an adjustment increment for the 1974-75 school year, and that his salary for the 1974-75 school year shall be the same as the salary he received during the 1973-74 school year.

December 4, 1974

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In the Matter of the Tenure Hearing of Joseph Reina and Philip Bartone, School District of the City of Elizabeth, Union County.

COMMISSIONER OF EDUCATION

ORDER

For the Complainant Board of Education, O'Brien, Daaleman & Liotta (Raymond D. O'Brien, Esq., of Counsel)

For the Respondent Joseph Reina, *Pro Se*

For the Respondent Philip Bartone, *Pro Se*

This matter having been brought before the Commissioner of Education by Raymond D. O'Brien, Esq., attorney for the complainant Board of Education of the City of Elizabeth, hereinafter "Board"; and,

It appearing that separate tenure charges were filed by the Board against school custodians Joseph Reina and Philip Bartone stating that the charges would be sufficient, if true in fact, to warrant suspensions; and

It appearing that the charges were certified to the Commissioner by resolution of the Board dated August 9, 1973; and,

It appearing that Joseph Reina notified the Commissioner by letter dated September 18, 1973, that he would not defend himself against the charges made by the Board; and,

It appearing that Philip Bartone notified the Commissioner by letter dated September 24, 1973, that he would defend himself against the charges made by the Board; and,

It appearing that Philip Bartone was notified by letter dated October 26, 1973 from the State Department of Education, Division of Controversies and Disputes, hereinafter "C & D," that he would be required to file an Answer to the charges made by the Board; and,

It appearing that Philip Bartone was again notified by letter from C Y D on December 10, 1973, that an Answer was required; and,

It appearing that an Answer had not been filed by Philip Bartone; and,

It appearing that certain officers of the Teamsters Local Union 866, hereinafter "Union," interceded on behalf of Philip Bartone by telephone and by letters dated December 13, 1973, and January 9, 1974; and,

It appearing that two conferences scheduled for the adversaries were postponed by request of the Union; and,

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It further appearing that the Union notified C & D by letter dated February 27, 1974, that it was withdrawing from the third conference scheduled for March 5, 1974; and,

It appearing that C & D was notified by letter of the Board dated March 20, 1974, that Philip Bartone had retired; and,

It appearing that no Answer or defense has been made by Joseph Reina or Philip Bartone; and,

It appearing that an examination of the charges reveals in pertinent part the following determination by the Board:

> "*** that Joseph Reina *** be suspended without pay for a period of 2 days and that the charges and evidence in support of such charges *** be forwarded to the Commissioner ***" (Exhibit A)

and

> "*** that Philip Bartone *** be suspended without pay for a period of 5 days and that the charges and evidence in support of such charges *** be forwarded to the Commissioner***." (Exhibit B)

It is assumed that these unanswered and uncontested charges are true in fact, and the Commissioner has no evidence to the contrary; therefore, it may be stated without equivocation that the Board has exceeded its discretionary powers since there is no authority in law for a local board of education to impose any penalty against a tenured employee. Such authority is delegated to the Commissioner by statutory prescription. *N.J.S.A.* 18A:6-10 *et seq.; In the Matter of the Tenure Hearing of David Fulcomer, Holland Township,* 93 *N.J. Super.* 404 (*App. Div.* 1967); *In the Matter of the Tenure Hearing of Dale Miller, School District of the Borough of Manville, Somerset County,* 1973 *S.L.D.* 409, affirmed State Board of Education May 1, 1974

It appearing that the Board has no authority to impose such a penalty; and,

It appearing that the appropriate action by the Board would have been to file charges pursuant to *N.J.S.A.* 18A:6-10 *et seq.;* and,

It appearing that the Commissioner alone has the authority to set a penalty for discipline infractions by tenured employees (*Fulcomer, supra*) although the Board may recommend what it feels is an appropriate penalty; and,

It appearing that appropriate penalties in this matter would be the loss of five days' salary for each employee; now therefore

IT IS ORDERED on this 21st day of May 1974, that the Board of Education of the City of Elizabeth withhold the equivalent of three additional

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days' salary from Joseph Reina so that the resultant penalties for both employees will be equal.

COMMISSIONER OF EDUCATION

May 21, 1974

In the Matter of the Tenure Hearing of Joseph Reina and Philip Bartone, School District of the City of Elizabeth, Union County.

COMMISSIONER OF EDUCATION

ORDER

For the Complainant Board of Education, O'Brien, Daaleman, & Liotta (Raymond D. O'Brien, Esq., of Counsel)

For the Respondent Joseph Reina, *Pro Se*

For the Respondent Philip Bartone, *Pro Se*

This matter having been brought before the Commissioner of Education (August E. Thomas, Assistant Director, Division of Controversies and Disputes) by Raymond D. O'Brien, Esq., attorney for the complainant Board of Education of the City of Elizabeth, hereinafter "Board"; and

It appearing that separate tenure charges were filed by the Board against school custodians Joseph Reina and Philip Bartone stating that the charges would be sufficient, if true in fact, to warrant suspensions; and

It appearing that the Commissioner rendered a decision in this matter dated May 21, 1974; and

It appearing that Board counsel notified this office by letter of May 22, 1974, that the Board did not, in fact, suspend either of respondents without pay; and

It appearing that the Board concedes that its Resolutions dated August 9, 1973, stated, *inter alia,* that:

> "BE IT RESOLVED, that the Board of Education determined that the written charges against Joseph Reina be forwarded to the Commissioner of Education together with certificate of such determination and that upon certification of the charge to the Commissioner, the Board of Education suspends Joseph Reina for two days without pay; and
>
> "BE IT RESOLVED, that the Board of Education determined that the

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written charges against Philip Bartone be forwarded to the Commissioner of Education together with certificate of such determination and that upon certification of the charge to the Commissioner, the Board of Education suspends Philip Bartone for five days without pay"; and

It appearing that the Commissioner's Order of May 21, 1974, was grounded, in part, on these Resolutions which the Board now contends have never been effected; and

It appearing that the Board's letter of May 22, 1974, states in part that, "*** Unfortunately, the Resolution of the Board of Education of the City of Elizabeth dated August 9, 1973, *** indicates *** that the Board of Education *suspends* Joseph Reina for two days without pay. ***" (*Emphasis supplied.*); and

It appearing that the Board's letter dated May 22, 1974, suggests that "*** the Commissioner was misguided or misunderstood our Resolution to the detriment of Mr. Reina, therefore with this new evidence perhaps the Commissioner would review his decision***"; and

It appearing that the Commissioner was in fact misinformed by the Board's Resolutions, *ante;* therefore IT IS ORDERED on this 12th day of June 1974 that the Commissioner's Order, dated May 21, 1974, be modified to read that the Board of Education of the City of Elizabeth withhold the equivalent of two days' salary from Joseph Reina. Philip Bartone has retired; therefore, it is not possible, in his case, to exact a penalty.

COMMISSIONER OF EDUCATION

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Toms River Education Association,

Petitioner,

v.

Board of Education of the Toms River Regional School District, Ocean County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Alphonse A. Stanzione, Jr., Esq.

For the Respondent, Milton H. Gelzer, Esq.

This matter comes before the Commissioner of Education as the result of an Order to Show Cause, issued on May 8, 1974, based on a duly verified complaint filed by the Toms River Education Association, hereinafter "Association," against the Toms River Board of Education, hereinafter "Board."

On May 17, 1974, the return date of the Order, the parties appeared before a representative of the Commissioner and presented their respective positions. The entire record of this matter is now before the Commissioner for his determination.

The facts, as set forth in the record, are these:

The 1973-74 school calendar, as originally adopted by the Board, provided that schools would close for the year on June 19, 1974. (Schedule B as set forth in the Agreement between the Association and the Board) (P-1) Furthermore, that calendar provided that the Christmas recess would commence at the conclusion of the school day on December 21, 1973, and continue to January 2, 1974.

However, during December 1973, when the impact of the fuel energy crisis was most severe, the State Board of Education, pursuant to its authority at *N.J.S.A.* 18A:4-15 and *N.J.S.A.* 18A:4-16 determined that:

"WHEREAS, it is recognized that the public schools face an energy crisis and,

"WHEREAS, on December 3, the Governor's Cabinet Committee on Energy did accept and support a proposal to extend the school Christmas vacation to January 7, 1974, now therefore be it

"RESOLVED, that the Christmas vacation shall be extended through the first week of January; students to return to school January 7, 1974."

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Thereafter, on December 18, 1973, the Board adopted a resolution which provides, in pertinent part:

> "***
> "WHEREAS, the State Board of Education did meet on December 5th and by majority vote, mandated that all local districts would close their Schools on January 2, 3, 4, 1974 for the purpose of conserving energy and urged local districts to adjust their school calendars accordingly, now therefore be it
>
> "RESOLVED, that the Toms River Schools be closed on January 2, 3, & 4, 1974, which in effect creates a winter closing from the end of school on December 21st until the opening of school on January 7th, 1974, and be it further
>
> "RESOLVED, that the School Calendar be extended to the end of the school day on June 21, 1974." (P-2)

On April 2, 1974, Assembly Bill No. 1258, hereinafter "Bill," was signed into law, which provides as follows:

> "Be it enacted *by the Senate and General Assembly of the State of New Jersey:*
>
> "1. The days of January 2, 3 and 4 of 1974 during which schools were closed in this State by order of the State Board of Education shall for all purposes including State aid be considered as days when schools were open and facilities provided.
>
> "2. This act shall take effect immediately."

The Commissioner, in exercising his quasi-judicial responsibility set forth at *N.J.S.A.* 18A:6-9 Jurisdiction over controversies and disputes under school law, has heretofore articulated his view of the legislative intention expressed through the Bill. In *Westfield Education Association v. Board of Education of the Town of Westfield, Union County,* 1974 *S.L.D.* 387 (decided April 16, 1974), the Westfield Education Association challenged an action of the Westfield Board of Education whereby that Board, as a result of the emergency closing of its schools as directed by the State Board of Education resolution, *ante,* determined to recover those days during its spring recess. Originally, the Westfield Board had planned to close the schools on April 17, 18, and 19, 1974, as part of the recess. However, on January 8, 1974, a resolution was adopted fixing April 17, 18, and 19 as school days because of the January closing, *ante.* Subsequent to the passage of the Bill, the Westfield Board continued to plan to hold school on April 17, 18, and 19. The Commissioner, in his adjudication of the *Westfield, supra,* dispute, held, *inter alia:*

> "*** That the Legislature saw fit to include in the Bill the phrase '*** shall for all purposes ***' means, in the Commissioner's judgment

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> precisely that: for all purposes, including the purpose which has precipitated the instant dispute. It is clear that the Board's resolution of January 8, 1974, *** was generated by the State Board's directive to close school on January 2, 3, and 4, 1974. And, if the Legislature states that those days are, were, and shall be considered as '*** days when schools were open ***,' as it surely did through the Bill, then the express purpose for which the Board altered or changed the school calendar *** no longer exists. It follows, therefore, that, in this unique instance, the Board, through its adoption of the resolution establishing April 17, 18, and 19, 1974 as school days, transcended its statutory authority and is accordingly set aside. ***" (at p. 394)

Factually, the matter, *sub judice,* is very similar to the *Westfield, supra,* matter. Here, the Board adopted its resolution (P-2), on December 18, 1973, as the direct result of the State Board action taken on December 5, 1973. And according to the verified complaint filed by the Association which is not contested by the Board, the Board refuses to rescind its resolution (P-2) whereby the original school calendar is extended from June 19 to June 21, 1974.

The Association argues that the refusal of the Board to rescind its resolution (P-2) and adhere to the original school closing date of June 19, 1974, has caused both pupil and teacher unrest. In fact, numerous pupils were arrested subsequent to a demonstration over the Board's position. However, it is reported that charges filed by the Board against those pupils have since been dropped. Furthermore, the Association contends that the Board must be ordered to rescind its December resolution (P-2) in order to maintain the integrity of the Agreement (P-1) already in effect.

The Board bases its position on its desire to provide pupils with a quality education and, regardless of what the Legislature has said through the passage of the Bill, the clear fact is that its schools were, in fact, closed on January 2, 3, and 4, 1974. The Board argues for the education that was denied its pupils during those three days.

However, counsel to the Board, by letter dated May 9, 1974, and made part of the record herein, reports, *inter alia:*

> "*** At the Board meeting held on May 7, a motion was passed indicating that the Board will close for at least two days prior to the Memorial Day holiday provided (a) that your [the Commissioner of Education] office does not rule against such action and (b) that in computing time off, that the Board will not go below 177 school days. ***"

In the Commissioner's judgment, it appears that the Board's position is this: The Board, by its December 1973 resolution (P-2), added two days to its school calendar--from June 19 to June 21, 1974; however, the Board is now willing to delete two school days from its calendar, but the two days will be deleted at its discretion.

The Commissioner cannot agree. Through the passage of the Bill, the

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Legislature, from whom all boards of education in New Jersey derive their authority, has effectively limited the authority of all boards of education from taking *any* action which would extend or alter its original 1973-74 school calendar as the direct result of the State Board of Education directive to close school during January 1974. *Westfield, supra*

This being so, the resolution (P-2) adopted by the Board on December 18, 1973, extending the original school closing date from June 19 to June 21, 1974, is *ultra vires* and is hereby set aside.

It must be emphatically emphasized, however, that the Commissioner once again affirms his previous holdings in regard to a board of education having the sole authority to adopt its school calendar (*N.J.S.A.* 18A:36-2) which authority is not subject to negotiation. See also *Carl Moldovan et al. v. Board of Education of the Township of Hamilton, Mercer County,* 1971 *S.L.D.* 246; *Eugene Somma et al. v. Board of Education of the City of Long Branch, Monmouth County,* 1974 *S.L.D.* (decided March 13, 1974); *Evan Goldman et al. v. Board of Education of the Borough of Bergenfield, Bergen County,* 1973 *S.L.D.* 441.

The circumstances, however, surrounding the State Board of Education directive in regard to the closing of schools in January and the subsequent action of the Legislature through passage of the Bill are unique influences which, properly, have affected the wide latitude and authority vested in local boards of education through Title 18A, Education Law. For this reason the third prayer for relief of the Association whereby it seeks an order permanently restraining and enjoining the Board from extending the school year, for any reason, beyond June 19, 1974, is hereby denied.

The Commissioner of Education, after carefully considering the record before him, hereby directs the Toms River Board of Education to rescind its resolution of December 18, 1973, whereby the original school calendar was extended from June 19 to June 21, 1974, and permanently restrains and enjoins the Toms River Board of Education from altering the 1973-74 school calendar as the result of the State Board of Education directive to close schools on January 2, 3, and 4, 1974.

COMMISSIONER OF EDUCATION

May 21, 1974

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In the Matter of the Annual School Election Held in the School District of the Township of Piscataway, Middlesex County.

COMMISSIONER OF EDUCATION

DECISION

For the Respondent, Rubin & Lerner (Frank Rubin, Esq., of Counsel)

Petitioner, a citizen resident in the Township of Piscataway, Middlesex County, avers that the annual school election held in the Township on February 13, 1974, was irregular. She requests the Commissioner of Education to declare it invalid and to set it aside. Her avowal and request are contained in a letter to the Commissioner dated February 14, 1974.

At a time subsequent to receipt of the letter the Commissioner appointed a representative to conduct an inquiry into the matter. It was held on March 4, 1974 at the Middlesex County voting machine warehouse, Metuchen. On that occasion testimony was offered by petitioner and the Piscataway Superintendent of Schools and, at the conclusion of the inquiry, the Board of Education of the Township of Piscataway, hereinafter "Board," moved for a dismissal of the complaint. The report of the Commissioner's representative is as follows:

The complaint of petitioner herein is that the Board had mailed a brochure to all residents of Piscataway prior to the election of February 13, 1974, and that this brochure contained a map with misleading information. Specifically, she avers that the map indicated she was to vote at the same Fellowship Farm School where she had voted for nineteen years but that the map's indication was incorrect in the context of subsequent events.

She also maintains that an official notice of the election carried on page 18 of the January 31, 1974, edition of the *pd. review* (a newspaper serving Piscataway and Dunellen) was equally confusing. This notice is cited in pertinent part as follows:

POLLING DISTRICT NO. 7

> "Polling Place at the Fellowship Farm School at Stelton Road and Freedom Avenue in the School District for legal voters residing within General Election Districts Nos. 4 and 5 of the Township, Ward #4." (P-1)

Petitioner maintains that there are no "General Election Districts Nos. 4 and 5" of the Township but that the wards are divided into districts, and that Ward 4, without qualification, means Districts 1, 2, 3, 4, 5, 6, 7, and 8 of Ward 4.

However, in testimony petitioner states that "*** if you read the whole thing [the official notice of the election] you would understand it.***" (Tr. 14) She further clarifies her complaint in answer to this question as follows:

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"*** Q. What you are saying, really, is that there was a change of procedure from prior years.

"A. Right, and there was no attempt to clarify or help people to vote.*** I don't think it was malicious, I just believe it was not a real concern that people should get to the polls.***" (Tr. 15)

The Superintendent of Schools testified that there had been seven polling places in the school district in the 1974 election, and that this number was the same as in former years. However, he also indicated that there had been a realignment of voting districts assigned to these polling places and that petitioner's assigned polling place was one of those that was changed. (Tr. 17) He gave this reason for voting district realignment.

"***A. The Township regrouped voting districts for the general election in the fall. It has been the practice of the Board of Education and its administrators to conform to the Township general election districts in directing people to school election districts.***" (Tr. 17)

He also indicated he did understand petitioner's confusion even though the Board had inserted a legal advertisement in three newspapers and for the "*** first time we published a map to try and help to clarify it even more***." (Tr. 18)

The Commissioner's representative has reviewed the testimony herein and concludes that there is no evidence of irregularity. By petitioner's own testimony a complete reading of the legal notice (P-1) would produce an understanding of its meaning, and the Board did do more than it was required to do to publicize the realignment of voting districts. Therefore, the Commissioner's representative recommends that the Board's Motion to Dismiss be granted and that the Petition be dismissed.

* * * *

The Commissioner has reviewed the record in this matter and concurs with his representative's conclusion and recommendations as reported, *ante*. While there was evident confusion at the annual school election with respect to the realignment of voting districts in the Township of Piscataway, there is no evidence herein that the Board was responsible for such confusion but evidence to the contrary that the Board took responsible steps to prevent it.

Accordingly, the Motion of the Board is granted. The Petition is dismissed.

COMMISSIONER OF EDUCATION

May 23, 1974

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In the Matter of the Annual School Election Held in the School District of the Township of Montville, Morris County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on February 13, 1974 in the School District of the Township of Montville, Morris County, were as follows:

	At Polls	Absentee	Total
David J. Didimamoff	983	25	1008
Donald J. Engleke	847	18	865
John P. Anderson	760	21	781
Catherine Mozak	764	16	780
Eleanor Sterling	728	14	742
Joseph J. Costello	441	13	454

Pursuant to a letter request from Candidate Catherine Mozak dated February 15, 1974, the Commissioner of Education directed an authorized representative to conduct a recount of the ballots cast and to hold an inquiry to consider alleged irregularities in the conduct of the election. The recount and inquiry were conducted on March 13, 1974 at the Morris County voting machine warehouse, Morris Plains.

The Commissioner's representative reports that, at the conclusion of the recount of the voting machine totals and the checking of the report of the canvass of the absentee ballots, there was no change in the officially announced tally.

At the inquiry which preceded the recount, *ante,* Candidate Mozak testified with respect to several alleged irregularities which were detailed in her letter of February 15, 1974. Specifically, she stated that the Cedar Hill polling place had opened with only three officials, that the polling place in the Montville High School had opened at 2:15 p.m. instead of 2:00 p.m., and that at the conclusion of the election there was great difficulty in opening the voting machines. She also indicated that certain other alleged irregularities concerned with absentee ballots might be pursued by her in an appeal to the Morris County Board of Elections. However, there is no indication in the record before the Commissioner that such an appeal has taken place or is definitely contemplated.

The Secretary of the Montville Board of Education also testified at the inquiry of March 13, 1974, and, subsequent to the inquiry, submitted a certified list of election officials. He stated that these officials had been given written and oral instructions with respect to their duties but that some of them had not reported for work as scheduled on the day of the election and substitute replacements were difficult to secure.

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The Board Secretary's subsequent certification indicates that the Board of Education had approved a judge, inspector, and two clerks as election officials in each polling place pursuant to statutory prescription. *N.J.S.A.* 18A:14-6 However, he also indicates that replacements had to be secured for six officials prior to the day of election and other officials required replacement on election day. In one instance it is indicated by the Board Secretary that a clerk "forgot to come" and he was not replaced.

The Commissioner's representative found that the poll lists compiled at the election were generally in order except that in some instances addresses were not stated in writing as required by statute *N.J.S.A.* 18A:14-48.

The Commissioner has reviewed such testimony and the report of his representative and finds that there were irregularities herein with respect to the fulfillment of the precise requirements of election procedure as set forth in the statutes. One election district lacked the requisite number of workers. The poll list was not complete. Although such irregularities may have been, and probably were, inadvertent or occasioned by circumstance, they cannot be condoned and, accordingly, the Commissioner urges the Board of Education to take whatever action is necessary to insure correction in the future.

The Commissioner can find no evidence in this instance that the will of the people was suppressed and could not be fairly determined. It is purely speculative to propose that if conditions in this election were different, the results would have been different. Such elections have not been set aside in the past absent clear proof that alleged irregularities did, in fact, constitute so major a factor as to nullify the apparent expression of the voters. (See *In the Matter of the Application of Elmer H. Wene,* 26 *N.J. Super.* 363 (*Law Div.* 1958); *Sharrock v. Keansburg,* 15 *N.J. Super.* 11 (*App. Div.* 1951).)

For the reasons cited, *ante,* the Commissioner holds that the annual school election held in the School District of the Township of Montville on February 13, 1974, must be given effect. Accordingly, the Commissioner finds and determines that David J. Didimamoff, Donald J. Engleke, and John P. Anderson were elected to full terms of three years each for service on the Montville Board of Education.

COMMISSIONER OF EDUCATION

May 23, 1974

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Scotch Plains-Fanwood Education Association,

Petitioner,

v.

Board of Education of Scotch Plains-Fanwood, Union County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Mortimer Katz, Esq.

For the Respondent, Johnstone & O'Dwyer, (Jeremiah D. O'Dwyer, Esq., of Counsel)

This matter having been opened before the Commissioner of Education through a Petition of Appeal and Answer filed thereto, and a conference of counsel being held on December 10, 1973; and

It appearing that the parties agree, by Stipulation of Fact, that the sole issue in this matter is whether the Federal Wage and Price Control Board would permit salary increases to be provided for the represented school nurses herein in excess of 5.5 percent; and

It appearing that the Commissioner has been vested with quasi-judicial authority to hear and determine controversies and disputes arising under school law; and

It appearing that the dispute herein does not arise under Title 18A, Education Law; now therefore

IT IS HEREBY ORDERED on this 23rd day of May 1974 that this matter be and hereby is dismissed.

COMMISSIONER OF EDUCATION

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In the Matter of the Annual School Election Held in the Borough of Ringwood, Passaic County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for the election of three members of the Borough of Ringwood Board of Education for full terms of three years each at the annual school election on February 13, 1974, were as follows:

	At Polls	Absentee	Total
Irene R. Milnor	358	–0–	358
Louis B. Piccininno	354	–0–	354
Phyllis A. Prekopa	106	–0–	106
Francis Phalen	88	–0–	88
James Cremona	82	–0–	82
Henry Seligson	72	–0–	72

Additionally, a total of fourteen other candidates received a total of 20 votes.

Candidates Milnor, Prekopa and Piccininno filed nominating petitions and their names appeared on the ballot on the voting machines used in the election. The tally for all other candidates for a three-year term were written in by voters. Such votes will be referred to hereinafter by their statutory term "irregular ballots."

By letter Petition, dated February 16, 1974, Candidate Phalen alleged that incorrect instructions for the casting of irregular ballots were given by election officials on the day of the election, and he maintained that such instructions had the effect of increasing the tally of Candidate Prekopa at his expense. He stated his belief that if the instructions had been proper he "would have won," and he requested the Commissioner of Education to take whatever corrective action the Commissioner deemed appropriate.

Thereafter, the Commissioner appointed a representative to conduct an inquiry with respect to the alleged impropriety. Such inquiry was held on March 12, 1974 at the office of the Passaic County Superintendent of Schools, Paterson. At that time Candidate Phalen and a total of ten other witnesses gave testimony with respect to the election. The report of the Commissioner's representative is as follows:

The complaint herein is concerned primarily with the great difficulty in properly recording irregular ballots when the spaces provided for such votes on voting machines are awkward to reach and when the required lock-out mechanism is not understood by voters. In this instance, the problems were evidently compounded by instructions from some election officials which were incorrect (Tr. 9, 15-17, 24, 29) and by the fact that irregular ballots had not been employed in Ringwood to any great extent in recent years.

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Specifically, however, the complaint is concerned with the interrelationship between each of the three spaces provided for the casting of irregular ballots and the three spaces below containing the imprinted names of candidates who had filed nominating petitions for three-year terms. The respective sets of spaces are not aligned in a directly vertical relationship but instead at an oblique angle. Thus, an irregular ballot cast in the large space number 1 has the effect of locking out the lever for the casting of a vote for regular candidate number 1, although the spaces are not aligned in an apparent expression of this relationship.

Furthermore, it is apparent from testimony herein that in at least one polling place of the Ringwood District, the election officials misunderstood the relationship of the spaces provided for irregular ballots to the spaces below containing the names of regular candidates and gave instructions that were incorrect. Candidate Phalen testified that he was told he was to "*** ignore this number one slot ***" (Tr. 12) whereas the number one slot was operational and had a direct effect in locking out the lever in the number one box for regular candidates in the line to the right below. The relationship for slots two and three was the same.

However, there is no testimony herein that people were in fact unable to properly record a vote for write-in candidates. Instead, according to Candidate Phalen's testimony, the misalignment of boxes for the casting of irregular ballots "*** caused an artificial swelling of the total – for Phyllis Prekopa and a depressing of the vote total for Lou Piccininno.***" (Tr. 9) The Commissioner's representative finds that this may well have been true but that at best the testimony is conjectural and thus presents no cause for action. The principal contest herein is between Candidates Prekopa and Phalen and the casting of a ballot for each of these candidates was the result of an affirmative act. Thus, to argue that the one total represented an "artifical swelling" is to ignore that fact.

The Commissioner's representative notes that a similarly confusing situation was considered by the Commissioner *In the Matter of the Annual School Election Held in the Township of Hillsborough, Somerset County,* 1965 *S.L.D.* 74, and in the course of his decision the Commissioner had reason to consider the use of irregular ballot slot number one. He said:

> "*** There appears to be no clear practice with respect to the use of irregular ballot slot #1 among the various election boards of the State. This larger write-in space is provided primarily for use in presidential elections in which the voter may want to write the names of a series of electors. Use of this slot in school district elections varies among counties. In some areas slot #1 is locked out and small slots equal in number to the candidates whose names appear on the ballot are able to be opened. In other sections none of the slots are locked out and a voter may write an irregular ballot in any one of 40 openings. The Commissioner has observed, in his experience in recounting contested elections, that where large slot #1 is not locked out it is often necessary to void a ballot because more than one name has been written in this space. *From his experience,*

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> *the Commissioner would recommend that slot #1 not be used in school elections.****" (*Emphasis supplied.*) (at p. 76)

The Commissioner's representative finds that this latter recommendation is as noteworthy and viable today as it was in 1965 and, if given effect in Ringwood in the school election of 1974, it would have prevented the "mass confusion" (Tr. 37) which evidently prevailed.

Such confusion is on many occasions more the rule than the exception with respect to irregular balloting and as the Court said *In re Borough of South River,* 26 *N.J. Super.* 357, 361 (*Law Div.* 1953):

> "*** Any person familiar with the voting machines is aware of the difficulty in placing names either by writing or any other means upon the receptacle or device on the machine for that purpose.***"

However, the Commissioner's representative finds no clear and convincing evidence herein that the will of the electorate of Ringwood was thwarted or suppressed or that the results of the election of February 13, 1974, would have been different if the confusion had not occurred. Accordingly, he recommends that the announced results, reported *ante,* be allowed to stand but that in future years the number one slot for the casting of irregular ballots be locked out. He further recommends that election officials in Ringwood be thoroughly briefed prior to the day of election on the relationship of spaces for irregular and regular ballots.

* * * *

The Commissioner has reviewed the report of his representative and concurs with the recommendations contained therein. The confusion and irregularity evident in this election were easily avoidable, and the fact that write-in ballots had not posed similar problems in recent years was no excuse for what did occur. There are many possible emergencies which may arise because of the use of voting machines, but confusion and irregularity are not an inevitable result. Indeed, the Commissioner holds that the opposite is true if contingency planning is the rule and not the exception.

However, the Commissioner can find no concrete evidence herein that the will of the people was suppressed. It is purely speculative to propose that if conditions in this election had been different the results would have been different. In the past such elections have not been set aside. As the Commissioner said *In the Matter of the Annual School Election Held in the School District of Manasquan, Monmouth County,* 1965 *S.L.D.* 104, 107:

> "*** However, it is well established that an election will be given effect and will not be set aside unless it is shown that the will of the people was thwarted, was not fairly expressed, or could not properly be determined. *Love v. Board of Chosen Freeholders,* 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *Petition of Clee,* 119 *N.J.L.* 310 (*Sup. Ct.* 1938); *Application of Wene,* 26

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N.J. Super. 363 (*Law Div.* 1953), affirmed 13 *N.J.* 185 (1953) There has been no such showing herein.***"

Accordingly, the Commissioner finds and determines that Louis B. Piccininno, Irene R. Milnor, and Phyllis A. Prekopa were elected on February 13, 1974 to seats on the Ringwood Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION

May 24, 1974

Mountainside Teachers' Association,

Petitioner,

v.

Mountainside Board of Education, Union County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Mortimer Katz, Esq.

For the Respondent, Charles A. Jerome, Esq.

This matter having been opened before the Commissioner of Education through a Petition of Appeal and Answer filed thereto, and a conference of counsel being held on December 5, 1973; and

It appearing that the sole issue in this matter is whether the Federal Wage and Price Control Board would permit salary increases pursuant to *N.J.S.A.* 18A:29-4.2 to be provided for the represented school nurses; and

It appearing that the Federal Wage and Price Control Board (Economic Stabilization Program, Cost of Living Council) rendered its determination in this matter; and

It appearing that by letter dated May 16, 1974, counsel for petitioner represents that this matter may be dismissed; now therefore

IT IS HEREBY ORDERED on this 29th day of May 1974, that this matter be and hereby is dismissed.

COMMISSIONER OF EDUCATION

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In the Matter of the Election of Dorothy Bayless to the Board of Education of the Lawrence Township School District, Mercer County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Smith, Cook, Lambert, Knipe & Miller (Thomas P. Cook, Esq., of Counsel)

For the Respondent, Cascone & Hofing (Howard G. Golden, Esq., of Counsel)

Petitioner, the Board of Education of the Lawrence Township School District, hereinafter "Board," requests a Summary Judgment by the Commissioner of Education that one of its members should be barred from further service on the Board because of the fact that the member's spouse is an employee of the Board. In the Board's view, such an employment constitutes substantial and continuing conflict of interest and is in contravention of the specific statutory prescription of *N.J.S.A.* 18A:12-2 which bars service by a board member who is "*** interested directly or indirectly in any contract with or claim against the board." Respondent, a Board member newly elected to office in February 1974, denies that a substantial and disqualifying conflict of interest exists in the factual circumstances of her husband's employment and avers that the voters of the district were fully cognizant of such employment when they elected her to membership on the Board.

The matter is submitted for Summary Judgment by the Commissioner on a Joint Submission and Stipulation of Facts and on Briefs of counsel. The Joint Submission and Stipulation of Facts is composed of certain principal elements which are contained in the following recital.

At the election of new members to the Board, held in Lawrence Township on February 13, 1974, Mrs. Dorothy Bayless, respondent, was elected to serve a three-year term on the Board. Her husband, Mr. Frederic W. Bayless is currently employed by the Board at an annual salary of $12,400 for the 1973-74 school year. Although Mr. Bayless was first hired by the Board in 1957 and has served continuously since that time, principally as the Supervisor of Buildings and Grounds, his present position in the employ of the Board is that of Supervisor of Custodial Services. The job description of this position (annexed to the Joint Stipulation as Exhibit A) is as follows:

> "Under the direction of the Business Manager, the Supervisor-Custodial Services has charge of Buildings and Grounds Custodial/Housekeeping programs and activities.
>
> "The Supervisor-Custodial Services shall:
>
> "1. Inspect and determine the cleaning work to be done in the various buildings, and the equipment and supplies needed.

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"2. Develop plans for custodial/housekeeping work to be performed at each building. Maintain detailed methods descriptions of such plans and distribute same to principal and employee involved.

"3. Give assignments to building custodians and supervise the performance of their work.

"4. Obtain, store, safeguard, record, distribute, and supervise the proper use of equipment, materials, and supplies.

"5. Prepare factual reports.

"6. Establish and maintain the essential building custodial records and files pertaining to personnel, equipment, material, supplies, work done costs, and time spent.

"7. Assist Business Manager in preparation of annual budget.

"8. Confer with building principals on personnel assignments, cleaning complaints, and other matters."

However, it is represented by respondent that Mr. Bayless has responsibility at the present time for only Items 1 and 3 as contained in the job description and only partly with respect to the latter item. His service in the employ of the Board is further delineated in the Joint Stipulation as follows:

"*** Since July of 1973, Mr. Bayless has been serving on a special assignment to carry out a complete study of the facilities, machinery and equipment in the various buildings within the School District. As part of this study it is contemplated that he will prepare a comprehensive manual and report dealing with the preventative maintenance of the buildings and equipment. Pursuant to this special assignment, Mr. Bayless, with the assistance of the High School Drafting Department, has revised and updated blueprints for the buildings within the System and will be examining all of the equipment in the buildings, and setting up a work schedule to indicate the amount of time needed to carry out each of the maintenance jobs related to the various machines. Mr. Bayless' present activities include the spot-checking and analysis of, and reporting to school principals on. building maintenance.

"Although no specific decisions have been made, at this time, it might be assumed that upon the completion of this special assignment and study, Mr. Bayless' activities and relationships to the School System and to the Board might again be as indicated in Exhibit A. ***"

It is also stipulated that Mr. Bayless is not part of the Custodian and Employees Unit of the Lawrence Township Teachers' Association but that his salary is determined by the Board on an individual basis. He was appointed for the 1973-74 school year by Board resolution, dated June 26, 1973, and his job category and salary range appear in the Board's salary guide for school administrators (annexed to the Joint Stipulation as Exhibit B).

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In the context of these stipulated facts, the issue herein may be succinctly stated: May respondent begin service, or continue to serve, on the Board, while her spouse is a Board employee; or do the facts, *ante,* when viewed *in pari materia,* with the statutes and the common law, present a conflict of interest which is so compelling as to bar such service? With respect to this issue, it is noted here that respondent has in fact begun her service on the Board. The service began at the Board's regular reorganization meeting in February 1974 in the absence of a determination by the Commissioner that such service was improper and because of an opinion by a hearing examiner appointed by the Commissioner who conducted an oral argument with respect to a Motion for Summary Judgment herein on February 21, 1974. At that time, in an oral opinion jointly accepted by the parties, the hearing examiner expressed the view that the manifest will of the voters of Lawrence Township should not be thwarted unless and until the kind of service by a Board member which is herein contested is found to be illegal by the Commissioner and, therefore, that respondent should be seated as a full member of the Board *pendente lite* without prejudice to the position of the Board. The hearing examiner also observed that there was a dearth of case law directly at point and that, by common knowledge, persons situated similarly to respondent were serving on local boards of education throughout the State.

The statute of primary reference herein, as noted, *ante,* is *N.J.S.A.* 18A:12-2 which provides in its entirety that:

> "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board."

In the Board's view, this statute specifically bars respondent from service on the Board since her husband is under "contract" to the Board and since she, as his spouse, has a direct and continuing interest in such contract. The Board avers that lack of interest in a "contract" or "claim" against the Board is a qualification for the very office of Board member; and, in support of this avowal, it cites *Visotcky v. City Council of Garfield,* 113 *N.J. Super.* 263 (*App. Div.* 1971). Further, the Board argues that it is axiomatic that a member of a local board of education holds office as a public trust in the public interest and that the common law and the principal statute of reference, *N.J.S.A.* 18A:12-2, disqualify participation by a Board member in the business of the Board if he or she has a substantial financial, "psychological," or "personal" interest in such business. In this regard the Board cites *Pressey v. Hillsborough Township,* 37 *N.J. Super.* 486, 491; *Aldom v. Borough of Roseland,* 42 *N.J. Super.* 495, 500 and in particular that section of *Aldom* wherein it is said:

> "The interest which disqualifies is not necessarily a direct pecuniary one, nor is the amount of such an interest of paramount importance. It may be indirect; it is such an interest as is covered by the moral rule: no man can serve two masters whose interests conflict. Basically the question is whether the officer, by reason of a personal interest in the matter, is placed in a situation of temptation to serve his own purposes to the prejudice of those for whom the law authorizes him to act as a public official. And in the determination of the issue, too much refinement

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> should not be engaged in by the courts in an effort to uphold the municipal action on the ground that his interest is so little or so indirect. ***
>
> "The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends on the circumstances of the particular case.***" (at pp. 502-503)

The Board also maintains that, although the relationship of spouses has been altered somewhat in recent years toward a status of more independence. "*** it is also clear that the marital relationship creates joint interests and loyalties that may transcend this new independence." (Brief of the Board, at p. 6) In support of this contention, the Board cites a letter written by Chief Justice Hughes to Superior Court Judge Geoffrey Gaulkin and his wife, Mrs. Ellen Gaulkin, which letter was reproduced in the New Jersey Law Journal on Thursday, January 17, 1974, and which stated in part:

> "*** The policy of the court, therefore, should not rest upon the supposition that the judge controls his wife (or in increasing instances, that the judge controls her husband). On the contrary, the necessity for the policy rests rather upon the factum of marital identity and the public image thereof. Even in these modern and permissive times, the general public feels that the marriage relationship is not merely a surface or convenient means to satisfy physical urges or procreate and raise children, but rather that it is a physical, emotional and intellectual partnership between two people, an ongoing enterprise in which the hearts, minds and interests of both parties are peculiarly joined and woven together into a single lasting fabric. The public expects a man to have a sympathetic interest in the work of his wife, and she in his. Indeed, a marriage in which each spouse is totally independent and disinterested in the vocational activities of the other is not likely to be a happy or satisfying one . . . "

Further the Board argues that in common law, and under the statute *N.J.S.A.* 2A:34-24, a husband has an obligation to support his wife and therefore, a wife has a substantial interest in the earnings of her husband.

In the Board's view, two prior decisions of the Commissioner with pertinence herein, although the relative positions of each spouse as employer and employee were reversed, were incorrectly founded and contrary to the decision of the Supreme Court in *Sturr v. Borough of Elmer,* 75 *N.J.L.* 703 and *Griggs v. Princeton Borough,* 33 *N.J.* 207, 219. The referenced decisions of the Commissioner, *Decker v. Board of Education of Berkeley Township,* 1959-60 *S.L.D.,* 57, and *Nichols v. Pemberton Township Board of Education,* 1938 *S.L.D.,* 48, have held that a married woman's earnings and property are hers alone and that the husband has no interest in, or control over, them.

Respondent acknowledges, in effect, that some conflicts of interest may arise during her service on the Board but that she could and would be compelled as a Board member to refrain from all discussions or actions which specifically involved her husband. However, she avers that the decision of the Commissioner,

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Decker, supra, is applicable in the instant matter and that a decision herein to the contrary "*** would be a violation of federal and state law requiring equality between the sexes." In her view, if it is true, as the Commissioner held in *Decker,* that a husband has no control over his wife's earnings, the reverse must also be true and required.

Further, she argues that her husband's present salary of $12,400 comprises only approximately two-tenths of one percent of the Board's total budget of $5,856,765 for the school year 1973-74 and is a "minimal amount" which should not disqualify her service as a Board member. While not disputing the determinations of the courts in *Visotcky* and *Aldom, supra,* respondent holds that the facts in those matters are not consistent with the facts of the instant matter, since the question in *Visotcky* involved one person who held two offices and the question in *Aldom* pertained to an interest covered by moral rule. Respondent avers that while the Court in *Aldom* set forth the principle that no man can serve two masters whose interests conflict, "*** this obviously cannot be held to apply merely because two people happen to be married. ***" (Letter Memorandum of Respondent, at p. 2)

Finally, respondent requests the Commissioner to "condemn" an alleged executive meeting of the Board wherein, it is alleged, there was included for discussion the possible conflict of interest of candidates for the Board. In support of a contention that such discussion was improper, respondent cites *Krejci v. Board of Education of the Township of South Hackensack,* 1938 *S.L.D.* 38. Respondent also states that her husband will soon retire and thus, with respect to her own alleged conflict of interest, the matter herein may soon be moot.

The Commissioner, however, finds no merit in these latter arguments. The Board took no action of its own which damaged respondent herein, but instead properly referred the matter as a controversy under the school laws pursuant to statutory prescription. *N.J.S.A.* 18A:6-9 Neither can it be held that the matter is not presently viable because of the possibility or probability of future occurrences.

The Commissioner has otherwise noted the facts of the instant matter in context with the contention of the parties and the citations of reference. At this juncture he observes that there is no difference between the parties herein on one essential point – there exists a potential for at least isolated, easily discernible conflicts of interest whenever a husband or wife sits as a member of a local board of education which employs his or her spouse. However, in the Board's view, such conflicts do not stand alone subject to an easy remedy – abstention from specific action – but instead, as part of a continuing and pervasive conflict involving both direct and indirect interest.

The Commissioner concurs with the Board in this regard. This concurrence is grounded in the fact that a local board of education in New Jersey is responsible for the "government and management" of the public schools of the State and for the "*** employment, regulation of conduct and discharge of its employees." (*N.J.S.A.* 18A:11-1) Each local board, and this Board, is thus an

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"employer" in the commonly accepted sense; but, with a specific stricture applicable as a public employer which has no comparable parallel in the private sector. This stricture, stated broadly, is that the primary loyalty of each member of a local board of education is to the whole of the electorate of his or her district and not to one person or group. Such loyalty must be total. The law (*N.J.S.A.* 18A:12-2) specifically says, in effect, that the loyalty is not total when the local board member is interested, either "directly or indirectly," in any "contract" to which the Board is a corporate party. (*N.J.S.A.* 18A:12-2) Certainly, a contract between the Board and an employee is such a contract as is mentioned in the statute. (*N.J.S.A.* 18A:12-2) The interest is apparent. The conflict is real. The Commissioner so holds.

This determination is grounded on a careful reading of certain opinions of the courts in the years subsequent to the Commissioner's prior determinations in *Decker* and *Nichols, supra,* and in the belief that current employer-employee relationships which are now more precisely defined in law, specifically by *Chapter* 303, *Laws* of 1968, demand that a public body which must negotiate the "terms and conditions" of employment, must be free of even the appearance of bias as it conducts the public's business.

In a decision of the Supreme Court of New Jersey, *Jones v. MacDonald,* 33 *N.J.* 133 (1960) the issue was whether or not an individual could serve as both the councilman of the Borough and a member of the County Board of Taxation. Thus, the circumstances differed from that herein, and the Court specifically stated that it was concerned with the common-law doctrine which prohibits a dual holding of incompatible offices. Nevertheless, it appears to the Commissioner that certain dicta of the Court in *Jones* are equally applicable herein and particularly those sections which speak of the general responsibilities and duties of those who hold public office. In this regard the Court said:

> "*** Public policy demands that an office holder discharge his duties with undivided loyalty. The doctrine of incompatibility is intended to assure performance of that quality. Its applicability does not turn upon the integrity of the person concerned or his individual capacity to achieve impartiality, for inquiries of that kind would be too subtle to be rewarding. The doctrine applies inexorably if the offices come within it, no matter how worthy the officer's purpose or extraordinary his talent. *DeFeo v. Smith,* 17 *N.J.* 183, 188 (1955).***" (at p. 135)

and,

> "*** The demands of the two offices are antagonistic in the area just described. Nonetheless defendant stresses the phrase, 'where one is subordinate to *** another,' in the excerpt above from *DeFeo* and urges accurately that here neither office is subordinate to the other in any sense of direct supervision. Of course subordination clearly evidences incompatibility, *cf. Lofland v. Hilton,* 80 *N.J.L.* 528 (*Sup. Ct.* 1910), even if the subordination is less than complete, as for example if the incumbent of one office may vote for an appointee to the other, *Wescott v. Scull,* 87 *N.J.L.* 410, 418 (*Sup. Ct.* 1915), or if the fiscal needs of one office are

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> within the control of the other, *DeFeo v. Smith, supra.* But the doctrine of incompatibility is not limited to instances of subordination as the quotation from *DeFeo* plainly reveals.***" (at p. 137)

and,

> "*** It is no answer to say that the conflict in duties outlined above may never in fact arise. It is enough that it may in the regular operation of the statutory plan. 'If the duties are such that placed in one person they might disserve the public interests, or if the respective offices might or will conflict even on rare occasions, it is sufficient to declare them legally incompatible.' *DeFeo, supra* (17 *N.J.*, at p. 189). See *Wescott v. Scull, supra* (87 *N.J.L.*, at p. 418). Nor is it an answer to say that if a conflict should arise, the incumbent may omit to perform one of the incompatible roles. The doctrine was designed to avoid the necessity for that choice. 'It is immaterial on the question of incompatibility that the party need not and probably will not undertake to act in both offices at the same time. The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices.' 42 *Am. Jur., Public Officers,* § 70, p. 936.***" (at p. 138)

A similar question concerned with dual office holding by one individual, as noted by the Court in *Jones, supra,* was considered in *DeFeo v. Smith,* 17 *N.J.* 183 (1955) in which the Court stated:

> "*** Even though neither the statutes nor the Constitution provides against it, our law on the subject is directively clear and emanates from *State ex rel. Clawson v. Thompson,* 20 *N.J.L.* 689 (*Sup. Ct.* 1846):
>
> '*** there is no express provision, either in the late or present constitution of this state, nor any legislative enactment declaring these offices incompatible; yet it does not follow, for that reason, that they are not so. There are many cases where two offices cannot be held by the same person; although neither the constitution nor the statutes have provided against it. Where there is no express provision, the true test is, whether the two offices are incompatible in their natures, in the rights, duties, or obligations connected with or flowing out of them. Offices, says Bacon, are incompatible or inconsistent, when they cannot be executed by the same person; or when they cannot be executed with care, and ability; or where one is subordinate to, or interferes with another, *Bac. Abr. Tit. Office K.* '***" (at p. 186)

Thus in these decisions the Supreme Court set forth certain principles with respect to the holding of two offices which, while not directly applicable to the facts herein, provide a frame of reference. The Commissioner, however, finds it particularly significant that the Court stated in *Jones, supra,* that it is not an answer to say, as respondent says in the matter, *sub judice,* that"*** if a conflict should arise, the incumbent may omit to perform one of the incompatible roles." (at p. 138) There should be no necessity for such choice on a continuing

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basis and where there is, as herein, because of a contract entered into by the Board, the Commissioner holds that the Board member's very membership on the Board is forfeit.

The pervasive and continuing nature of the possible conflicts in the instant matter appear to be evident. The possible conflicts extend not only through clearly discernible employer-employee relationships – the awarding of a salary – but to a myriad of peripheral but important subjects: insurance coverage of many kinds, sick leave policy, the way thermostats are set, the apportionment of money for supplies, a vacation leave plan, working hours and reporting schedule, etc. In each of these instances, a local school board member whose spouse is an employee of the board is forced to make decisions with a double impact – on the school system as a whole and on the one with whom he or she is joined in a "physical, emotional, and intellectual partnership" in the words of Chief Justice Hughes as reported, *ante*. The conflict of interest is real.

Nor is this holding mitigated by argument that other conflicts of interest are inherent in the very nature of the office of board member; *i.e.*, local board of education members must vote on school budgets which have a direct effect on their own tax effort, a board member with children in school is required to vote on a school calendar wherein his own vacation plans may be affected. The holding herein is not concerned with such occasional, required actions but with a continuing contractual relationship of man and wife – one an employee of a governing body on which the other sits.

In summation, the Commissioner holds that it is illegal and contrary to the statutory prescription, *N.J.S.A.* 18A:12-2, for either a man or a woman to serve as a member of a local board of education while his or her spouse is, by contract, a full-time employee of the same board. The conflict of interest, direct and/or indirect, is so apparent that there is the appearance of bias and, thus, such service is proscribed. *Jones, supra*

However, the Commissioner is cognizant of the wide ramifications such a holding would have if its sequel were a direction by the Commissioner that respondent's position was considered vacant or that it was to be considered vacant at some time in the future. By common knowledge, there are many persons similarly situated in the operations of the school districts of the State.

Accordingly, the Commissioner gives no such direction at the present time but instead proposes to submit this decision for direct review and consideration by the State Board of Education. However, in the event that the decision herein is affirmed by the State Board of Education, the Commissioner recommends that its effective date of implementation as it affects respondent and others similarly situated shall be the date of the next annual school election in February 1975.

COMMISSIONER OF EDUCATION

May 31, 1974

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In the Matter of the Election of Dorothy Bayless to the Board of Education of the Lawrence Township School District, Mercer County.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 31, 1974

For the Lawrence Township Board of Education, Smith, Cook, Lambert, Knipe & Miller (Thomas P. Cook, Esq., Special Counsel)

For Dorothy Bayless, Barbara Ann Kulzer, Attorney at Law

For the New Jersey Education Association, *Amicus Curiae,* Ruhlman and Butrym (Cassel R. Ruhlman, Jr., Esq., of Counsel)

For the New Jersey School Boards Association, *Amicus Curiae,* Allan P. Dzwilewski, Esq.

For the Intervenor, Jack Ittleson, *Pro Se*

On February 12, 1974, Mrs. Dorothy Bayless was elected to serve a three-year term on the Lawrence Township Board of Education, hereinafter "Board." Mr. Frederic W. Bayless, her husband, has been an employee of the same Board for seventeen years. His present, full-time position is Supervisor of Custodial Services.

Immediately after the election of Mrs. Bayless, but prior to her taking the oath of office, both Mrs. Bayless and the Board requested the then, Commissioner of Education to "*** review this matter in detail to determine whether or not Mr. Bayless' relationship to the Lawrence Board creates a conflict of interest that will prevent Mrs. Bayless from taking her seat on the Board.***" (Joint Submission and Stipulation, at p. 4)

The Board contends that such a circumstance, where a board member's spouse is employed on a full-time basis by the same board, constitutes a pervasive and continuing conflict of interest and is in contravention of the specific statutory prescription, *N.J.S.A.* 18A:12-2.

> "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board."

In the Board's view, *N.J.S.A.* 18A:12-2 specifically bars Mrs. Bayless from serving, since her husband is under contract to the Board, and since she, as his spouse, has a direct and continuing interest in that contract. The Board also avers that lack of interest in a contract is a qualification for the office of board of education member. Additionally, the Board contends that the very nature of

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the marriage relationship creates joint interests and loyalties which may transcend a spouse's independence. Further, the Board argues that a husband has an obligation to support his wife; therefore, a wife has a substantial interest in the earnings of her husband.

Mrs. Bayless denies that a substantial and disqualifying conflict of interest exists in the factual circumstances of her husband's employment. She avers that the voters of the school district were fully cognizant of such employment when they elected her to membership on the Board. (This was corroborated by Thomas P. Cook, Esq., special counsel to the Board, at the oral argument held before the State Board of Education on October 2, 1974.) She acknowledges that some conflicts of interest may arise during her service on the Board, but that she could and would be compelled to refrain from all actions which specifically involved her husband. Further, she argues that her husband's salary comprises a minimal amount of the total Board budget and should not disqualify her service.

On February 21, 1974, in an oral opinion jointly accepted by the parties, the hearing examiner, appointed by the Commissioner, expressed the view that the will of the voters should not be thwarted unless and until the service was found to be illegal by the Commissioner. Immediately thereafter, Mrs. Bayless took the oath of office and began service on the Board.

Subsequently, in his written opinion of May 31, 1974, the Commissioner determined that

> "*** it is illegal and contrary to the statutory prescription, *N.J.S.A.* 18A:12-2, for either a man or a woman to serve as a member of a local board of education while his or her spouse is, by contract, a full-time employee of the same board.***"

Because of the unique policy considerations involved in this matter, and mindful of the wide ramifications such a holding would have, the Commissioner presented the case directly to the State Board of Education for review and consideration.

Oral argument was heard on October 2, 1974, before the entire State Board of Education. The New Jersey School Boards Association and the New Jersey Education Association participated as *amici curiae*, and Mr. Jack Ittleson, *Pro Se,* participated as intervenor.

The State Board of Education is fully aware that this case presents for its review an issue of significance to all educators, the public at large, and local board of education members. The ramifications of the Commissioner's opinion, if sustained, will affect not only local board of education members currently serving terms of office, but potential candidates seeking office in the future.

It is undisputed that local board of education members play a real and essential role in the democratic process. They are representatives of the people

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and, without question, must place the public's interest foremost in their board activities. Nevertheless, board of education members are also private citizens, with private interests. As a result, conflicts do arise. The New Jersey Conflicts of Interest Law reflects such considerations as follows:

N.J.S.A. 52:13D-23(8)

> "*** under our democratic form of government public officials and employees should be drawn from all of our society, that citizens who serve in government can not and should not be expected to be without any personal interest in the decisions and policies of government; that citizens who are government officials and employees have a right to private interests of a personal, financial and economic nature; that standards of conduct should separate those conflicts of interest which are unavoidable in a free society from those conflicts of interest which are substantial and material, or which bring government into disrepute.***"

In the circumstances of the instant matter, we must determine whether the conflicting interest is substantially and materially sufficient to (1) disqualify Mrs. Bayless from holding her Board seat, or (2) whether she may continue to serve as a duly elected member of the Board, abstaining from participation in and voting on particular matters directly or indirectly affecting her husband.

As a Board, we understand that if we choose to solve this instant conflict of interest problem through disqualification, we may be creating another problem – abridgement of the right to hold public office. *N.J.S.A.* 10:1-1 sets forth this right as follows:

> "The right of citizens of this State to hold office or employment shall be coextensive with their right to vote, shall be equal as to all citizens and shall not be denied or abridged on account of sex or marital status. Such equal rights and privileges shall extend to all offices, boards, commissions or other public service in the State and its political subdivisions of whatever nature or kind.***"

Controversies dealing with infringement of the right to hold public office, coupled with disqualification of persons because of their marital relationship, must be severely and strictly scrutinized. To support such an infringement, and such a classification of persons, a compelling State interest is absolutely essential.

Because of the circumstances in this particular case, we have serious reservations concerning the recommendation as set forth by the then, Commissioner of Education. Rather, we believe, given the circumstances as set forth in the record of the instant matter, the remedy of the Doctrine of Abstention is adequate. Therefore, we reject the recommendation of the Commissioner of Education as embodied in his written opinion of May 31, 1974. We must caution that this decision of the State Board of Education pertains to the case of Mrs. Dorothy Bayless, solely, and that any future

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controversy involving a conflict of interest shall be reviewed and decided on its own facts and merits.

Mr. Paul J. Christiansen and Mr. Calvin J. Hurd dissented in this matter.

October 2, 1974 – Date of Decision
November 4, 1974 – Date of Service by Mail

In the Matter of the Election of Dorothy Bayless to the Board of Education of the Lawrence Township School District, Mercer County.

STATE BOARD OF EDUCATION

MINORITY OPINION

Decided by the Commissioner of Education, May 31, 1974

For the Lawrence Township Board of Education, Smith, Cook, Lambert, Knipe & Miller (Thomas P. Cook, Esq., Special Counsel)

For Dorothy Bayless, Barbara Ann Kulzer, Attorney at Law

For the New Jersey Education Association, *Amicus Curiae,* Ruhlman and Butrym (Cassel R. Ruhlman, Jr., Esq., of Counsel)

For the New Jersey School Boards Association, *Amicus Curiae,* Allan P. Dzwilewski, Esq.

For the Intervenor, Jack Ittleson, *Pro Se*

The Commissioner of Education, although expressing an opinion on the subject of this appeal, has submitted this matter directly to the New Jersey State Board of Education for direct review and determination because of the serious policy implications and wide ramifications involved.

His opinion should be adopted for the reasons expressed in it. The question involved is a most difficult one – whether, in view of the provisions of *N.J.S.A.* 18A:12-2 and other authority, such a conflict of interest exists in the service of a member on a local board of education by whom the person's spouse is employed so as to disqualify the board member from such service.

Questions are raised by the parties as to the right of the electorate to representatives of their own choosing on a public body and the right of the individual to serve on such a body. In a statewide system of education in which some district board members are elected and others appointed, the mode of

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selection cannot be persuasive in determining questions of conflict of interest. If the conflict is impermissible in the appointive situation, it is without sense to say that the conflict changes its character because the person was elected by voters. The voting procedure is not a cleansing mechanism in these circumstances. Nor is the right to serve an absolute one (See, for example, *N.J.S.A.* 18A:12-1 and 18A:12-3 and statutes hereafter cited.); but, one that must be discounted by the larger public interest in having members of governing entities free from direct and indirect influences that bespeak partiality in fact or in appearance. Statutes on the subject do not cover all situations, nor are they necessarily uniform. Some, for example, indicate that membership on public bodies calls for abstention in voting on matters where material gain to the member or employee could result from determinations[1]; some fix severe criminal or other penalties upon members or employees of governmental bodies for failure to abstain from voting on matters where material gain could result directly or indirectly[2]; and some statutes express the absence of any disability in dual-position situations.[3] There are others of various kinds which need not be detailed here to illustrate the complexity of the issue.

No statutes have been found which specifically cite marital relationship as the direct focus and basis of conflict of interest. Of significance, however, is the express finding and declaration of the State Legislature in addressing itself specifically to conflicts of interest with respect to all public officials and employees:

> "The Legislature finds and declares: (a) In our representative form of government, it is essential that the conduct of public officials and employees shall hold the respect and confidence of the people. Public officials must, therefore, avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.***" (*N.J.S.A.* 52:13D-12)

It expresses the ultimate need: That conduct of public officials should be free from conflict and the appearance of conflict.

The majority of the State Board has determined that the "doctrine of abstention" is a sufficiently curative remedy in this case, and has narrowly limited its holding to the facts of this case. But this approach may not meet the public need.

The marital relationship has long been tenderly regarded in law. Notwithstanding growing divorce rates, the attacks in some quarters upon the marital institution itself, and the increasing number of loose living arrangements which are in vogue as substitutes for the judicially recognized obligations of the marital contract, there is no indication that marriage with all of its concomitants, including inter-spousal dependence and interest, and family

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[1] *N.J.S.A.* 8A:2-1b and g; *N.J.S.A.* 18A:72A-4(h)

[2] *N.J.S.A.* 2A:135-7, -8; 18A:6-8; 18A:64-6.1, .2, and .3; *N.J.S.A.* 48:5A-31 and -51.

[3] *N.J.S.A.* 18A:6-8.4; *N.J.S.A.* 52:27B-69.1, .2, and .3.

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interests, does not have an effect on an individual's judgments and views. Nor is there any indication that the public holds a different view. (See letter, Chief Justice Hughes, *New Jersey Law Journal,* January 17, 1974.)

There is no doubt that many a local board member whose spouse is employed by the local board has rendered sound and effective services on the board and has made decisions without regard to marital interest. But in other cases, the nature of school government at the local level, where the governors are ever so close to the people affected, cannot help but give "the justifiable impression among the public" that the public trust, directly or indirectly, may be in danger of violation.

N.J.S.A. 18A:12-2 is clear in making any direct or indirect interest in a contract or claim against the local board, a basis for disqualification. It appears that the Legislature expressed this intent in enacting this statute as a part of Article 1 which deals solely with qualifications and which is so entitled. When we note that *N.J.S.A.* 2A:135-8c is clear in imposing heavy criminal liabilities against a board member "directly or indirectly interested in furnishing any goods, chattels, supplies or property to or for the *** school district," the strength of the policy becomes apparent.[4]

These considerations lead to the conclusion that in the sensitive and expansive area of educational government, which touches directly every individual, the need for the highest degree of rectitude, in appearance and in fact, should be urged.

CALVIN J. HURD

Board member, PAUL J. CHRISTIANSEN, joins in this opinion.

October 2, 1974 – Date of Decision
November 8, 1974 – Date of Service

[4]That the statute does not mention, in addition, "services" to the district under an employment contract with the board, makes no significant difference. The contractual interest in an employment situation is just as real, involving as it does, "directly or indirectly", pecuniary benefit.

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Board of Education of the Township of Berkeley,

Petitioner,

v.

Township Committee of the Township of Berkeley, Ocean County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Wilbert J. Martin, Jr., Esq.

For the Respondent, Lomell, Muccifori, Adler, Kearney & Ravaschiere (Leonard Lomell, Esq., of Counsel)

Petitioner, the Board of Education of the Township of Berkeley, hereinafter "Board," appeals from an action of the Township Committee of the Township of Berkeley, hereinafter "Committee," certifying to the Ocean County Board of Taxation a lesser amount of appropriations for the 1974-75 school year than the amount proposed by the Board and rejected by the voters in the annual school district election. The facts of the matter were presented at a hearing conducted on May 23, 1974 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school district election held February 13, 1974, the Board submitted to the electorate the following proposals for amounts to be raised by local taxation for the 1974-75 school year:

Current Expense --	$1,816,293
Capital Outlay --	9,100
Total	$1,825,393

The proposals were defeated by the voters and subsequently, pursuant to the statutory mandate, the Committee made its own determination of the amount of money required to operate the schools of the district in school year 1974-75. This determination was that the sum of $105,000 could be excised from the Board's proposed expenditures for current expense purposes but that the proposal for capital outlay expenditures should remain intact. Thus, the Committee's proposal may be shown as follows:

	Board's Proposal	Committee's Determination	Reduction
Current Expense	$1,816,293	$1,711,293	$105,000
Capital Outlay	9,100	9,100	--0--
Totals	$1,825,393	$1,720,393	$105,000

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In support of its determination, the Committee has listed specific budgetary items, which, in its judgment, could be reduced without harm to the district. These reductions are itemized in the following table:

Account Number	Item	Board's Budget	Committee's Proposal	Amount Reduced
211	Sal. Asst. Prins.	$ 66,800	$ 52,800	$14,000
213.1	Sal. Tchrs.	1,163,000	1,143,000	20,000
535	Trans.	25,300	16,300	9,000
730C	Noninstr. Equip.	12,800	800	12,000
	Total Reduction			$55,000

Additionally, the Committee proposes that the Board appropriate an additional amount of $50,000 from existing balances.

At the hearing, *ante,* and in written testimony, the Board has extensively documented its alleged need for a restoration of the full amount of the Committee's reduction, and the Committee, in turn, has set forth its own underlying determinations in opposition to the views of the Board. However, the hearing examiner finds no necessity to examine such argument in detail since it is clear that the Board has ample funds in unappropriated balances to secure all of the services and materials it avers it needs. In similar instances in former years the Commissioner has found his intervention to be inappropriate and unnecessary. *Board of Education of the Eastern Camden County Regional School District v. Borough of Berlin and Township of Voorhees, Camden County,* 1972 *S.L.D.* 523 A restoration of funds in such instances would not provide an alleviation of need but an inflation of plenty and, accordingly, cannot be recommended.

This determination is grounded on the basic fact that at the present juncture the Board has available to it in unexpended, unappropriated balances the total sum of approximately $200,000. (In a letter dated May 28, 1974 to the hearing examiner, the amount of such balances is estimated at $193,583.48 by the Superintendent of Berkeley Township Schools.) Such a sum of money, even if subject to the attrition of an expenditure of $105,000, is clearly sufficient to meet all of the Board's needs and particularly so in the context of testimony at the hearing, *ante,* that the largest use of unexpended balances in prior years has never exceeded $20,000 and has averaged only $10,000-$15,000.

Accordingly, the hearing examiner recommends that the determination of the Committee be allowed to stand.

* * * *

The Commissioner has reviewed the report of the hearing examiner and concurs with the recommendations contained therein. There is no evidence herein that the Board's efforts to operate a thorough and efficient school system in the Township of Berkeley during school year 1974-75 will be impaired if the

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Committee's determination is allowed to stand and, in fact, the evidence leads to a contrary conclusion.

In such a circumstance the Commissioner finds no reason to substitute his discretion for that of the Committee. *Board of Education of East Brunswick Township v. Township Council of East Brunswick Township,* 48 *N.J.* 94 (1966)

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

June 11, 1974

Barbara Gertner, an infant by her guardians, Mr. and Mrs. Lee Gertner; Beverly Baram, an infant by her guardians, Mr. and Mrs. Samuel Baram; and Deborah Van Pelt,

Petitioners,

v.

Board of Education of the Borough of Elmwood Park, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Winne and Banta (Robert M. Jacobs, Esq., of Counsel)

For the Respondent, Bartlett & Turitz (Stanley Turitz, Esq., of Counsel)

Petitioners, pupils enrolled in the senior class of the Elmwood Park High School, aver that they have been improperly and illegally denied their entitlement to participate in the graduation exercises of their class by an action of the Elmwood Park Board of Education, hereinafter "Board," and, therefore, that such entitlement should be restored to them forthwith. The Board denies any impropriety or illegality in its conduct with respect to petitioners and requests the Commissioner of Education to dismiss the Petition of Appeal.

A hearing in this matter was conducted on June 7, 1974 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

In effect, this matter is submitted for direct Summary Judgment by the Commissioner on a set of stipulated facts to which both parties agree. These facts may be succinctly recited as follows:

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1. Each of the three petitioners, herein, was suspended five times during the 1973-74 school year for class "cutting" violations. The fact of the cutting violations is not questioned and it is admitted by petitioners that school officials met with them and their parents after each of the first four occurrences.

2. It is also admitted that they were warned, after the fourth such violation of school rules, that another infraction of such rules would result in an indefinite suspension or expulsion from school.

3. Notwithstanding such warnings, petitioners each cut class a fifth time; and thereafter one of the petitioners was suspended for an "indefinite period of time," and two of petitioners were informed that they were to be "dropped from the rolls." (Attachments to Petition of Appeal)

4. There was no hearing before the Board prior to the time such actions were taken; although, the subsequent suspensions lasted for three weeks in two instances and five weeks in a third.

5. On May 13, 1974, however, all three petitioners were afforded a hearing by the Board, and, at the conclusion, petitioners were informed that they would be reinstated in school as of May 14, 1974, but that they would not be allowed to participate in graduation exercises.

These are the primary stipulated facts with pertinence to the instant matter. Petitioners also maintain that at the hearing of May 13, 1974, *ante,* the Board failed to have present witnesses, who were adverse to petitioners, failed to provide an opportunity for cross-examination of such witnesses, and failed to furnish copies of records and reports on which the Board's decisions were based. The Board does not deny such avowals, but finds no error, therein, since the factual truth of the alleged delinquencies, the cutting of classes, was not in doubt and thus, not the subject of proofs.

Petitioners now contend that their extended suspensions from school attendance were based on fatally defective procedures, and that the Board's decision to bar them from graduation exercises represents an unjust, excessive, and unreasonable penalty. In support of their view with respect to procedural defects, petitioners cite *Scher v. Board of Education of West Orange,* 1968 *S.L.D.* 92; *R.R. v. Board of Education, Shore Regional High School,* 109 *N.J. Super.* 337 (*Ch. Div.* 1970); and *Tibbs v. Board of Education, Township of Franklin,* 114 *N.J. Super.* 287 (*App. Div.* 1971), affd. 59 *N.J.* 507 (1971).

The Board avers that the legality of the cited suspension is not at issue herein; but, instead, that the only issue for presentation to the Commissioner is whether or not the denial of graduation privileges represents an excessive punishment. In the Board's view, its ultimate decisions, which were grounded in the recommendations of school administrators, were wholly consonant with its responsibility for the government of its schools and offered no evidence of an arbitrary, capricious, or unreasonable punishment inflicted on petitioners.

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Therefore, the Board argues, the Commissioner may not substitute his discretion for that of the Board. In support of this view, the Board cites *Boult v. Board of Education of Passaic,* 136 *N.J.L.* 521 (1948).

* * * *

The Commissioner has reviewed the report of the hearing examiner, and the contentions of the parties, and it is noted that the basic and fundamental cause for petitioners' present predicament was no isolated action of carelessness, but a repeated, knowing, and deliberate violation of the rules of their school with respect to class attendance. On five separate identified occasions, they not only violated such rules, but disregarded the admonitions of school administrators and defied the authority of the Board to expel them from further attendance. (See *N.J.S.A.* 18A:37-2) Having violated and abused their privilege to a free, public education, petitioners plead, nevertheless, at this juncture, that the privilege of a graduation award ceremony should not be denied.

The Commissioner finds no merit in such a plea. The Board has fully restored petitioners to their full academic programs and the simultaneous decision to withhold a public award privilege is entirely justified in the interests of an orderly and efficiently operated school system in the Borough of Elmwood Park. The Commissioner so holds. While the Commissioner has said in the past that he does not favor frequent suspensions as a means of discipline, such deliberate violations of school rules as evidenced herein leave few alternatives available and the one ultimately chosen by the Board cannot be held, in such circumstances, to be inappropriate.

As the Commissioner said in *Gustave M. Wermuth and Sylvia Wermuth, as Natural Parents and Guardians for Marsha Wermuth, a Minor Under the Age of 16 v. Julius C. Bernstein, Principal of Livingston High School, and Board of Education of the Township of Livingston, Essex County,* 1965 *S.L.D.* 121:

> "*** An effective school is an orderly one, and to be so it must operate under reasonable rules and regulations for pupil conduct. Unacceptable behavior must be restrained and discouraged and when necessary appropriate deterrents and punishments must be employed for purposes of correction and to insure conformity with desirable standards of conduct.***" (at p. 129)

The fundamental fact herein is that the Board has exercised its own discretion to impose what it regards as just such an effective "deterrent" against future abuse. Such discretion may be exercised by the Board pursuant to the statutory prescription which confers on the Board the responsibility for the "government" and "management" of its schools (*N.J.S.A.* 18A:11-1) and will not be upset by the Commissioner absent a showing that the discretion has been abused:

> "*** When an administrative agency created and empowered by legislative fiat acts within its authority, its decision is entitled to presumption of correctness and will not be upset unless there is an affirmative showing that such discretion was arbitrary, capricious or unreasonable.***"

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Thomas v. Morris Township Board of Education, 89 *N.J. Super.* 327, 328 (*App. Div.* 1965)

The Commissioner holds there is no such showing herein. Despite delays, petitioners were ultimately offered, and received, a hearing before the Board. The Board restored to them their fundamental and primary entitlement to complete their educational program. In such circumstance, the Commissioner finds no reason to substitute his discretion for that of the Board with respect to a lesser penalty since the lesser penalty that the Board found appropriate is not a concomitant privilege to an academic enrollment, but a privilege separate and apart. *John H. Bartlett, Jr. v. Board of Education of the Township of West Orange,* 1938 *S.L.D.* 697

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

June 10, 1974

"S.A.," a minor, by his parent,

Petitioner,

v.

Board of Education of the Township of South Orange-Maplewood, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Edward Applegate, *Pro Se*

For the Respondent, Lieb, Wolff & Samson (David Samson, Esq., of Counsel)

Petitioner, the father of a handicapped, seventeen-year-old pupil enrolled in the public schools of the Township of South Orange-Maplewood, avers by original Petition of Appeal filed May 11, 1973, that his son, hereinafter identified as "S.A.," was not afforded an educational program suitable to his needs. The Petition was subsequently amended in written form and, following a conference of counsel held on September 7, 1973, a hearing in the matter was set down for December 11, 1973. However, this hearing was adjourned at the request of counsel for the Board of Education, and a subsequent hearing scheduled for January 8, 1974, was cancelled at petitioner's request. There followed a long period of delay during which the Petition was not moved forward by petitioner.

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Subsequently, a hearing was held on May 21, 1974 before a hearing examiner appointed by the Commissioner of Education at the office of the Morris County Superintendent of Schools, Morris Plains. The report of the hearing examiner is as follows:

The conference of counsel in this matter was held on September 7, 1973, as noted, *ante,* and the following agreements were reached:

***

"1. It is stipulated that petitioner's son is not suspended from school.

"2. There is some question about whether or not the Board's program for his education in school year 1973-74 is one which is suitable to his needs. In order to resolve this question the hearing examiner directed counsel for the Board to:

"(a) refer the question for resolution to the district's Child Study Team.

"(b) report the determined judgment of this team to petitioner and the hearing examiner within 10 days of this date.

"3. It is the understanding of the hearing examiner that petitioner's son will remain out of school pending this decision by the team.

"September 7, 1973"

Pursuant to such agreement, S.A. did remain out of school for a period of time, but on October 25, 1973, petitioner was informed that the Board had decided to place S.A. in an educational program with instruction on a "one-to-one" basis. This instruction did in fact begin, according to testimony at the hearing, *ante,* on November 12, 1973, and S.A. continued to be enrolled in such program through the date of November 26, 1973; however, it now appears that during the last few days of this enrollment he may have been absent. In any event, according to the testimony of school officials, his work in the program was satisfactory.

Thus, it is clear that from the beginning of the school term in September 1973 through the date of November 26, 1973, a period of approximately seventy days, S.A. was considered to be, and was an enrolled pupil in the schools of South Orange-Maplewood. It is equally clear from the record that during all of this time he was classified as a handicapped pupil. (Case Summary, at p. 14)

Such facts are significant, since at the hearing of May 21, 1974, petitioner moved to further amend his Petition and introduced documents to prove that, in fact, S.A. had been inducted on November 24, 1973 into the United States Air Force for a period of active duty and had served continuously from that point forward to the fourteenth day of March 1974. (P-1, P-2) On the basis of this service, rendered during the course of what might be considered a "senior year"

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(S.A. will be eighteen years of age on June 16, 1974), petitioner claims that S.A. is entitled to an appropriate diploma pursuant to the statutory prescription of *N.J.S.A.* 18A:36-17. It is stipulated that if such diploma, of the type awarded by the Board of Education to handicapped pupils, is awarded to S.A., petitioner will withdraw other claims which are contained in the larger Petition.

The hearing examiner accepted such amendments to the Petition of Appeal in oral form at the hearing, *ante*, and recommends that this request and claim of petitioner be considered by the Commissioner. The statute of reference, *N.J.S.A.* 18A:36-37, provides in its entirety as follows:

> "Any pupil or student who has completed or shall complete the work of the junior year in any of the public high schools or educational institutions and who heretofore and subsequent to July 1, 1940, entered, or hereafter in time of war, shall enter the active military or naval service of the United States or the active service of the United States merchant marine or the active service of the women's army corps, the women's reserve of the naval reserve or any similar organization authorized by the United States to serve with the army or navy, or the active military or naval service of the Dominion of Canada, or who in time of emergency heretofore entered or hereafter shall serve on active duty with the armed forces of the United States, and who continued or shall continue to attend the regular sessions in any of the public high schools or educational institutions until 21 days prior to such entry and whose school work has been satisfactory until 21 days prior to such entry, shall be given credit for the work of the complete senior year without examination, and shall be entitled to and receive the diploma, certificate, degree, or other credentials or standings awarded to those pupils or students of the school or institution who have satisfactorily completed the work of the said senior year.
>
> "As used in this section the term 'in time of emergency' shall mean and include any time after June 23, 1950, and prior to the termination, suspension or revocation of the proclamation of the existence of a national emergency issued by the president of the United States on December 16, 1950, or termination of the existence of such national emergency by appropriate action of the president or congress of the United States."

It is noted, however, that the Board of Education has opposed this application for a diploma on the principal ground that S.A. had not been in an active program of education for the full period of twenty-one days prior to his induction into the armed forces.

* * * *

The Commissioner has considered the report of the hearing examiner in this matter and it is noted that, for seventy days during the period of September through November 1973, S.A. was either awaiting placement in an educational program as a handicapped pupil, or was actively and satisfactorily engaged in such a program. In the Commissioner's judgment, such facts justify a conclusion

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that the requirements of the statute (*N.J.S.A.* 18A:36-17) have been met, and that S.A. is entitled to the diploma which he seeks.

Therefore, the Commissioner of Education directs that such diploma, appropriate to the accomplishments of S.A. as a handicapped pupil, be awarded to him by the Board of Education of the Township of South Orange-Maplewood.

COMMISSIONER OF EDUCATION

June 7, 1974

Brooklawn Education Association,

Petitioner,

v.

Board of Education of the Borough of Brooklawn, Camden County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Ruhlman and Butrym (Cassel R. Ruhlman, Jr., Esq., of Counsel)

This matter having been brought before the Commissioner of Education by Cassel R. Ruhlman, Jr., Esq., attorney for the Brooklawn Education Association, hereinafter "Association"; and

It appearing that the central issue brought forward is the propriety of an action taken by the Board of Education of the Borough of Brooklawn, hereinafter "Board," by which its scheduled April recess was reduced by three days to compensate for the closing of its schools on January 2, 3, and 4, 1974 by directive of the State Board of Education; and

It appearing that the relief sought by the Association is for the Commissioner, pursuant to the provisions of Assembly Bill No. 1258, to order the Board to close its schools on June 11, 1974 instead of June 14, 1974, thereby recovering the three days by which the original April recess was reduced; and

It appearing that this action was presented to a representative of the Commissioner on Friday, June 7, 1974, at 10:00 a.m., a period of only four calendar days prior to the requested early termination of the school year and only two school days prior to the proposed effective date; and

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It appearing that such period of time is insufficient on its face to provide an orderly and effective readjustment of the myriad details of school closing procedures; therefore

It is determined by the Commissioner of Education that the Petition of Appeal brought forward herein is untimely and, accordingly, such Petition is hereby dismissed.

COMMISSIONER OF EDUCATION

July 7, 1974

In the Matter of the Annual School Election Held in the School District of the City of Camden, Camden County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for candidates for three seats on the Board of Education of the City of Camden, hereinafter "Board," at the annual school election held February 13, 1974, were as follows:

	At Polls	Absentee	Total
Eluria Milliken	2,016	3	2,019
Ralph A. Franco	1,933	–0–	1,933
Joseph Cupparo	1,892	3	1,895
Bernard Carter	1,066	–0–	1,066
Otis D. Jackson	988	–0–	988
Charles Ferrara	572	–0–	572
Benjamin Sease Ortiz	484	–0–	484
Ruth Ann Conley	470	3	473
Walter Kirk	202	–0–	202
Wendy Paynter	80	–0–	80

Pursuant to charges of irregularities filed by Candidates Carter and Jackson, hereinafter "petitioners," by letter dated February 19, 1974, an inquiry was conducted by a representative of the Commissioner of Education on March 4, 1974 at the Camden County Board of Elections Office, Camden. From the testimony heard and the documentary evidence received the following facts were elicited.

When the polls were declared open at the Parkside School polling place at 2:00 p.m., the single voting machine could not be operated. At approximately 2:15 p.m., the attorney for petitioners telephoned the Board Secretary to inform him that the voting machine was inoperative at the Parkside School polling place. (Tr. 64) The Board Secretary telephoned the County Board of Elections and informed the custodian of voting machines of the situation. (Tr.

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65, 93) The custodian told the Board Secretary that if one of the election board workers would telephone him from the polling place, he probably could explain over the telephone the proper instructions for making the voting machine operative. The Board Secretary then telephoned the attorney for petitioners and informed him that the custodian would provide the necessary instructions to the election board members working at the Parkside School. The custodian received a telephone call at approximately 2:20 p.m. from a person at the Parkside School who was not an election board member, reporting that the machine was not operating. The custodian immediately sent his assistant to the polling place to examine the voting machine. (Tr. 93-94) The attorney for petitioner telephoned the Board Secretary again to state that the voting machine was still inoperative, and the Board Secretary immediately sent the assistant secretary to the Parkside School. (Tr. 65) The Board Secretary remained in his office in order to be available to the thirty-eight polling places being utilized for the school election. (Tr. 65) At approximately 2:45-3:00 p.m., the assistant custodian from the County Board of Elections arrived at the polls, immediately followed by the assistant secretary. Shortly thereafter, two other technicians arrived at the polling place from the County Board of Elections.

The assistant custodian of voting machines discovered that the seal connected to the knob on the top of the voting machine had been broken. The white tag, normally attached to the seal by a short length of wire, was lying on the top of the voting machine. The printing on this white tag reads: *"WARNING - ELECTION OFFICER* - Do not break seal until the *POLLS HAVE CLOSED" (Emphasis in text.)* The Board Secretary was informed by a telephone call from the assistant secretary and the assistant custodian of voting machines that a replacement voting machine would have to be delivered to the Parkside School voting place. (Tr. 66) The assistant custodian also telephoned the custodian of voting machines and reported the same information to him. (Tr. 94) The custodian instructed his assistant to remain at the Parkside School until he could speak to the registrar of elections and receive further instructions. (Tr. 94) The Board Secretary telephoned the registrar of elections and was informed that, since one truck was delivering a voting machine in the southern part of Camden County, the trucking company would be called to provide another vehicle to transport a voting machine to the Parkside School. (Tr. 66-67)

The custodian of voting machines telephoned the registrar at approximately 3:20 p.m. and requested instructions in regard to the situation at the Parkside School. (Tr. 83, 94-95) The registrar directed that a replacement machine be delivered to the Parkside School as soon as the trucking company had a vehicle available. (Tr. 83) The custodian telephoned the trucking company at approximately 3:30 p.m. in order to have the replacement machine delivered. (Tr. 95) In the meantime, the custodian began to prepare another voting machine for delivery by installing the ballot information for the Camden school election. (Tr. 83) The registrar also telephoned the trucking company several times to determine when a vehicle would be available to transport the voting machine. (Tr. 84) At approximately 5:00 p.m., the registrar received a telephone call from the custodian reporting that the replacement voting machine was being loaded at the Election Board warehouse for delivery to the Parkside

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School. (Tr. 84) The voting machine was delivered to the Parkside School polling place at approximately 5:15 p.m. (Tr. 68, 108)

At approximately 4:00 p.m. the Board Secretary arrived at the Parkside School, and shortly thereafter he prepared a sealed cardboard box to be used as a ballot box. (Tr. 67-68) Voters were given blank white cards and plain white envelopes and instructed to write the names of no more than three candidates on the card, and to write either "yes" or "no" for each of the three proposals listed on the official sample ballot. The sample ballot was displayed for this purpose. The cards were then sealed and dropped into the cardboard carton used as a ballot box.

One of the allegations made by petitioners is that the inoperative voting machine could have been repaired at the polling place. Both the registrar and the custodian of voting machines testified that they believed at the time that the voting machine could be repaired. However, the standing rule is: when the seal on a voting machine is broken before the polls are closed, the machine must be immediately replaced in order to avoid the possibility of tampering.

An examination of the inoperative voting machine at the warehouse disclosed that the seal connected to the knob on the top of the voting machine had been broken and removed, and the knob had been turned clockwise until it clicked and locked in place. This action, in effect, locks the entire mechanism of a voting machine, and a machine cannot be made operative until it is returned to the warehouse where the master key must be used to unlock a machine. Therefore, it was determined at the inquiry that the voting machine could not have been made operative by the assistant custodian who went to the Parkside School voting place, and the machine did have to be replaced.

The correct procedure for opening a Shoup voting machine is described on a long sheet of paper which has both printed instructions and picture diagrams. (Exhibit E-1) These instructions are provided to election board members who work at polling places. To open a machine, two keys must be inserted in keyways located on the top of the machine. The keys are provided in a small manila envelope. The keys are turned clockwise a quarter of a turn. Immediately to the left of the two keyways is a vise handle, and to the left of the vise handle there is a knob. After the keys are turned, the vise handle must be turned counter-clockwise as far as it will go which is about one-half of a revolution. The keys are then removed, and the voting machine is operative.

At the close of the polls, the two keys are reinstated and again turned clockwise as far as they will go. Then the seal on the knob must be broken, and the wire which passes through the knob must be removed. The knob is turned clockwise until it locks in place with an audible click. The machine is then permanently locked and inoperative. The last operation is to turn the vise handle clockwise as far as it will go. This raises the ballot and exposes the returns on the face of the machine. Both keys are then sealed in the machine by this action and cannot be removed. Only the master key kept in the warehouse can unlock the voting machine after the foregoing operations have been performed.

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Before the polls at the Parkside School were opened at 2:00 p.m., three of the four election board members were present - the judge of elections plus two others. One of the election board workers testified that she stood on a chair and inserted the two keys in the voting machine. She testified that the white tag was lying on the top of the machine but that she did not see the wire and seal. She testified that she tried to turn the knob until she could hear a click, but she could not turn it. Her exact testimony is as follows:

> "***Well, I couldn't -- I didn't have enough in me that day to hear that, to turn it to make it click or else it was something in there***. It just wouldn't click for me. So, I called Mrs. Nichols to help me. ***So, when she got up there, then she clicked it. We got it to click and we got down and *** I was certain by hearing this click that it was open.***" (Tr. 18-19)

Both the custodian of voting machines and his assistant testified that prior to the election, they inspected all the voting machines to be used at the thirty-eight polling places and tested each machine three times. After these tests, each machine was sealed, and the numbers of each machine, the paper roll number, the white seal number, the red seal number, and the protective counter number were recorded on a ledger. (Tr. 98) An inspection of this ledger by the Commissioner's representative discloses that the following information was recorded:

District 13C Machine No. 39430
Paper Roll No. 133473
Protective Counter No. 08269
Seal No. (White) 122639
Seal No. (Red) 122680

The last four items listed above were also recorded on the small manila envelope containing the two keys for voting machine #39430. This envelope accompanied the machine when it was delivered to the Parkside School polling place.

Petitioners testified that they did not receive written notice from the County Board of Elections of the time and place where the election machines could be examined prior to the school election, as required by *N.J.S.A.* 18A:14-42.

The registrar testified that the ballots for the school election were not delivered by the printer until Friday, February 8, 1974, and, since Tuesday, February 12, 1974, was a legal holiday, the two technicians did not have sufficient advance time to prepare the voting machines for the school election held February 13, 1974; therefore, the candidates were not notified regarding the inspection of the machines. (Tr. 88-89)

Petitioners also questioned why three of the four election board workers

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listed for the Parkside School polling place were not the same persons who actually worked there on school election day.

Testimony from two of the Parkside School election board workers disclosed that four election board workers were present but normally eight would have been provided. One worker testified that she worked even though she had an abscessed tooth because she discovered several days prior to the election that several workers were ill and several others could not work on February 13, 1974 for other reasons.

Testimony by the personnel clerk for the County Board of Elections established that there was great difficulty obtaining sufficient numbers of election board workers prior to the school election. She testified that, on Monday, February 11, 1974, she was still making arrangements to secure election board workers, even though she had mailed cards on January 2, 1974, asking election board workers to respond immediately and report their availability. (Tr. 109-113)

Petitioners allege that the Camden Board of Education erred in not extending the hours that the polls at the Parkside School were open, in view of the difficulty with the voting machine. The Board Secretary testified that, on the day of the election, he asked the Board's attorney for a legal opinion as to whether the Parkside School polls should be kept open after 9:00 p.m. as a result of the voting machine problem. He testified that the Board's attorney advised against such a course of action. (Tr. 76-77) The Board Secretary further testified that the attorney also advised against opening the ballot box and counting the paper ballots at the conclusion of the school election. (Tr. 78)

Two of the election board workers at the Parkside School polls testified that the use of paper ballots did not hinder the election, and only one voter who received a voter authorization form failed to vote at the polling place. (Tr. 47) These election board workers also testified that no poll list was maintained in accordance with *N.J.S.A.* 18A:14-48. (Tr. 32)

An examination of the replacement voting machine which was used from approximately 5:00 to 9:00 p.m. at the Parkside School disclosed that 115 persons cast ballots on that machine. Candidate Carter received 94 votes and Candidate Jackson received 101 votes. A count of the twenty-three paper ballots removed from the sealed ballot box by the Commissioner's representative disclosed that Candidate Carter received eighteen votes and Candidate Jackson received nineteen votes. The addition of these votes to the totals received by Candidates Carter and Jackson does not change the totals sufficiently to affect the outcome of the school election.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the record in the instant matter, including the findings of fact made by his representative.

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From the record before him, the Commissioner finds and determines that the defect in the voting machine at the Parkside School was accidentally caused by the attempts of the election board members to open the machine. The record supports the conclusion that inadvertently the knob was turned instead of the vise handle, thus permanently locking the voting machine mechanism. This machine is still impounded and cannot be reset and made operative until the master key is used to unlock the machine's mechanism.

Although it was unfortunate that the circumstances in this instance resulted in a delay until approximately 5:15 p.m. before a replacement voting machine was delivered and made operative, the Commissioner can find no evidence of intentional wrongdoing or conspiracy on the part of any of the participants, as alleged by petitioners.

The Commissioner determines that the following irregularities did occur at the school election held February 13, 1974:

1. insufficient provision was made by the Board of Education to have the necessary number of trained election board workers available for the school election as required by *N.J.S.A.* 18A:14-6;

2. the election board workers at the Parkside School polling place did not maintain a poll list as required by *N.J.S.A.* 18A:14-48, and the Board of Education did not provide such a poll list as required by the same statute;

3. the Board of Education did not provide written notice to the candidates of the time and place when the voting machines could be examined in accordance with *N.J.S.A.* 18A:14-42;

4. the County Board of Elections did not have available the prescribed ballot boxes for use in just such an emergency as required by *R.S.* 19:48-7; and

5. the Board of Education and the election board workers were wrong in not counting the paper ballots cast, in accordance with *R.S.* 19:48-7.

The Commissioner notices that *N.J.S.A.* 18A:14-42 provides that the use of voting machines and the duties of election workers in school elections shall be the same, with certain exceptions set forth therein; as in elections held pursuant to Title 19, Elections, of the Revised Statutes. Therefore, the breakdown of the voting machine in the instant matter required compliance with *R.S.* 19:48-7, including the use and counting of unofficial ballots.

In the future, the Commissioner advises this Board and all other local boards of education, to plan ahead in anticipation that such election problems as hereinbefore described might occur, even though such occurrences are relatively rare in number. The optimum situation is, of course, to be prepared for any eventuality in order that all citizens participating in an annual or special school election may cast their ballots in an orderly procedure with a minimum of delay and inconvenience. (*N.J.S.A.* 18A:14-4.1)

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In the judgment of the Commissioner, the Board was correct in not extending the hours of the school election at the Parkside School polling place. There were thirty-eight polling places, and at 9:00 p.m. the election workers at each polling place began to count election returns. Had the Board attempted to keep the Parkside School polls open after 9:00 p.m., the possibility would have been great that voters in that district would have known some of the results from other polling places throughout the school district. Such a circumstance would be inimical to a fair election procedure. Also, the provisions of *N.J.S.A.* 18A:14-45 prescribe that the polls "shall be" open between the hours of 5:00 and 9:00 p.m. and any additional time which the Board may designate between 7:00 a.m. and 9:00 p.m. Polls may remain open after 9:00 p.m. only for the period of time necessary to permit those present at the closing of the polls to cast their ballots. The intention of the statute is clearly to permit those voters present in the polling place at 9:00 p.m. to cast their ballot, but no additional voters may enter the polling place after 9:00 p.m. Therefore, the Board had no authority to extend the hours of the election beyond 9:00 p.m., even had it so desired.

The Commissioner finds no grounds to void this school election because of the inoperative voting machine or the irregularities which did take place. Although the incident was unfortunate with its consequent delay for some voters and loss of opportunity to vote by others, it cannot be clearly shown that the inoperative voting machine or the other irregularities had a direct bearing on the ultimate result of the election. The same inconvenience was suffered by all voters who appeared at the polling place while the machine was inoperative. It is a fair inference that some were able to remain and cast paper ballots, some may have returned later and voted, and others could not wait or return and failed to cast a ballot. There is, however, no way to ascertain what number of votes would have been cast for which candidates had the machine not malfunctioned. Even assuming, *arguendo*, as do petitioners, that they would have received a preponderance of votes and a greater number of votes at the Parkside School polling place had no problem occurred, there is no proof that they would have received a sufficient number of additional votes from this polling place to change the final election result. Stated another way, there is no proof in the record that the will of the people was thwarted in the school election as the result of the problems herein described.

Accordingly, the Commissioner determines that Eluria Milliken, Ralph A. Franco and Joseph Cupparo were elected to three-year terms on the Board of Education of the City of Camden at the annual school election held February 13, 1974.

COMMISSIONER OF EDUCATION

June 12, 1974

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Bridgewater-Raritan Education Association, Inc. and John F. Heeckt,

Petitioners,

v.

Board of Education of the Bridgewater-Raritan Regional School District, Somerset County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioners, Ruhlman and Butrym (Cassel R. Ruhlman, Esq., of Counsel)

For the Respondent, Blumberg, Rosenberg, Mullen and Blackman (William B. Rosenberg, Esq., of Counsel)

This matter having been opened before the Commissioner of Education (Joseph F. Zach, Deputy Assistant Commissioner, Division of Controversies and Disputes) by Cassel R. Ruhlman, Jr. Esq., attorney for petitioners, by a Petition of Appeal filed May 16, 1974, and an Answer having been filed on May 31, 1974, by William B. Rosenberg, Esq., attorney for the Board of Education of the Bridgewater-Raritan Regional School District, hereinafter "Board," oral argument was heard on the Commissioner's own Motion on Tuesday, June 11, 1974, at the State Department of Education, Trenton; and

It appearing that the precise issue before the Commissioner is the propriety of the action taken by the Board at a meeting held January 22, 1974, whereby the Board shortened its scheduled April recess by three days, namely, April 17, 18, and 19, 1974, in order to compensate for the closing of its public schools on January 2, 3, and 4, 1974, by directive of the State Board of Education; and

It appearing that the relief sought by petitioners is an order by the Commissioner directing the Board to close the public schools on Tuesday, June 18, 1974, instead of Friday, June 21, 1974, thereby recovering the three days by which the April recess was reduced, in accordance with *c.* 11, *L.* 1974; and

It appearing that final examination for pupils are scheduled to be held on June 14, 17, and 18, 1974, and that the preparation of final grades and report cards is scheduled to be completed in order that pupils may receive these academic achievement reports on June 20, 1974, and that the high school graduation ceremonies are scheduled to be held on June 19, 1974, and intermediate school promotion exercises will be held on June 20, 1974; and

It appearing that Friday, June 21, 1974, is not a school day for pupils, and that only teaching staff members are now scheduled to report for duty on June 21, 1974; therefore

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The Commissioner finds and determines that the relief requested by petitioners, if granted, would be disruptive of the total educational process to a degree which would cause a chaotic and unmanageable result. Pupils cannot be required to undergo final academic examinations under the conditions sought by petitioners, and the myriad details which require attention to properly close the academic year, including the preparation of pupils' final scholastic achievement reports, could not be properly and adequately treated.

The Commissioner must attempt to enforce the Legislative determination set forth in *c.* 11, *L.* 1974, concurrently and in harmony with the constitutional requirement that each local board of education provide a thorough and efficient system of public education. In the judgment of the Commissioner, the matter herein controverted contains a set of circumstances which preclude the possibility that both objectives can be accomplished. Accordingly, the Commissioner will grant relief to petitioners which will not, in his judgment, violate the mandate of the people of this State as set forth in the organic law, for a thorough and efficient system of education.

For the reasons stated, the Commissioner directs the Board of Education of the Bridgewater-Raritan Regional School District to close the public schools at the end of the school day for pupils on Thursday, June 20, 1974, when the teaching staff members have completed all necessary duties, instead of Friday, June 21, 1974, as previously scheduled.

Entered this 12th day of June, 1974.

COMMISSIONER OF EDUCATION

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New Milford Education Association,

Petitioner,

v.

Board of Education of the Borough of New Milford, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Ruhlman and Butrym (Cassel R. Ruhlman, Esq., of Counsel)

For the Respondent, Lester Aaron, Esq.

This matter comes before the Commissioner of Education as the result of an Order to Show Cause issued on June 7, 1974, based on a duly verified complaint filed by the New Milford Education Association, hereinafter "Association," against the New Milford Board of Education, hereinafter "Board." On June 12, 1974, the return date of the Order, the parties appeared before a representative of the Commissioner and presented their respective positions. The entire record of this matter is now before the Commissioner for his determination.

It appearing that on December 13, 1973, the Board acted to comply (C-2) with the directive of the New Jersey State Board of Education in regard to the closing of the public schools because of the energy crises on January 2, 3, and 4, 1974; and

It appearing that on December 13, 1973, the Board also acted to extend its original 1973-74 school calendar (C-1) by three days to compensate for the three days its schools were directed to close during January by the State Board; and

It appearing that this action of the Board alters the original school closing date (C-1) for pupils from June 21, 1974 to June 26, 1974, and alters the original school closing dates (C-1) for teachers from June 24, 1974 to June 27, 1974; and

It appearing that on April 2, 1974, Assembly Bill No. 1258 (*P.L.* 1974 *c.* 11) was signed into law; and

It appearing that *P.L.* 1974 *c.* 11 provides, *inter alia:*

"***

"1. The days of January 2, 3, and 4 of 1974 during which schools were closed in this State by order of the State Board of Education shall for all

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purposes including State aid be considered as days when schools were open and facilities provided.***"

and

It appearing that the Commissioner has on prior occasions addressed the legislative intent of *P.L.* 1974 *c.* 11 in *Westfield Education Association v. Board of Education of the Town of Westfield, Union County,* 1974 *S.L.D.* (decided April 16, 1974), and *Toms River Education Association v. Board of Education of Toms River Regional School District, Ocean County,* 1974 *S.L.D.* (decided May 21, 1974); and

It appearing that the administrative schedule adopted for the final weeks of school closing would not be significantly affected if the relief requested herein were to be granted; now therefore

The Commissioner finds and determines that that action of the New Milford Board of Education taken on December 13, 1973, in which it altered the closing dates of its schools for summer recess for both its pupils and teachers is *ultra vires* and is hereby set aside. *Toms River Education Association, supra*

Accordingly, the Commissioner directs the New Milford Board of Education to rescind that action taken by it on December 13, 1973, and further directs the New Milford Board of Education to adhere to its original school closing dates of June 21, 1974 for pupils and June 24, 1974 for its teachers.

COMMISSIONER OF EDUCATION

June 14, 1974

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Hillsborough Education Association,

Petitioner,

v.

Board of Education of the Township of Hillsborough, Somerset County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Ruhlman and Butrym (Cassell R. Ruhlman, Esq., of Counsel)

For the Respondent, Nathan Rosenhouse, Esq.

This matter comes before the Commissioner of Education as the result of an Order to Show Cause issued on June 7, 1974, based on a duly verified complaint filed by the Hillsborough Education Association, hereinafter "Association," against the Hillsborough Board of Education, hereinafter "Board." On June 12, 1974, the return date of the Order, the parties appeared before a representative of the Commissioner and presented their respective positions. The entire record of this matter is now before the Commissioner for his determination; and

It appearing that the Board complied with the directive of the New Jersey State Board of Education in regard to the closing of its schools on January 2, 3, and 4, 1974 because of the energy crises; and

It appearing that the Board acted at its March 1974 meeting to revise its scheduled Easter recess from six days to one day thereby recouping the three days from its January closing in addition to two other days not in dispute herein; and

It appearing that the Board subsequently granted another day for the Easter recess which then provided for a two-day recess; and

It appearing that the relief sought by the Association pursuant to *c.* 11,*L.* 1974 is to have the school calendar shortened by two days from June 24, 1974 to June 20, 1974 for teachers and from June 20, 1974 to June 18, 1974 for pupils to compensate for the days added to the Easter recess by virtue of the schools closing in January; and

It appearing that final examinations are scheduled for the high school between June 12, 1974 and June 18, 1974; and

It appearing that on June 19 a review of the examinations is scheduled between the pupils and the teachers; and

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It appearing that a staff workshop to be conducted by a math specialist for teachers assigned to grades kindergarten through eighth is scheduled for June 21, 1974; and

It appearing that the Superintendent avers (C-1) that report cards and grade assignments for next year would not be ready if the school year is curtailed; and

It appearing that field trips for the elementary schools are scheduled for June 17, June 18, and June 19, 1974; therefore,

The Commissioner finds and determines that the relief requested by petitioner, if granted, would be disruptive of the total educational process to a degree which would cause a chaotic and unmanageable result.

The Commissioner must attempt to enforce the legislative determination set forth in *c.* 11, *L.* 1974, concurrently and in harmony with the constitutional requirement that each local board of education provide a thorough and efficient system of public education. In the judgment of the Commissioner, the matter herein controverted contains a set of circumstances which preclude the possibility that both objectives can be accomplished. Accordingly, the Commissioner will grant relief to petitioners which will not, in his judgment, violate the mandate of the people of this State as set forth in the organic law, for a thorough and efficient system of education.

For the reasons stated, the Commissioner directs the Board of Education of the Township of Hillsborough School District to close the public schools for pupils at the end of the school day for pupils on Thursday, June 20, 1974 as previously scheduled, and on Friday, June 21, 1974, for teachers, when the teaching staff members have completed all necessary duties.

Entered this 14th day of June, 1974.

COMMISSIONER OF EDUCATION

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**In the Matter of the Tenure Hearing of Dominic Parisi,
School District of the City of Elizabeth, Union County.**

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board of Education, O'Brien, Daaleman, Liotta and Muscatello (Raymond D. O'Brien, Esq., of Counsel)

For the Respondent, Weiner, Mirabelli and Glennon (Dominick A. Mirabelli, Esq., of Counsel)

The Board of Education of the School District of the City of Elizabeth, hereinafter "Board," has certified a single charge against respondent, a tenured principal in its employ, pursuant to the statutory prescription found in the Tenure Employees Hearing Law. *N.J.S.A.* 18A:6-10 *et seq.* In the Board's judgment such charges, if proven true in fact, would be sufficient to warrant dismissal or reduction in salary.

A hearing in the matter was conducted by a hearing examiner, appointed by the Commissioner of Education, at the office of the Somerset County Superintendent of Schools, Somerville, on March 25, 1974. The report of the hearing examiner follows:

The original complaint was signed and submitted by the mother of "V.B.," on November 7, 1973, and stated that she had been informed that:

> "*** on Wednesday, October 31, 1973 the school principal Dominick (sic) Parisi, together with a school aide, Donald Naylor, held down my daughter's hands to her side and cut a braid of hair from her head. ***" (Exhibit A)

Subsequent to the receipt of this accusation the Superintendent conducted three days of inquiry beginning November 12, 1973 for the purpose of determining the facts in order that a recommendation might be made to the Board regarding the complaint.

It was agreed at a pre-hearing conference of counsel in the instant matter, that the Commissioner would accept certain limited sworn testimony of one secretary and certain teachers of Battin High School relative to the school performance of V.B. for the purposes of the present adjudication. Such testimony is found on pages 79 through 129 of the transcript of the Superintendent's inquiry, marked Exhibit E. On December 13, 1973, the Superintendent presented the following written charge to the Board:

> "*** Mr. Parisi has conducted himself in a manner unbecoming a principal in the following situation:
>
> "*** On October 31, 1973, Mr. Parisi cut a braid of hair from the head of

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[V.B.]. Mr. Parisi indicated that said action was taken without malice and stated that such action resulted from 'joking.' During this time Mr. Parisi admitted that he was brandishing a pair of scissors above [V.B.'s] head and making snipping motions with the same and that the cutting of the hair was 'accidental.' Mr. Parisi also admitted that he had given [V.B.] five dollars to repair such damage to her hair.

"*** it is the opinion of the Superintendent of Schools that although such action may have been 'accidental' the procedure and activities on the part of the principal which resulted in the incident were improper and unbecoming a principal.

"I should also indicate to the Board that charges in this matter were also made against Mr. Donald Naylor, teacher assistant at Battin High School. During the course of the fact-finding sessions Mr. Parisi and Mr. Naylor, appearing under oath and as recorded in the transcript of the hearings, testified that Mr. Naylor was not present in the room when said incident occurred and denied participation in the same. It is the opinion of the Superintendent of Schools that sworn testimony does not support the charges against Mr. Naylor and that charges have not been substantiated to date.***" (Exhibit F)

Thereupon, on December 13, 1973, the Board made its determination and by resolution certified the above charge to the Commissioner.

Testimony at the hearing established that V.B. was an eleventh-grade pupil at the all-girl 1500 pupil Battin High School, assigned to a tenth-grade homeroom because of a deficiency of earned credits. Erratic behavior prompted numerous visits to the office of the principal. Yet, withal, she was not a pupil with severe disciplinary problems. V.B. testified that on October 31, 1973, she was summoned by the principal during her sixth-period physical education class. While she was in the principal's office, Mr. Parisi used a large pair of scissors to cut off a ten-inch braid of hair (P-1) which projected upward from the top of her head. This was done, she testified, while her arms were immobilized by Mr. Parisi and Donald Naylor, a teacher assistant at Battin High School. Thereafter, she testified, Mr. Parisi stated that he was sorry he had cut her hair, and offered her $5.00 from his wallet, which she refused. She further testified that he placed the $5.00 in her pocketbook (P-2), and that she left in an agitated state of mind for her seventh-period class, after which she returned to her home and reported the incident to her mother.

It was testified by Donald Naylor that he had been working in a nearby office when the incident took place and, hearing loud laughter, stepped into the principal's office intending to quiet V.B. (Tr. 80) However, he testified that, at the moment he entered, V.B. sat in stunned silence, her hair having already been cut (Tr. 85-86), whereupon he withdrew from the scene. (Tr. 88) He denied having ever forcibly held V.B. while the principal cut her hair. (Tr. 72) This was later corroborated by the principal. (Tr. 134)

Dominic Parisi testified that he has been at Battin High School since 1961,

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first as a language teacher and for the past three school years as principal. He testified that on numerous occasions he had counseled V.B. regarding certain problems that had arisen in her classes and elsewhere throughout the school. He alleged that a rapport had grown between them that was recognized by the staff in that they frequently made reference to V.B. as "your friend" (Tr. 125), and that there was no irony or sarcasm implied therein. (Tr. 126) He further testified that on October 31, 1973, he had summoned V.B. to his office to query her about the origin of certain vulgar words placed on a blackboard in her homeroom that morning (which were in no way attributed to V.B.). (Tr. 132) The principal testified that he, noticing her unaccustomed and unique hairdo consisting of a number of tightly braided and bound radiating ponytails, said, "I'm going to cut your hair." (Tr. 132) He stated that, in a playful manner with shears in hand, he pretended to set about cutting it while she remained seated before him, whereupon she unexpectedly lurched and the hair was cut. He said he was stunned at what he had done by accident, and he apologized and offered her $5.00 to help fix her hair. (Tr. 133-134) In making reference to the incident he readily referred to it as an "unbecoming" act (Tr. 135) done on "that unfortunate day." (Tr. 131) He testified that thereafter, on the next day, he in timely fashion made the incident a matter of report, whereupon the Assistant Superintendent directed that a conference be set up with V.B., her parent, the principal, and himself. Such a conference was held. In retrospect, the principal stated:

> "*** I was really shocked that this happened because I didn't have it in my mind to do a thing to this young lady or to anybody in a school where we had other girls wearing —– that were wearing African hairdo (sic) and I never called anybody in. It wasn't my business.***" (Tr. 133)

The Superintendent testified at the hearing that, with the exception of the incident which by its nature required close scrutiny there was no other blight upon the record of the principal. In this regard he stated:

> "*** Other than this particular incident, there has been no question in my opinion as Superintendent of Schools with regard to Mr. Parisi's professional effectiveness and professional responsibility in the operation of the high school.*** [W]e look with a great deal of favor upon the manner in which he conducted the high school *** and the Board of Education felt that he was doing an exceptionally good job.***" (Tr. 140)

and,

> "*** Mr. Parisi admitted that he had cut the hair. He stated that it was accidental and *** I felt that the position of a principal joking with a girl in a senior high school and snipping a scissor above her head was improper conduct and I so ruled. ***" (Tr. 141)

The hearing examiner notes that Battin High School is composed of twenty-five percent black pupils, as well as large numbers from Spanish and other minority ethnic groups. It is evident that respondent has earned and enjoyed a warmth and rapport with pupils, parents, and staff that is

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commendable. That such is so is shown by the introduction into evidence of a petition relative to the instant matter signed by eighty-seven Battin High School staff members expressing support and confidence in their principal as a highly concerned and dedicated educator. (R-1) Such is likewise expressed in a letter to the Board (R-2) by the current past president of the Battin High School P.T.A. and in a similar letter (R-3) from members of the Executive Board of the Battin High School P.T.A., which reads as follows:

> "*** Although we cannot condone such an incident we consider it an impulsive act and not done with any malice or intent to harm. Mr. Parisi is a man who has given much of himself to the students of Battin High School. He has labored for many years for the benefit of all our children. We also feel this incident, at least in part, was due to Mr. Parisi's well known concern for his students. He does not stand aloof from them and his door is always open to listen to their problems. If he were the type principal who shunned contact with his students this incident would never have occurred.
>
> "Any attempt to magnify this incident will only exacerbate the situation and could cause irreparable harm to a respected man and an outstanding principal. ***"

In summary, the hearing examiner finds that respondent is responsible as charged for the act of improperly cutting a braid from the head of V.B. Regardless of intent, the inescapable fact remains that the pupil's hair was cut. However, the credible evidence fails to establish that V.B. was forcibly restrained. He further finds that this act stands alone in an otherwise unblemished record of service to the Board for a period of time in excess of twelve years. It remains for the Commissioner to determine whether the above act constitutes "unbecoming conduct" within the intendment of *N.J.S.A.* 18A:6-10, and if such finding be in the affirmative, what penalty, if any, shall properly be imposed upon respondent.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record and the report of the hearing examiner in the instant matter, and observes that no objections, exceptions, nor additions thereto have been filed by respective counsel for the Board and respondent. However, a third attorney who was present at the hearing on behalf of the complainant herein, the mother of the pupil identified as V.B., has objected to a decision of the hearing examiner which, in effect, denied complainant standing to prosecute her own complaint, and conferred the responsibility for such prosecution on the Board.

Such objection was contained in a letter dated May 24, 1974, addressed to the Commissioner of Education, wherein the Commissioner is requested to reopen this matter "*** so that additional evidence and argument can be made

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on the issue of appropriate punishment." (Letter of attorney for complainant, at p. 2)

The Commissioner cannot agree with such objection, nor accede to such a request, since it is the local board of education alone, which, upon certification of a charge against a tenured employee, pursuant to the statutory prescription (*N.J.S.A.* 18A:6-10 *et seq.*), must bear the burden for prosecution of the charge on behalf of all the citizens of the community. The Commissioner so holds.

This holding is consistent with prior decisions of the Commissioner in such matters. In the decision on request to intervene, *In the Matter of the Tenure Hearing of Kathleen M. Pietrunti, School District of the Township of Brick, Ocean County,* 1972 *S.L.D.* 387 the Commissioner was confronted with a request for intervention which was similar to the one herein. The Commissioner denied the request and said:

> "*** II. The Board of Education does represent the whole of the Brick Township Community ***
>
> "III. The request, if allowed as a precedent, will unnecessarily complicate and delay this and future tenure hearings before the Commissioner. All such proceedings tend to be lengthy under present circumstances and can only add a further dimension of time.***"

and,

> "*** The statutes are replete with evidence that the Legislature intended the local board of education to be truly representative of the needs of all of the people of the State's respective communities***. Numerous *** statutes detail the nature of that representation from election to office, to action in 'public' meetings, and to dismissal of tenure employees ***. How then, can there be logic in an argument that some or many members of a given community have interests separate and apart from those of their elected representatives?
>
> "In the Commissioner's view, such an argument is wholly divisive of the authority granted to the board and is clearly *ultra vires* when, as herein propounded, a group seeks to channel a charge and the 'evidence' in support of it directly to the Commissioner independent of the required 'determination' by the Board of Education.***" (Unpublished decision)

Accordingly, the Commissioner affirms the action of the hearing examiner which conferred the responsibility for the prosecution of the charge herein on the Board of Education alone and, conversely, he rejects a request by complainant that this matter be reopened for the presentation of additional evidence or argument regarding an "appropriate punishment." The evidence is already conclusive. The penalty must be determined by the Commissioner. *N.J.S.A.* 18A:6-10 *et seq.*

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The record in this matter contains clear and convincing proof, supported by respondent's own testimony, that respondent did in fact cut a braid of hair from the head of V.B. While such proof is tempered by the finding that there was no evidence of forcible restraint, the fact that the act was committed remains. The Commissioner concludes that such an action does constitute conduct unbecoming a professional teaching staff member employed in the public schools, and so holds. It remains then to assess an appropriate penalty for this conduct.

In this regard, respondent's prior record must be considered and it is observed that such record stands unblemished for a period of approximately twelve years. Accordingly, the considerations herein are similar to those enumerated by the Commissioner of Education *In the Matter of Frederick L. Ostergren, School District of Franklin Township, Somerset County,* 1966 *S.L.D.* 185 wherein the Commissioner said:

> "*** The Commissioner has also kept in mind the penalties imposed in other cases brought before him in which teachers inflicted physical indignities upon pupils. In *Fulcomer, supra,* he upheld the dismissal of the teacher. In *Nickerson, supra,* there was no dismissal or loss of pay. The Commissioner finds significant differences between these two cases and the matter herein. The circumstances under which the episode occurred, its provocation, the nature of the incident itself, the age of the pupil, the teacher's record, his attitude and the prognosis for his continued effective performance and usefulness in the school system, varied materially in these cases. In the Commissioner's opinion each such matter must be judged in the light of all of the circumstances. The kind and degree of penalty will necessarily vary also according to the particular problem.***" (at p. 188)

Similarly herein, the Commissioner has considered all the circumstances and determines that the maximum penalty to be assessed should be a reduction in salary, and that an appropriate reduction would be an amount of one twenty-fourth of the annual salary payable to respondent by the Board of Education during the 1973-74 school year.

COMMISSIONER OF EDUCATION

June 17, 1974

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Parents, on behalf of "G.S.,"

Petitioners,

v.

Board of Education of the Borough of Rockaway, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Eugene M. Friedman, Esq.

For the Respondent, James, Wyckoff, Vecchio & Thomas (Joseph J. Vecchio, Esq., of Counsel)

Petitioners, parents of a ten-year-old boy, hereinafter identified as G.S.," aver that the Board of Education of the Borough of Rockaway, hereinafter "Board," has refused, and continues to refuse to reimburse them for tuition costs borne by them for the education of their son during the 1972-73 school year. Wherefore, they request the Commissioner of Education to determine that such reimbursement is properly and legally due them. The Board denies such liability and maintains its actions in this matter are, and have been, in full accord with the applicable statutory prescription and rules of the State Board of Education.

A hearing in this matter was conducted on January 29, 1974 at the office of the Morris County Superintendent of Schools, Morris Plains, by a hearing examiner appointed by the Commissioner. Subsequently, petitioners filed a Memorandum of Law, and the Board filed a Brief. The report of the hearing examiner is as follows:

G.S. was enrolled in the Rockaway Borough School District in 1968 as a kindergarten pupil, and his enrollment continued into the 1969-70 school year. (Tr. 11) At some time during the 1969 school year he was classified as being "emotionally disturbed" (Tr. 14) and, thereafter, during school year 1970-71 he was enrolled by his parents as a pupil in the Wilson School, a private institution. (Tr. 15) This school was not approved during that school year or in school year 1971-72 for the placement of pupils at public school expense, and all costs for the education of G.S. during those two years were borne by petitioners.

However, in the spring months of 1972 petitioners heard, or were apprised of the fact, that the Wilson School had been approved as a private school by the State Department of Education and was, therefore, eligible to receive public school pupils at public expense if such pupils were assigned to the school by a local board of education. (Tr. 17) Whereupon, petitioners contacted Rockaway school officials in June 1972 (Tr. 121) to inquire about procedures they should follow to have the tuition costs for the education of G.S. paid by the Board for school year 1972-73. The mother of G.S. talked directly to the coordinator of

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the Board's Child Study Team (Tr. 121) According to this official's testimony, he told her that if G.S. were registered in the Rockaway school system, she could expect that he would be given a public school placement in the fall in a special class for handicapped children. (Tr. 121) In this respect, he testified, he was "almost positive" this would be the case. (Tr. 121)

Petitioners did not immediately thereafter register G.S. in the Rockaway School District, but on August 15, 1972, the mother of G.S. did appear at the school offices and did complete the requisite registration form. (P-2) Thereafter, on or about August 21, 1972, the school received a "Pre-School Physical Examination" form (P-3) which had been completed by petitioners' family physician.

At that juncture, the required registration procedure had been accomplished. However, when the Rockaway public schools opened for the fall term on September 9, 1972 (Tr-23), G.S. did not present himself to any of its schools, nor did petitioners call the schools for direction. Neither did the Board's school officials call or communicate in any way with petitioners prior to that date or immediately thereafter. In fact, the record is barren of any contact at all between the parties in controversy herein in either oral or written form, in the interval of time between August 15, 1972 at which time the mother of G.S. had appeared at the school offices to complete the registration documents (P-2), and September 11, 1972. On that date a contact between the parties herein was made by telephone, but no further contact was made between them in writing until September 29, 1972, on which date the Board addressed the following letter to petitioner:

> "This is to advise you that your son [G.S.] has been accepted in Denville's class for young neurological impaired children with average or above average intellectual potential.
>
> "Will you please advise us concerning the date on which you expect to enroll [G.S.] so that we can make arrangements for his transportation." (P-1)

Petitioners promptly thereafter appealed such proposed placement by letter dated October 9, 1972, which also requested, *inter alia*:

> "*** we ask your cooperation in refraining from such a commitment date at this time. For the best interest of all concerned, we certainly hope to have this matter cleared up as quickly as possible." (R-1)

In fact, G.S. never did attend the class in Denville to which he was assigned by the Board's letter of September 29, 1972 (P-1) but, instead, continued in enrollment at the Wilson School where he had been placed by petitioners, without knowledge of the Board, on September 14, 1972. (Tr. 23, 95)

While the Board had no knowledge of this placement by petitioners on September 14, 1972 until later in the month, and then by chance (Tr. 95),

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neither did the Board communicate many of its own actions to petitioners during the total period here involved. These actions by the Board were significant and, along with other data, may be related concisely in chronological form as follows:

Subsequent to the visit of the mother of G.S. to the Rockaway administrative offices on August 15, 1972, the Director of Special Services contacted the Wilson School and asked that the records of the boy be sent to him. This request was made on August 17, 1972. (Tr. 87)

On August 18, 1972, the Director of Special Services called the Denville schools to see if placement was available there for G.S. in a special class for neurologically impaired children. (Tr. 88)

On September 11, 1972, the parties herein were in brief telephone contact (Tr. 88), which evidently was concerned only with the transmittal of records. On September 12, 1972, the records arrived in the Rockaway schools' offices from the Wilson School. (Tr. 89)

On September 14, 1972, the Director of Special Services met with petitioners to discuss a possible placement of G.S. in the Denville schools. (Tr. 89)

On September 19, 1972, members of the Rockaway Child Study Team visited the Wilson School, according to testimony of the Director of Special Services, "*** to see if it was adequate and comparable to the Denville situation ***." (Tr. 91) Additionally, on September 19, 1972, the Child Study Team was notified by the Denville schools that G.S. would be accepted in that school system as a tuition pupil, and a "social history" of the boy was "taken" from the mother of G.S. (Tr. 93) Subsequently, on an indeterminate date, the Child Study Team decided that G.S. should be placed in the Denville school class on the grounds that it was "suitable" for him. (Tr. 92)

On September 22, 1972, a learning disabilities specialist tested G.S. (Tr. 94)

On September 27, 1972, the Director of Special Services called the mother of G.S. and told her that the Denville schools had accepted G.S., but according to the official's testimony, such placement was deemed not acceptable. (Tr. 94) According to the mother of G.S., the placement of her son should have been continued in the Wilson School because:

> "*** There was a program that was working for [G.S.] that we felt was more than adequate and we just felt that he should remain in this situation.***" (Tr. 36)

> "*** plus I had also taken [G.S.] for a psychological evaluation and this psychologist had felt that it was very important for him to remain in his present situation.***" (Tr. 51)

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The psychologist of reference did not testify at the hearing.

This completes a narrative recital of pertinent facts as educed from documents submitted in evidence and testimony elicited at the hearing, *ante.* However, it may also be said that the Child Study Team employed by the Board is a complete one consisting of a psychologist, learning disabilities specialist employed full-time, social worker, speech therapist, school doctor, and a psychiatrist employed on a part-time basis or on call. (Tr. 109) The work of the Team is coordinated by the Director of Special Services (a school administrator), and the members of the team most involved with the classification of G.S. included this official, the psychologist, and social worker. (Tr. 116)

There is no argument herein about the adequacy of the proposed placement of G.S. in the special class in the Denville Schools or the qualifications of its teacher. (Tr. 92) Neither is there argument over the present classification of G.S. as neurologically impaired. (Tr. 15)

In the context of such facts and testimony, the issues of this case may now be set forth as they were delineated at the conference of counsel held prior to the hearing, *ante.*

(1) Was G.S.'s enrollment ever consummated in a legal sense? (2) Was G.S. properly scheduled for placement in a special education facility for the 1972-73 school year by the Board? If he was not, what relief should the Commissioner afford? (3) Was the Board's authority exercised herein in an incorrect manner?

With respect to such issues petitioners maintain the Board knew, or should have known, that G.S. was a handicapped pupil and that, prior to the opening of school in September 1972, specific plans should have been made for him and an "educational plan" developed. They assert that they did everything the school required as a prerequisite for the registration of G.S., but they aver that in the absence of a specific class assignment, they could not merely have sent him to school on the first day. In their words:

> "*** Fairness requires that, in this context, the child be considered as enrolled in the Rockaway School System.***" (Memorandum of Petitioners, at p. 3)

Petitioners then argue, in effect, that since the Board failed to notify them of an appropriate placement for G.S. prior to the opening of school, the Board had an obligation to allow him to remain in the placement decided upon and deemed most appropriate by them; *i.e.,* placement in the Wilson School and payment of tuition costs involved. In this view, the proposed transfer of G.S. in the circumstances "***clearly was incorrect, improper and an abuse of direction and would have been particularly abusive to the child's condition.***" (Memorandum of Petitioner, at p. 4) In support of this avowal and their prayer for relief, they cite *Traurig v. Board of Education of Livingston, Essex County,* 1971 *S.L.D.* 260; aff. State Board of Education 266.

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The Board, on the other hand, maintains that G.S. was never formally and finally enrolled in the Rockaway schools since he failed to put in even one appearance subsequent to the time his registration had been submitted to school officials and, thus, had not complied with the criteria which defines pupil enrollment as contained in the administrative code. This rule is set forth in *N.J.A.C.* 6:20-1.2 as follows:

> "(b) No pupil attending a public school operated by a board of education shall be enrolled in more than one school register in any school district during a school year. *Such pupil shall be enrolled as of the first day of attendance for that year." (Emphasis the Board's.)*

Further, the Board maintains, this view is buttressed by the provision of *N.J.A.C.* 6:28-1.8 which states:

> "(a) Local boards of education shall be responsible for the identification of handicapped children between the ages of five and 20 who are residents of their school district and *are not attending nonpublic schools.***" (Emphasis the Board's.)*

Nevertheless, the Board avers, *arquendo,* that its procedures and determinations controverted herein were legally correct in the circumstances, and that (1) its Child Study Team proceeded expeditiously to review the records and classification of G.S. and to secure a suitable placement for him; (2) such a placement was secured in a public school which the Board asserts is to be preferred over private school placement; and (3) the rejection of this placement by petitioners bars them at this juncture from the relief they now seek.

In the Board's argument, it did nothing herein that it was not empowered to do and avers that its determination based upon the recommendation of its legally constituted Child Study Team must be given effect. In support thereof, the Board cites *Ruth and Lawrence Lange v. Board of Education of the Borough of Hi-Nella, Camden County,* 1959-60 *S.L.D.* 65; *Parents of "K.K." v. Board of Education of the Town of Westfield, Union County,* 1971 *S.L.D.* 234.

The hearing examiner has reviewed such arguments in the context of all the facts of this matter, and it noted that petitioners' assignment of responsibility to the Board herein rests on a simple proposition; namely, that the Board did not act quickly enough to classify, develop a program for, and place their child in the summer of 1971 and that, therefore, they were entitled to place him in a school of their choosing, and keep him there, at public expense. The hearing examiner finds no merit in such an argument.

Of prime importance in this regard is that petitioners, by their own testimony (Tr. 17, 86), knew "*** [t]owards the end of the school year of [1971] 1972 ***" that the Wilson School was to be categorized as an approved school, and yet from that time forward to August 15, 1972, they took no positive and final action to register G.S. in the public schools of the Rockaway district in order that the Child Study Team of that district might have a fair opportunity to assess the advisability of the placement of G.S. in the Wilson

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School or in an alternative setting. The delay of petitioners in this regard approximated a period of more than two months. The Board cannot be charged with unreasonable delay when, at the very onset of the busiest period of the school year, it was suddenly informed on August 15, 1971, that petitioners had finally decided to re-enroll G.S. in the Rockaway school system. The hearing examiner finds that the Board cannot be so charged and, in fact, that there was not significant delay.

A succinct reiteration of the facts is sufficient to confirm this point.

Registration of G.S. was effectuated on August 15, 1971, and completed on August 21, 1971 with submission of medical data although a record of the achievements of G.S. in the Wilson School was not received in Rockaway until September 12.

Within one week of that latter date the Director of Special Services had met with petitioners to discuss possible placement for G.S. (Tr. 89), tests had been administered (Tr. 94), members of the Child Study Team had visited Wilson School (Tr. 91), and an appropriate placement for G.S. had been found in the Denville schools. (Tr. 93) Such facts contradict and render a nullity the charge that the Board delayed, but that school officials acted with expedition to place G.S. promptly in an appropriate educational program.

Even assuming, *arquendo,* that this was not the case, the hearing examiner could not find that fault lies with the Board herein since it is clear from the record, in the context of applicable law, that G.S. was never "enrolled" in the legal sense in the Rockaway School System for the 1971-72 school year. He never appeared or was presented at the schoolhouse door on any occasion, although he was not "temporarily" excluded as he could have been by statutory prescription. *N.J.S.A.* 18A:48-16 Thus, he was not "enrolled" according to the definition set forth in the rule (*N.J.A.C.* 6:20-1.2) which predicates an enrolled status on the fact that there must be a "first day of attendance."

While petitioners argue that G.S. could not be sent to school, absent written notice from the Board of a placement for him, there is no requirement in law known to the hearing examiner in this regard.

The statute which also applies to the instant matter requires that the "parent" (or other person responsible for the child) shall "cause such child regularly to attend the public schools" (*N.J.S.A.* 18A:38-25) and [s]uch regular attendance shall be during all the days and hours that the public schools are in session ***." *N.J.S.A.* 18A:38-26

Accordingly, having found that G.S. was never legally enrolled in the schools of the Borough of Rockaway during the school year 1971-72, and absent any violation of law or abuse of discretion by the Board, the hearing examiner recommends dismissal of this Petition and its prayers for relief. Petitioner chose to enroll G.S. in a private school and, while they are free to so choose, there is no entitlement for the payment of such enrollment costs from public funds.

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Parents of "K.K." v. Board of Education of the Town of Westfield, Union County, supra.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, the report of the hearing examiner, and the exceptions thereto as filed by counsel pursuant to *N.J.A.C.* 6:24-1.16.

The Commissioner determines that petitioners, parents of G.S., without the sanction or knowledge of the Board, elected to re-enroll G.S. in the Wilson School on September 14, 1972. Accordingly, it is petitioners' responsibility to bear the cost of tuition in such private school placement as they deemed advisable for the continuing education of their child.

It is clearly shown that petitioners delayed presenting their request to enroll G.S. in the Rockaway schools until August 15, 1972. In timely fashion, the Director of Special Services on August 17, 1972, requested that the Wilson School forward the records of G.S., and on August 18, 1972, sought information from the Denville schools pertinent to placement availability in a proper class setting. Such timely action is indication of good faith. It must, however, be recognized that the subsequent weeks of delay are without question the busiest of times for both private and public schools and occasioned the unfortunate delay until September 12, 1972 of the records transfer and ultimate notification of placement by the Rockaway schools of G.S. in a Denville school class until September 29, 1972. In the meantime, petitioners had enrolled G.S. in the Wilson School without the knowledge of agents of the Board.

While such delay as herein described is unfortunate and should be assiduously avoided whenever possible, it in no way is totally attributable to either litigant. Nor can it be the basis for an order that tuition payments be required of the Board.

The Commissioner is aware of the difficult problem with which petitioners must continually cope as the result of their child's unfortunate impairment. The Commissioner shares the concern which petitioners and all other similarly situated parents possess that their children receive the most adequate education that can be provided. In this instance, the Commissioner finds that the Board's Child Study Team acted as expeditiously as possible to make an appropriate educational placement for G.S. in a special education class in the Denville schools. Petitioners could have availed themselves of this educational placement for G.S., but they clearly chose not to do so. Instead, they chose to continue the enrollment of G.S. in the Wilson School's special education program. While petitioners have every right to make such a choice, they cannot expect the Board to be required to reimburse them under these circumstances.

Petitioners are free at any time to enroll their child as a pupil in the Rockaway Township School District, but the Board's Child Study Team must

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recommend an appropriate placement for G.S., and the school administrators will then make the final determination for such placement.

Absent a finding of arbitrary or capricious action, abuse of discretion, or statutory violation by the Board of Education of the Borough of Rockaway, the Commissioner determines that the Petition has no merit. Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

June 17, 1974

Louis G. Mangieri,

Petitioner,

v.

Board of Education of the Borough of Carteret, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, John Cervase, Esq.

For the Respondent, Johnstone & O'Dwyer (Franz J. Skok, Esq., of Counsel)

Petitioner, a resident of the Borough of Carteret, alleges that the secretary-business manager of the Carteret School District was appointed illegally by the Board of Education of the Borough of Carteret, hereinafter "Board," on October 11, 1971, and that he does not meet State requirements for the position. Petitioner requests the Commissioner of Education to render a judgment to this effect and to remove the secretary-business manager from office. The Board moves for an order of the Commissioner dismissing the Petition on the principal grounds that there was an alleged failure of counsel for petitioner to attend a conference of counsel on April 18, 1973, and a failure to diligently prosecute the matter from that date forward.

Oral argument with respect to the Board's Motion to dismiss the Petition of Appeal was held on May 17, 1974 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The instant Petition was filed in the Division of Controversies and Disputes on October 17, 1972, and, thus, postdated by approximately one year one of the specific sources of the complaint; namely, the allegation that on October 11, 1971, the secretary-business manager of the Board had been appointed illegally.

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Thereafter, an Answer to the Petition was requested from the Board and was filed on November 28, 1972, and a conference of counsel was set down for January 18, 1973. This conference was adjourned at the request of the Board and a new conference date was established for April 18, 1973.

On the day of this conference, counsel for the Board was present but counsel for petitioner did not appear nor had he given any advance notice that he would not be present. Nevertheless, counsel for the Board and the hearing examiner formulated a short memorandum setting forth the issues of the matter as they perceived them and by letter of April 23, 1973, the hearing examiner communicated the essence of these issues to counsel for petitioner.

This letter contained the following two concluding sentences:

"***Would you please respond to this framing of issues?

"We will proceed through litigation of this matter when you indicate you are ready."

However, counsel for petitioner did not then, nor has he since, responded in writing to the framing of issues although at a time subsequent to the conference he did tell the hearing examiner in the course of a telephone conversation that the issues as set forth met with his approval. Neither in the interval of time between the letter of April 23, 1973, and the date of January 5, 1974, did he indicate in writing that he was ready to proceed.

On January 5, 1974, counsel for petitioner did address the following letter to the hearing examiner:

"I spoke to your secretary some time ago asking when the above case would be scheduled for hearing. I failed to follow up by a letter.

"Would you kindly set the matter down for hearing."

Thereafter, a hearing was, in fact, set down for March 5, 1974, but was adjourned at the request of the Board until such time as a conference of counsel attended by both parties had been held, pursuant to the applicable rules. *N.J.A.C.* 6:24-1.8

Subsequently, however, after another attempt to hold a conference had been adjourned at request of the Board, the Board filed a Notice of Motion on March 19, 1974 to dismiss the Petition. This Notice of Motion was accompanied by a letter in lieu of a Memorandum of Law and, in the letter, the Board sets forth the facts of the delay as reported, *ante*. It is also stated therein that the Board relies for support of its Motion on *N.J.A.C.* 6:24-1.8 which provides:

"After an answer has been filed or the time for doing so has expired, the Commissioner may summon the parties to appear before him at a conference for the purpose of eliminating or simplifying issues, obtaining admissions of fact or of documents that will avoid unnecessary proof,

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arriving, if possible, at an agreement of facts, and otherwise expediting the determination of the controversy. The Commissioner may require the parties to submit written statements, verified by oath, as to the facts involved in any controversy or dispute, and may further require the submission of certified copies of all documents necessary to a full understanding of the question. *For failure to appear at such conference or to participate therein or to take action required by the Commissioner by authority of this rule, the Commissioner in his discretion may make such order with respect to the continued prosecution of the matter, including dismissal of a petition or of an objection thereto, as he deems just and proper."* (*Emphasis the Board's.*)

Petitioner has not replied to the Notice of Motion in writing. However, on May 17, 1974, counsel for petitioner did appear at an oral argument on the Motion and did argue that the Motion should not be granted. In essence he avers that petitioner's entitlement to a hearing on his complaint remains, and is not eroded or diminished by the fact of long delay or of an alleged inefficiency of prosecution which, in any event, is not attributable to petitioner himself, but, if at all, to his counsel.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the record in this matter. It is noted that the delinquencies in the prosecution of the Petition of Appeal are three in number; namely,

1. counsel for petitioner failed to appear at a conference of counsel set down for April 18, 1973; and, thereafter, he

2. failed to indicate to opposing counsel either in oral or written form that he accepted the issues as framed in the conference which he did not attend and indicated such acceptance to the hearing examiner only in oral form; and, thereafter, he

3. failed to indicate for a period of approximately eight months subsequent to the conference that he was ready to proceed through litigation.

Such facts, in the Commissioner's judgment, do not justify a conclusion that petitioner nor his counsel are aggrieved at this juncture but to the contrary that the dilatory tactics herein employed, if ignored or condoned by the Commissioner, would represent an injustice to the Board.

The Commissioner must, of course, assume jurisdiction over controversies under the school law. *N.J.S.A.* 18A:6-9 He need not maintain that jurisdiction, however, when, as herein the delay is inordinate, the insufficiency of prosecution is pronounced, and where the controversy is so lightly regarded by its presentors. The Commissioner so holds.

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Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

June 17, 1974
Pending before State Board of Education

John M. Rainey,

Petitioner,

v.

Board of Education of the City of Trenton, Mercer County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Ruvoldt & Ruvoldt (Harold J. Ruvoldt, Jr., Esq., of Counsel)

For the Respondent, McLaughlin, Abbotts & Cooper (James J. McLaughlin, Esq., of Counsel)

Petitioner, a nontenure teaching staff member in the employ of the Board of Education of the City of Trenton, hereinafter "Board," during the 1972-73 school year and the month of July 1973, alleges that his employment was thereafter illegally terminated. He demands judgment to this effect. The Board denies that its actions herein were illegal or improper.

By agreement of counsel this matter is submitted for Summary Judgment on the pleadings at this juncture, although it has been delayed in its final submission pending a decision of the Commissioner of Education and the State Board of Education in *Arthur L. Page v. Board of Education of the City of Trenton and Pasquale A. Maffei, Mercer County,* 1973 *S.L.D.* 704, affirmed State Board of Education May 1, 1974. The instant pleadings are very limited in scope but the essential facts are directly parallel to those in *Page, supra,* except that petitioner herein makes no claim to any tenure entitlement. His claim, instead, is grounded in the obligations of contract and the fundamental rights to due process which are possessed by all citizens of the United States.

The essential facts of this matter are that petitioner had been employed by the Board during the 1972-73 school year, and on June 13, 1973, he was offered another contract of employment for the school year 1973-74. (Exhibit B, attached to Petition of Appeal) This employment offer specified that his yearly salary was to be $16,740 and that his position was to be that of "Coordinator, Special Education."

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After receipt of the employment offer, petitioner notified the Board by signed form letter (Exhibit C, attached to Petition of Appeal) that he wished to continue his work for the Board beginning on July 1, 1973, and he actually began his next year's employment on that date. This employment continued during all of the month of July and to the date of August 14, 1973.

On the evening of August 14, 1973, however, the Board met and voted by resolution to eliminate certain positions, including that of petitioner, on the grounds that a vote of the people had "***mandated that the budget for the school year 1973-74 be reduced by a sum in excess of one million dollars***." *Page, supra,* at p. 705 Thereafter, by letter of August 20, 1973, petitioner was notified of the Board's action by letter from Pasquale A. Maffei, Assistant Superintendent of Schools. This letter (Exhibit A, attached to Petition of Appeal) is quoted in its entirety as follows:

> "The Superintendent has instructed me to comply with item I, D under 'Personnel' in Exhibit N of the Board of Education Agenda of Tuesday, August 14, 1973. The action taken by the Board of Education was in the form of resolution regarding the elimination of certain positions in the Trenton School System.
>
> "It is my duty to inform you that the position of Co-ordinator of Special Education is included among the positions eliminated. The effective date of the action was August 14, 1973.
>
> "In effect, the position you have held in the Trenton School System has been abolished. In view of the fact that you do not have tenure status in the Trenton School System, there is no assurance that any offer of employment can be made to you for the school year 1973-74. However, I am prepared to give you consideration for any other position for which you may qualify.
>
> "Kindly contact my office for an appointment. I expect to be at my desk on Wednesday or Thursday, August 22 or 23."

This concludes a recital of the essential facts in this matter. It remains necessary, however, to say again as in *Page, supra,* that "***the basic issue emerging from such review now remains to be stated. Concisely, this issue is whether or not the Board's action of August 14, 1973, to abolish the position of petitioner, was a legally correct and proper action.***" (at p. 706) If it was, there is no relief the Commissioner can afford. If it was not, petitioner is then entitled to be made whole from the date of the termination of his employment.

In considering this issue in the context of the relevant facts, the Commissioner finds that it has been rendered *stare decisis* by *Page, supra,* for all the reasons therein contained, and he determines similarly that the facts in the instant matter support a judgment

> "***that the action of the Board herein controverted cannot be sustained on the basis of budgetary considerations (R-1), since in June 1973, the

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> Board knew of its budgetary limitations and, despite this knowledge, in effect gave sanction to petitioner's position for another year and employed him for it at a salary commensurate with the tasks imposed. Thus, the later action of the Board in August 1973, to abolish the position, was patently frivolous, since the stated reason for the abolishment (R-1), if valid in fact, was a valid in June as it was in August. ***" (at p. 709)

The Commissioner then said in *Page, supra*:

> "***It follows, then, that the Commissioner determines that the action taken herein by the Board was not in 'good faith.' Additionally, however, the Commissioner holds that even a contrary opinion in this specific regard would not obviate the harm caused by the precipitate and untimely notice which petitioner received that his position would be abolished. In the circumstances, the Commissioner holds he was entitled to a more considerate treatment (the Board could expect no less than a sixty-day notice if petitioner had resigned (*N.J.S.A.* 18A:28-8); and, therefore, should be made whole at this juncture on these grounds alone. Accordingly, the Commissioner directs that the Board immediately restore petitioner to a position which embraces administrative duties of the kind previously performed by him, and that his salary be restored***."
> (at pp. 709-710)

The decision of the Commissioner in the instant matter is the same.

Accordingly, the Commissioner directs the Board to restore petitioner forthwith to a position which embraces duties of the kind previously performed by him and further directs that petitioner's contracted salary and other emoluments, subject only to mitigation by virtue of other employment, be made payable retroactive to the date of his discharge by the Board and for the balance of the 1973-74 school year.

COMMISSIONER OF EDUCATION

June 17, 1974

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Peter Contardo,

Petitioner,

v.

Board of Education of the City of Trenton, Mercer County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION ON MOTION TO DISMISS

For the Petitioner, Ruvoldt & Ruvoldt (Harold J. Ruvoldt, Jr., Esq., of Counsel)

For the Respondent, McLaughlin, Abbots & Cooper (James J. McLaughlin, Esq., of Counsel)

Petitioner, a member of the Board of Education of the City of Trenton, hereinafter "Board," alleges that an October 17, 1973 resolution adopted by the Board, which provides that under certain circumstances a board of education member may be excluded from a meeting of the Board, is *ultra vires.*

The respondent Board, while admitting that the resolution was passed, holds that it is valid and in no way contrary to the laws of the State of New Jersey.

On January 7, 1974, the Board filed a Notice of Motion to Dismiss the Petition for failure to state a claim upon which relief can be granted. On January 10, 1974, petitioner filed a Notice of Motion for Summary Judgment. No facts being in dispute, thus obviating the need for a plenary hearing, oral argument was heard by a hearing examiner at the Department of Education on April 22, 1974. Counsel for both parties have filed supporting Memoranda of Law for their respective positions.

The single pertinent fact that gives rise to the present controversy is as follows. On October 17, 1973, the Board adopted the following resolution:

> "DUTIES OF MEMBERS WHEN IN ASSEMBLY"
>
> "The observance of decorum by members of the Board when in assembly, is not due to themselves and to one another, as gentlemen assembled together to deliberate on matters of common importance and interest, but it is also essential to the regular and satisfactory proceeding of an assembly.
>
> "Therefore, let it be stated that no member is to disturb another or the assembly itself; by speaking without having acquired from the Chair the privilege to speak or to continue to speak when called out of order; assault by one member upon another, threats, challenge, affrays are to be considered breaches of decorum.

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> "In all instances of irregular and disorderly conduct it is competent for every member, and it is the special duty of the presiding officer, to complain to the assembly, or to take notice of the offense, and call the attention of the assembly to it. When a complaint of this kind is made by the presiding officer, he is to name the offending member; he declares to the assembly that such a member, calling him by name, is guilty of certain irregularity or improper conduct.
>
> "The member who is charged with an offense against the assembly is entitled to be heard in his place in exculpation, and is then asked to withdraw. Being withdrawn the presiding officer states the offense committed, and the assembly proceeds to consider the degree and the amount of punishment to be inflicted.
>
> "Punishments which can be inflicted upon the offending member by the assembly may consist of a reprimand, an apology, begging pardon, exclusion from the assembly, requiring good conduct and decorum."

Petitioner asserts that insofar as the resolution, *ante*, may create a situation whereby a duly elected and seated member of the Board may be excluded from the proceedings of that body, it is contrary to the laws of the State of New Jersey. Petitioner argues that such exclusion would deny a legally qualified member from exercising his responsibilities which he has by oath sworn to faithfully discharge pursuant to *N.J.S.A.* 18A:12-2.1. Therefore, petitioner maintains that the Board has no authority to adopt a resolution which enables the Board to "try" one of its members for alleged misconduct or to bar such a member from participating in any meeting of the Board.

Accordingly, petitioner seeks an order from the Commissioner of Education to prevent the Board from compelling a member of the Board to withdraw or be excluded from any meeting of the Board or otherwise imposing any punishment upon any member of the Board.

The Board, for its part, holds that its policy is consistent with the statutory provisions of *N.J.S.A.* 18A:11-1 which provides that a board of education shall:

> "***c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business***."

The Board maintains that the policy resolution herein controverted is intended for the government of the Board in public session. The Board also avers that it possesses the discretionary authority to adopt such a policy, as a separate governmental agency, and that the policy may not be upset, absent proof of irrational, arbitrary, or other improper motivation on the part of the Board. Therefore, the Board asserts that such an exercise of its discretionary powers may not properly be restrained or enjoined by the Commissioner. To this end the Board cites the following:

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> "***The School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal.***" *Kenny v. Board of Education of Montclair,* 1938 *S.L.D.* (1934) 647, affirmed State Board of Education 649, 653

and,

> "***it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions.***" *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N.J.L.* 329 (Supt. Ct. 1947), 136 *N.J.L.* 521 (*E. & A.* 1947)

Wherefore, the Board moves for dismissal of the Petition for failure to state a claim on which relief may be granted.

The Commissioner observes that *N.J.S.A.* 18A:11-1.c clearly provides the authority for a board of education to"*** make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business***." Such clear and apparent statutory authorization leads to the conclusion that the Board's action to establish a policy for the governance of its members at meetings was not *ultra vires.* It remains, however, to determine whether any provision within such adopted policy resolution was inconsistent with *N.J.S.A.* 18A or the rules of the State Board of Education, which inconsistencies, by the words of the statute, are precluded.

A board of education in New Jersey is a municipal corporation empowered to do only those things which it is authorized by law to do. It is empowered to make, amend and repeal rules for its own government and transaction of business; at the same time, it is forbidden to make such rules as are inconsistent with *N.J.S.A.* 18A or the rules of the State Board of Education. *N.J.S.A.* 18A:12-2.1 provides that each member of a board of education shall before entering upon the duties of his office take an oath that:

> "***he will faithfully discharge the duties of his office***."

The Commissioner opines that a board member excluded from a meeting or a series of meetings could not under such circumstances faithfully discharge the

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duties of his office. To hold otherwise would render that portion of the statute a nullity and be contrary to a harmonious reading and interpretation of the statutes.

The Commissioner further observes that the Legislature in its wisdom has provided for the removal from office of members of boards of education when a member ceases to be a *bona fide* resident of the school district he represents. *N.J.S.A.* 18A:12-3 Likewise, provision is made in the statutes for the filling of vacancies that exist. *N.J.S.A.* 18A:12-7; *N.J.S.A.* 18A:12-15; *N.J.S.A.* 18A:12-17; *N.J.S.A.* 18A:13-11

Additionally, the Legislature has been specific in designating the numbers of board members that shall serve in Type I, Type II, and regional school districts. *N.J.S.A.* 18A:12-6; *N.J.S.A.* 18A:12-11 and 11.11; *N.J.S.A.* 18A:12-12, 13, 14; *N.J.S.A.* 18A:13-8 In similar fashion the Legislature has precisely established the commencement date and the length of time in office of members of boards of education. *N.J.S.A.* 18A:12-8, 9; *N.J.S.A.* 18A:12-11, 11.1; *N.J.S.A.* 18A:12-17; *N.J.S.A.* 18A:12-19; *N.J.S.A.* 18A:13-8

With such precise designations by the Legislature as to terms of office, numbers of members, and filling of vacancies, the Commissioner concludes that it was the intention of the Legislature to maintain local boards of education at full strength to accomplish the heavy responsibility of providing a thorough and efficient system of education for the pupils in their care. The Commissioner further concludes that, had the Legislature desired that provision should be made for the temporary removal of a local board member from office, it would have made such provision, even as was done for the temporary removal of school employees or pupils from their recognized regular status. *N.J.S.A.* 18A:25-6; *N.J.S.A.* 18A:37-1 *et seq.*

However, the Legislature did not choose to make provision that a board of education should be empowered to temporarily reduce its numbers by suspending one or more of its members for either specific or indeterminate periods of time. The Commissioner cannot provide boards of education with authority which has not been granted by the Legislature. Assuming, *arguendo,* that the Commissioner could approve the controverted policy, to do so would be inconsistent with a harmonious interpretation of the statutes and would promote a possible decimation of boards of education that would render them for short or long periods of time less effective than was the intendment of the laws of the State of New Jersey.

In similar fashion, the Legislature has wisely provided for the resolution of disputes that arise under the education laws and has provided in *N.J.S.A.* 18A:6-9 that:

> "The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws***or under the rules of the state board or of the commissioner."

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With such provision, there is no necessity for a board of education to sit as a tribunal in judgment upon one or more of its members. Nor does the Commissioner deem desirable such fragmentation of a board.

For the foregoing reasons, the Commissioner denies respondent's Motion to Dismiss and grants the relief for which petitioner prays to this extent: It is ordered that the Board of Education of the City of Trenton delete from its policy statement entitled "Duties of Board Members When In Assembly," *ante*, that portion which reads as follows:

> "The member who is charged with an offense against the assembly is entitled to be heard in his place of exculpation, and is then asked to withdraw. Being withdrawn the presiding officer states the offense committed, and the assembly proceeds to consider the degree and the amount of punishment to be inflicted.
>
> "Punishments which can be inflicted upon the offending member by the assembly may consist of a reprimand, an apology, begging pardon, exclusion from the assembly, requiring good conduct and decorum."

The Commissioner opines that such deletion does not leave the Board without recourse, in its worthy endeavors to insure a proper sense of decorum, since a proper adoption of, and adherence to, recognized rules of parliamentary procedure as may be consistent with the statutes, or a revision of that portion of its policy which remains intact, will accomplish that end. In the event of a controversy within the membership, the Board may resort to *N.J.S.A.* 18A:6-9. Should any person or persons prove so disruptive to the orderly conduct of a meeting of the Board as to be violative of the statutes of the State of New Jersey, the statutory penalties are likewise clearly set forth and need no elaboration by the Commissioner.

Petitioner's Motion is therefore granted and Summary Judgment is entered in favor of petitioner to the degree and within the limits set forth herein.

COMMISSIONER OF EDUCATION

June 17, 1974

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"R.H.," a minor, by his parent and guardian *ad litem*,

Petitioner,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, LeRoy Carmichael, Esq.

For the Respondent, Parker, McCay & Criscuolo (William V. Webster, Jr., Esq., of Counsel)

This matter having been opened before the Commissioner of Education (Joseph F. Zach, Deputy Assistant Commissioner, Division of Controversies and Disputes) by LeRoy Carmichael, Esq., counsel for petitioner on a Notice of Motion for Interim Relief received June 14, 1974, requesting temporary restraint against the Board of Education of the School District of the Township of Delanco, hereinafter "Board," to prevent said Board from excluding R.H. from participation in the eighth grade promotion exercises scheduled to be held Tuesday, June 18, 1974, William Webster, Esq., counsel for the School District of the Township of Delanco; and

The arguments of counsel and testimony of witnesses having been heard regarding the allegation by petitioner that irreparable harm may result if respondent Board is not restrained from its intention to exclude R.H. from the eighth grade promotion exercises pending the final determination by the Commissioner of petitioner's allegation that such exclusion constitutes an excessively harsh penalty for the disciplinary infraction admittedly committed by R.H.; and

It appearing that R.H. was suspended from attendance at school and from participation in the eighth grade promotion exercises by the school principal on June 12, 1974 (*N.J.S.A.* 18A:37-4), as a punishment for uttering an obscene expletive to a teacher during the course of a practice for said promotion exercises; and

It appearing that the suspension of R.H. was affirmed by the Superintendent of Schools of the school district on June 12, 1974; and

It appearing that R.H. and his parent attended a regular meeting of the Board which was held on the evening of June 12, 1974, and informally discussed the matter herein controverted with the Board in executive session, after which the Board publicly affirmed the suspension of R.H.; and

It appearing that the Board has notified the parent of R.H. that he will

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receive his certificate of promotion, report card, and athletic award at the office of the school principal on Wednesday, June 19, 1974, even though the Board has indicated its intention to exclude R.H. from the promotion exercises;

The Commissioner finds that, under the circumstances of this matter, the penalty imposed by the Board upon R.H. is not excessively harsh in view of the admitted breach of discipline committed by R.H. The Commissioner has previously held that, under certain circumstances, a local board of education may withhold a public award privilege in the interest of maintaining an orderly and efficient school system. *Barbara Gertner et al. v. Board of Education of the Borough of Elmwood Park, Bergen County,* 1974 *S.L.D.* 611

In the previous case of *Gustave M. Wermuth et al. v. Board of Education of the Township of Livington, Essex County,* 1965 *S.L.D.* 121, the Commissioner stated the following:

> "*** An effective school is an orderly one, and to be so it must operate under reasonable rules and regulations for pupil conduct. Unacceptable behavior must be restrained and discouraged and when necessary appropriate deterrents and punishments must be employed for purposes of correction and to insure conformity with desirable standards of conduct.***" (at p. 129)

The basic fact in the instant matter is that the Board has exercised its discretionary authority to impose what it considers an appropriate penalty as a deterrent against future abuse of the kind admitted herein by R.H. The Commissioner will not set aside a discretionary action taken by a local board of education, acting within its statutory authority, unless he finds that the board's exercise of its discretion constituted an arbitrary, capricious, or unreasonable action. *Thomas v. Board of Education of the Township of Morris,* 89 *N.J. Super.* 327, 328 (*App. Div.* 1965) The Commissioner finds no evidence of an abuse of discretion in the matter herein controverted.

The Board in this instance has imposed a penalty, short of expulsion, which will exclude R.H. from the privilege of participation in a promotion ceremony which is separate and apart from the privilege to academic enrollment. *John H. Bartlett, Jr. v. Board of Education of the Township of West Orange,* 1938 *S.L.D.* (1912) 697

The Commissioner finds no reason to substitute his discretion for that of the Board in the instant matter; accordingly,

IT IS ORDERED that the temporary restraint requested by petitioner against the Delanco Township Board of Education is hereby denied.

Entered this 18th day of June 1974.

COMMISSIONER OF EDUCATION

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Clifton Teachers Association, Dolores Bush, Genevieve Drache, Ann Eodice, Elizabeth Kievit, Belle Krompasick, Evelyn Wescott, and Dorothy Yingling,

Petitioners.

v.

Board of Education of Clifton, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioners, Saul R. Alexander, Esq.

For the Respondent, Samuel Monchak, Esq.

This matter having been opened before the Commissioner of Education by formal Petition of Appeal and Answer thereto, and a conference of counsel having been held among the parties on August 16, 1973; and

It appearing that the individually named petitioners are employed as school nurses by the Clifton Board of Education, hereinafter "Board"; and

It appearing that the seven named school nurse petitioners are members of the Clifton Education Association; and

It appearing that petitioners allege improper salary determinations by the Board since July 1, 1972, pursuant to the provisions of *N.J.S.A.* 18A:29-4.2; and

It appearing that a change in the Board's legal representation occurred on May 14, 1974; and

It appearing that the Commissioner's representative in this matter by letter dated May 24, 1974 to the newly-assigned counsel to the Board, set forth the sole issue to be decided herein as to whether the Cost of Living Council would allow the requested increases pursuant to the provisions of *N.J.S.A.* 18A:29-4.2; and

It appearing that a copy of the Decision and Order rendered on April 29, 1974 by the Economic Stabilization Program, Cost of Living Council, on the Application for Exception filed by the Clifton Teachers Association is made part of the record herein; and

It appearing that by letter dated May 30, 1974, counsel to the Board agrees that the sole issue in this matter is the propriety of the application of the guidelines of the Cost of Living Council to the requested increases by petitioners pursuant to *N.J.S.A.* 18A:29-4.2; and

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It appearing that this issue has been adjudicated by the Economic Stabilization Program, Cost of Living Council, as set forth in its Decision and Order, dated April 29, 1974, *ante;* and

It appearing that this matter does not rise to the level of a controversy or dispute under school law pursuant to the Commissioner's authority at *N.J.S.A.* 18A:6-9; now therefore

IT IS HEREBY ORDERED on this 18th day of June 1974 that this matter be and hereby is dismissed before the Commissioner of Education.

COMMISSIONER OF EDUCATION

Oradell Education Association,

Petitioner,

v.

Board of Education of the Borough of Oradell, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Ruhlman and Butrym (Edward J. Butrym, Esq., of Counsel)

For the Respondent, Michael J. Breslin, Jr., Esq.

This matter comes before the Commissioner of Education as the result of an Order to Show Cause issued on June 7, 1974, based on a duly verified complaint filed by the Oradell Education Association, hereinafter "Association," against the Oradell Board of Education, hereinafter "Board." On June 12, 1974, the return date of the Order, the Superior Court of New Jersey, Law Division, Bergen County, enjoined the Association from proceeding with the matter before the Commissioner. The Commissioner was joined as a party defendant in the Court's Order, returnable June 14, 1974. This temporary restraint was dissolved by the Appellate Division, Superior Court, on June 14, 1974.

Argument on the Commissioner's Order to Show Cause, originally scheduled for June 12, 1974, was heard on June 18, 1974 before a representative of the Commissioner, during which the parties presented their respective positions. The entire record of this matter is now before the Commissioner for his determination; and

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It appearing that the Board complied with the directive of the New Jersey State Board of Education in regard to the closing of its school on January 2, 3 and 4, 1974, because of the energy crisis; and

It appearing that the Board acted at a closed session during February 1974 (R-1; Exhibits C, D, and E) to revise its scheduled Easter recess (R-1; Exhibit A) from six days to two days, in addition to adding another day for pupils at the end of the school calendar which then provided for pupils to complete school on June 21, 1974, the same day teachers originally were scheduled to conclude the school year, thereby recouping the three days from its January closing in addition to two other days not in dispute herein; and

It appearing that the relief sought by the Association pursuant to *L.* 1974, *c.* 11 is to have the school calendar shortened by three days from June 21, 1974 to June 18, 1974, to compensate for the days added to the spring recess by virtue of the school closing in January; and

It appearing that the Superintendent testified that for the remaining days of school, pupils are scheduled to attend one four-hour session each day; and

It appearing that report cards are scheduled to be submitted to the principal of the school for his review at noon on Wednesday, June 19, 1974; and

It appearing that promotion exercises for the sixth grade are scheduled for 11 a.m. on Friday, June 21, 1974; and

It appearing that the President of the Association represents that if the relief requested herein is granted, the teachers involved in the promotion exercises are willing to return to conduct those exercises; and

It appearing that the Board has an adequate system of notifying parents in regard to the emergency closing of its school; and

It appearing that general, routine activities by teachers and pupils are scheduled for the remaining school days; and

It appearing from the record that the Association attempted to resolve this matter with the Board prior to its filing the instant Petition of Appeal; and

It appearing that the Board's position that the Association was estopped by laches from now seeking relief is not valid; now therefore

The Commissioner finds and determines that the relief requested by petitioner, if granted, would be disruptive of the Oradell School System to a degree that would cause a chaotic and unmanageable result. It would be impossible to inform the various segments of the Oradell community, who must be so informed, that the school year would end today, June 18, 1974, as requested by the Association.

However, the Commissioner must attempt to enforce the legislative

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determination set forth in *L.* 1974, *c.* 11, concurrently and in harmony with the constitutional requirement that each local board of education provide a thorough and efficient system of public education. In the judgment of the Commissioner, the matter herein controverted contains a set of circumstances which precludes the possibility that both objectives can be accomplished.

Accordingly, the Commissioner will grant relief to petitioner which will not, in his judgment, violate the mandate of the people of this State as set forth in the organic law for a thorough and efficient system of education.

For the reasons stated herein, the Commissioner directs the Board of Education of the Borough of Oradell, Bergen County, to close the public school at noon on Thursday, June 20, 1974, or when the teaching staff members have completed all necessary duties, instead of Friday, June 21, 1974, as previously scheduled.

Entered this 18th day of June 1974.

COMMISSIONER OF EDUCATION

"C.C.," a minor by her parents and guardians *ad litem*,

Petitioner,

v.

Board of Education of the Village of Ridgewood, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Carlton and Blum (S. Richard Carlton, Esq., of Counsel)

For the Respondent, Greenwood, Weiss and Shain (Stephen G. Weiss, Esq., of Counsel)

This matter having been opened before the Commissioner of Education by S. Richard Carlton, Esq., counsel for petitioner by formal Petition of Appeal received June 12, 1974, requesting relief in two forms, namely, a restraint against the Board of Education of the Village of Ridgewood, hereinafter "Board," to prevent said Board from excluding C.C. from participation in the high school commencement exercises scheduled to be held Thursday, June 20, 1974, and a determination by the Commissioner setting aside certain administrative and Board actions which will deprive petitioner of her high school diploma pending the completion by her of certain academic requirements

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through attendance at the Board-sponsored summer school program; Stephen G. Weiss, Esq., counsel for the School District of the Village of Ridgewood; and

The arguments of counsel and testimony of witnesses having been heard, regarding the allegation by petitioner that irreparable harm may result if respondent Board is not restrained from its intention to exclude C.C. from the commencement exercises pending a final determination by the Commissioner on the merits of petitioner's Appeal; and

Further arguments of counsel and certain testimony and proofs having been heard on the merits of petitioner's allegations;

The Commissioner finds that, under the circumstances of this matter, no irreparable harm will be suffered by petitioner as the result of being excluded from the commencement exercises pending a final determination of this case.

The Commissioner is constrained to state that the actions of the Board, in this instance, constitute an exercise of its discretion in determining whether or not petitioner is entitled to receive a diploma of graduation from its high school. The Board may exercise such discretion pursuant to statutory authority which requires the Board to govern and manage its public schools. *N.J.S.A.* 18A:11-1 The courts of this State have determined in previous instances that an action of an administrative agency, such as a local board of education, is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such action was arbitrary, capricious or unreasonable. *Thomas v. Board of Education of the Township of Morris*, 89 *N.J. Super.* 327, 328 (*App. Div.* 1965) Petitioner is required to carry the burden of proof in the instant matter. At this juncture, the Commissioner cannot make a final determination on the merits of this case; therefore

IT IS ORDERED that the restraint requested by petitioner against the Board of Education of the Village of Ridgewood is hereby denied; and

IT IS FURTHER ORDERED that the Board file an appropriate Answer to the Petition of Appeal forthwith, and that the hearing officer determine what additional proofs or proceedings shall be required in order to complete the record in this case.

Entered this 20th day of June 1974.

COMMISSIONER OF EDUCATION

Case dismissed February 7, 1975

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**In the Matter of the Tenure Hearing of Anthony Polito,
School District of the Township of Livingston, Essex County.**

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Complainant Board of Education, Riker, Danzig, Scherer & Brown (Peter N. Perretti, Jr., Esq., of Counsel)

For the Respondent, Alongi, Bregg & Devito (Paul Alongi, Esq., of Counsel)

Respondent, a teacher with a tenure status employed by the Livingston Board of Education, hereinafter "Board," was suspended from his teaching duties by the Board on June 25, 1973. Subsequent to this act of suspension, the Board filed a certification with the Commissioner of Education that the written charges against respondent would be sufficient, if true in fact, to warrant his dismissal or a reduction in his salary. *N.J.S.A.* 18A:6-11 Three days of hearings on those charges were conducted by a hearing examiner appointed by the Commissioner. The submission of all documentary evidence in this matter was completed on December 6, 1973, and the decision of the Commissioner is now pending.

However, on December 18, 1973, respondent moved that he be paid at his regular salary pursuant to *N.J.S.A.* 18A:6-14. Oral argument on this Motion was heard on January 3, 1974 at the office of the Hudson County Superintendent of Schools by a representative of the Commissioner. The record of that argument is now before the Commissioner for his determination.

N.J.S.A. 18A:6-14, which was recently amended by *Laws* of 1971, *Chapter* 435, § 2, provides as follows:

> "Upon certification of any charge to the Commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary, from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued

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unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension."

The Commissioner observes that the point of contention in the Motion, *sub judice,* is the attribution of delay, over the "***120 calendar days***" between respondent's suspension on June 25, 1973, and January 3, 1974–a total of 192 days. (For a review of the Commissioner's interpretation of *N.J.S.A.* 18A:6-14 in regard to what constitutes "120 calendar days" and the application of the doctrine of mitigation for purposes of this statute, see *In the Matter of the Tenure Hearing of Walter Kizer, School District of the Borough of Haledon, Passaic County,* decided on Motion by the Commissioner, December 27, 1973. (1974 *S.L.D.* 501)

In regard to the period of time which has elapsed in this matter, the pertinent dates as reflected in the record are as follows:

June 25, 1973: Respondent was suspended without pay and the Board certified charges to the Commissioner of Education.

June 29, 1973: Tenure charges were received at the Commissioner's office.

July 2, 1973: General denial of written charges was entered by respondent.

August 1, 1973: Conference of counsel was conducted by hearing examiner. During this conference, counsel to the parties proposed September 4, 5, and 6 as the earliest mutually convenient dates for hearings on the charges. However, because the hearing examiner already had scheduled those days for hearings in another tenure matter, the parties subsequently agreed on September 11, 12, and 13, 1973, as the hearing dates.

August 13, 1973: Confirming letters regarding the dates of September 11, 12, and 13 were sent to the parties.

September 6, 1973: Counsel for respondent advised the Commissioner's office, by telephone, that because of his required appearance in federal court, he would be unable to appear on September 11, 12, and 13, 1973.

September 17, 1973: The Commissioner's office sent to the parties a confirming letter for one day of hearing to be held on September 27, 1973.

September 27, 1973: First day of hearing into the certified charges against respondent was conducted at the office of the Essex County Superintendent of Schools. At the conclusion (of the hearing on this day), counsel for respondent asserted that, because of additional appearances expected to be required of him in federal court, it would be difficult to agree on additional hearing dates at that time.

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October 29, 1973: Second day of hearing was conducted.

October 30, 1973: Third and final day of hearing into the factual issues involved in the matter was conducted.

November 26, 1973: Written factual summation on behalf of respondent was received.

December 6, 1973: Reply to respondent's factual summation was received on behalf of the Board.

At this time, the submission of all documentary evidence in the matter was complete.

In the Commissioner's judgment, *N.J.S.A.* 18A:6-14 was enacted by the Legislature in order to provide a tenured employee, who is suspended from his job subsequent to a certification of charges by his employing board and finds himself in protracted legal proceedings, financial assistance until the matter is decided. Such assistance is to be provided by the local board after 120 calendar days from the date of suspension. Furthermore, 120 calendar days means 120 consecutive days of twenty-four hours each. Such salary payment is to be mitigated by earnings received by the employee for substituted employment during that time. *In the Matter of the Tenure Hearing of Walter Kizer, supra* However, the Legislature also stated in *N.J.S.A.* 18A:6-14 that the benefits therein are to be provided after 120 calendar days "***excluding all delays which are granted at the request of such person [the employee] ***."

It is obvious to the Commissioner that a review of the pertinent dates listed above reflects that a "delay," as contemplated by the Legislature, has occurred. The issue to be decided, however, is how much delay was created at the request of respondent.

In that regard, the Commissioner observes from the record respondent's assertion that the proceedings may have been extended by 40 days at his request. On the other hand, however, the Board contends that it has caused no delay whatsoever in the proceedings and, in fact, was continually prepared to move forward with its case, as soon as it certified the charges on June 25, 1973.

Furthermore, counsel for the Board points out that the hearing examiner canceled the dates of September 4, 5, and 6 to which the parties had agreed. The Commissioner, in reviewing the record before him, finds that at the conference of counsel conducted on August 1, 1973, the parties had agreed to the dates for the first week of September, and the hearing examiner would also have agreed, had not another tenure hearing–lasting those same three days–already been scheduled for him.

In any event, the benefits provided by *N.J.S.A.* 18A:6-14 become operative after 120 days, excluding all delays which are granted at the request of the employee.

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In the Commissioner's judgment, the matter was mutually agreed to proceed to hearing for September 11, 12, and 13. At respondent's request, those days were adjourned. The effect of that adjournment was to delay the proceeding until September 27, 1973, the first day thereafter that the parties could agree upon. Thus, the Commissioner determines that in this instance a delay of 16 days–September 11 to September 26–was occasioned upon respondent's request.

At the close of the September 27 hearing, counsel for respondent represented that because of commitments in federal court it would be difficult for him to schedule additional hearings immediately. Thus, the last two hearing dates were set for October 29 and October 30, 1973. The time lapse from September 27 until October 29–a total of 31 days– was, in the Commissioner's judgment, due to respondent's request.

Although not presented by either side at the time of argument on this Motion, the Commissioner takes notice that counsel for respondent agreed to submit his factual summation within ten days of October 30, 1973, or November 9, 1973 (Tr. III-184). The summation was not received by the Commissioner's office until November 26–a delay of 17 days.

Accordingly, the Commissioner finds that respondent, by his requests, has delayed the proceedings in regard to the charges certified against him by the Board, by a total of 64 days. Having made that determination, the Commissioner orders the Board of Education of the Township of Livingston to pay to Anthony Polito his full salary beginning December 26, 1973–the 185th day of his suspension–pursuant to the terms of *N.J.S.A.* 18A:6-14, mitigated by all earnings from any substituted employment.

COMMISSIONER OF EDUCATION

January 11, 1974

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**In the Matter of the Tenure Hearing of Anthony Polito,
School District of the Township of Livingston, Essex County.**

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board of Education, Riker, Danzig, Scherer & Brown (Peter N. Perretti, Jr., Esq., of Counsel)

For the Respondent, Alongi, Bregg & DeVito (Paul Alongi, Esq., of Counsel)

Written charges, alleging conduct unbecoming a teacher, were filed against respondent with the Livingston Board of Education, hereinafter "Board," by a female pupil. The Board suspended respondent from his teaching duties without pay on June 25, 1973, and concurrently voted to file a certification with the Commissioner of Education that the written charges would be sufficient, if found true in fact, to warrant his dismissal or a reduction in salary. *N.J.S.A.* 18A:6-11

Hearings in this matter were conducted on September 27, October 29 and 30, 1973 at the office of the Essex County Superintendent of Schools by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

On December 18, 1973, respondent moved before the Commissioner to have the Board pay him his regular salary payments pursuant to the provisions of *N.J.S.A.* 18A:6-14. On January 11, 1974, the Commissioner, by written decision, ordered the Board to begin respondent's regular salary payments as of the 185th day of his suspension, the Commissioner having found that respondent caused a delay in these proceedings of sixty-four days. Thereafter, on February 13, 1974, a four-page interpretive statement regarding that decision was issued by the Commissioner. Finally, respondent filed a Notice of Appeal before the State Board of Education in regard to the number of days delay attributed to him in the Commissioner's Decision on Motion. That appeal is now pending.

The Board certified the following written charge filed with it against respondent, by a thirteen-year-old female pupil, hereinafter "D.J.," assigned to respondent's class:

"1. ***

"2. On or about April 13, 1973 a female pupil in the Mt. Pleasant Junior High School, [D.J.] *** was together alone with said Anthony Polito [respondent] at a time following the last scheduled period of that day. [D.J.] and Mr. Polito were in a classroom in the Mt. Pleasant Junior High School, which classroom was equipped with a

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large walk-in storage closet or security room designed for the maintenance of valuable equipment.

"3. [D.J.] complains that Anthony Polito requested her to go to or enter the said closet to see if a light was on therein, and that upon approaching the entrance to the closet he followed into the same immediately behind her.

"4. [D.J.] further complains that Anthony Polito then and there caused her to touch his exposed penis, and made certain verbal comments to her, the import of which was that he would instruct her in certain sexual conduct.

"5. [D.J.] complains that she immediately objected and that the acts and events were forced upon her and that thereafter the said Anthony Polito asked her not to disclose the incident."

Respondent has been employed by the Board as a vocal music teacher for five years. Among his assigned responsibilities was instruction of the Mt. Pleasant Junior High School vocal chorus, and a vocal subgroup thereof called the Note-A-Bells, whose membership was limited based on successful pupil audition thereto, for participation in an art festival concert, hereinafter "concert," performed for parents during May. (Tr. III-6-7) Respondent testified that his work with the school chorus begins in September and that D.J. was a member of the chorus from September of the 1972-73 academic year. (Tr. II-110) Respondent further testified that subsequent to D.J.'s participation in chorus, she successfully auditioned for membership in the Note-A-Bells. (Tr. II-111) Thereafter, D.J. auditioned for a vocal solo as a member of the Note-A-Bells and, after an initial unsuccessful audition, was assigned a vocal solo sometime in January 1973. (Tr. II-112) Although D.J. testified that she was assigned a vocal solo and a dance for the concert (Tr. I-17), respondent testified D.J. was assigned only the vocal solo; she was not assigned a dance. (Tr. II-113)

In preparation for the May concert, practice sessions were held for the chorus, the Note-A-Bells, and those pupils who had been assigned solo selections. (Tr. III-8) However, precisely what the established schedule of group practice sessions was, if in fact a schedule had been established, cannot be determined from the testimony herein. On direct examination, D.J. testified that practice sessions for the chorus were held during an activity period near the end of the school day, while practice sessions for the Note-A-Bells were held in the morning prior to the beginning of the school day. (Tr. I-11-12) D.J. testified that the chorus practiced on Tuesdays, while the Note-A-Bells practiced on Thursdays. (Tr. I-11) However, on cross-examination D.J. testified she practiced with the chorus under respondent's direction "***a couple of times a week***" and that she practiced with the Note-A-Bells "***sometimes, once a week***." (Tr. I-55)

In regard to her solo number, D.J. testified that she began to practice individually with respondent sometime during March 1973. (Tr. I-55) D.J. further testified that from the time individual practice sessions began until April

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13, 1973 (the date of the alleged incident from which the charges, *sub judice*, emerged), there had been approximately seven such sessions. (Tr. I-56)

In regard to the individual practice sessions with D.J., respondent testified that such practice would occur during the second class period of the day. During that time, respondent had a preparation period with no teaching responsibilities assigned while D.J. was scheduled for English. (Tr. I-34) (Tr. II-114) (Tr. III-3) Respondent explained that, as the time for the concert approached, the number of individual practice sessions with D.J. increased. (Tr. II-114) (Tr. III-6) Respondent had D.J. report to his classroom immediately after her first-period class, rehearsed with her for ten or fifteen minutes, then escorted her back to class. (Tr. III-3-4) Respondent testified that on occasion he made prior arrangements with the English teacher for D.J. to report late to class, and at other times he would simply step into the classroom and ask the English teacher to release D.J. (Tr. III-4)

In addition to the individual practices with respondent, D.J. testified she would also borrow from his classroom on a daily basis, a recording of the song she was to perform, *I Am Woman*, in order to practice at home. She would then return the recording the next day, and borrow it again in the afternoon from respondent's classroom to practice again in the evening at home. (Tr. I-31) (Tr. II-115)

Respondent testified that in preparation for May concert, a dress rehearsal was presented to the student body on April 13, 1973, the day the alleged events herein occurred. (Tr. III-6) By way of stipulation between the parties, it was agreed that the dress rehearsal concluded at 2:50 p.m. Report cards were also distributed that day, and the teaching staff was instructed not to release the pupils for the day until 3:00 p.m. (Tr. I-124) It is noted that while D.J. participated in this dress rehearsal as a member of the chorus (Tr. II-117), she did not have the opportunity to sing her solo because, at the time, respondent was not satisfied with her performance. (Tr. III-29)

D.J. testified that subsequent to the dress rehearsal she reported to her assigned classroom to receive her report card at approximately 2:50 - 2:55 p.m. (Tr. I-12-13), then went to the auditorium, as was her custom, to retrieve music sheets used by the pianist to return them to respondent's classroom. (Tr. I-13-14) Prior to returning the music sheets to respondent's classroom, D.J. had asked her close friend, K.W., to wait for her outside respondent's classroom. (Tr. II-8-9)

According to an architectural schema (J-2) of the Mt. Pleasant Junior High School and a hand-drawn facsimile thereof (J-1), the physical dimensions of respondent's classroom, where the alleged incident occurred, are approximately 31 feet by 41 feet. Against one of the 31-foot walls, three enclosed storage areas are located all of which have doors, with small windows, which may be locked. (Tr. II-21) Directly across the classroom, along the other 31-foot wall, are located four windows each of which is 4 feet 7 inches wide (J-2) and all of which are placed consecutive to each other. Immediately on the outside of this wall is the school bus loading zone, where pupils congregate prior to boarding their

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respective buses for home. Based on the testimony of D.J. (Tr. I-81) and respondent (Tr. II-123), as well as a photograph of the windows taken from the outside (R-1), the hearing examiner believes that pupils of junior high school age are generally tall enough to be able to see in respondent's classroom from the outside, and it is clear that anyone standing on the inside of the classroom would be able to see outside. The two 41-foot walls may be considered, in the hearing examiner's view, the front and back of the classroom respectively. A solid wooden door, through which one enters the classroom from a corridor, is on the back 41-foot wall, while the front 41-foot wall houses another door with a window therein. (Tr. I-19) This door leads into a small connecting office to another music room (J-1, J-2) assigned to a teacher identified as Mr. Thomas. (Tr. I-17-18) (Tr. II-97-98, 113)

D.J. testified that as she returned the music sheets to respondent's classroom "*** there were a lot of people coming in and out, returning music stands that had been used for the show, [the dress rehearsal for the May concert] and people just drifted out***." (Tr. I-15) Furthermore, D.J. testified that "***the Janitor did go in and out [of the classroom] a few times helping, you know, but a lot of kids were there.***" (Tr. I-15)

D.J. then explained subsequent events in the following manner:

> "***Well, people had *** gone out[.] [F]inally, nobody came in anymore and then we were just talking and I showed him my report card and he made a remark. And he said, 'Your father is not going to like this,' because I think I had one bad grade on it. He said 'Let's see if Mr. Thomas is in his room.' And Mr. Thomas is somebody who was working on a dance for a solo I was doing. (Tr. I-16)
>
> "He [respondent] unlocked his office and there was a light on in the room that is Mr. Thomas's room. I didn't see anybody in there, they have some sort of curtain or something over it, covering the window on the door. I didn't see Mr. Thomas in there, but the light was on so he could have been in there, but I'm not positive, I didn't see anybody.***" (Tr. I-18-19)

At this juncture, D.J. testified that she and respondent were standing in the small connecting office between the two music classrooms when respondent asked her to go into his classroom to see if a light was on in one of the three storage areas located against one of the 31-foot walls. D.J. testified that he asked her to check the light in storage room Number Two. (Tr. I-21)

Continuing, D.J. testified:

> "***I couldn't tell [if the light in storage room Number Two was on] because there was something covering, there was a little glass window [on the door] and there was something covering it, so I opened the door [to the storage room Number Two] and Mr. Polito came in behind me. So he said to me, 'I want you to feel something,' and he took my hand and he put his penis in my hand and he said, 'Let me show you how to stroke it.'

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> And I took my hand away and I went to leave and he said, 'Wait a minute, let me make sure nobody is out there or nobody can see in.' And he said, 'All right,' and he walked out and I walked out after him. And he said, 'Wait a minute. I want to talk to you.'***" (Tr. I-21)

D.J. testified that, as she opened the door to storage room Number Two, she had to push a few music stands out of the way to open the door. The incident with respondent, as set forth above, occurred inside the storage room but right by the doorway. The door, according to D.J., was closed and the light was off. The entire occurrence lasted about five seconds. (Tr. I-22) When the incident happened, D.J. testified she exclaimed to respondent, "I don't believe you." (Tr. I-23)

D.J. testified that respondent then left the storage room and went into the classroom and she, too, left the storage room. She wanted to walk out, when respondent said he wanted to talk with her. (Tr. I-23)

At this point, D.J. testified there was a knock on the classroom entrance door. When respondent opened the door, D.J. explained "***it [the knock] was my girl friend [K.W.] ***." (Tr. I-24) D.J. who was still in the classroom, signaled K.W. to wait because she wanted to tell K.W. what had just occurred. D.J. further alleged that as respondent was opening the door in response to the knock "***he opened it [the door], not all the way, but almost all the way and then he just let the door close and he was in the middle of a sentence, and he said, 'I'm sorry I did that.'***" (Tr. I-25-26) which K.W. averred she also heard. (Tr. II-12)

In regard to this "knock" on the door, K.W. testified that as she was waiting for D.J., "a student" came by and knocked on the door although she cannot recall who that student was. (Tr. II-11-12) Respondent testified that the "knock" was from a teaching colleague who was returning some guitars which had been borrowed from respondent's room. (Tr. II-121-122) Respondent's version is corroborated by the teacher who testified that he went to respondent's room "***shortly after three o'clock***." (Tr. III-66) The teacher also testified that while he remembered another person being in respondent's classroom at that time, he could not recall who it was; however, he remembered another pupil, a little boy, standing by respondent's classroom door as he was leaving. (Tr. III-66-67)

When D.J. left respondent's classroom, K.W. who is transported to and from school by bus, had left. D.J. testified that K.W. generally boards the school bus around 3:25 p.m. (Tr. I-28) (Tr. II-13) D.J. then walked slowly down the corridor to make sure respondent left the building before she proceeded to her locker on the second floor to get her school books.

D.J. was "confused" as she walked home because she was uncertain whether or not to tell anyone what had happened. (Tr. I-36) However, after arriving home, D.J. did explain what had happened to her friend K.W. during a telephone conversation. (Tr. I-37-38) It is noted here that D.J. did not inform her parents of the incident for approximately two weeks thereafter. (Tr. I-45,

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47, 101) In fact, although D.J. and K.W. discussed the alleged incident several times on the following days, it was not until the following Wednesday, April 18, 1973, when D.J. testified she and K.W. were serving post-school detention in the office and the school's health teacher walked in, that both girls simultaneously decided to tell her what occurred and seek her advice. (Tr. I-40, 42)

In this regard, the health teacher testified that both girls approached her in the school corridor (Tr. I-129) and that they had not been serving post-school detention. If they had been assigned detention, she explained, it would have been held in a classroom and not the school office. (Tr. I-136) In any event, while D.J. testified that the explanation given to the health teacher consisted of:

> "***'I know this girl who has a problem.' And I explained the problem and Mrs.Kolcun [the health teacher] asked where it happened and my girl friend [K.W.] had said, 'Back there in the Music Room.'***" (Tr. I-42)

The health teacher's recollection, on cross-examination, of the initial explanation given by the girls is:

> "***[K.W.] started *** [by explaining] 'We have a friend who is in trouble, could we tell you the story and could you give us advice.' *** [Then K.W. explained as follows] *** She [K.W.] told me [the health teacher] that *** a friend had a teacher in her school places (sic) [his] mail in her mailbox.***" (Tr. I-137-138)

K.W. denies making that statement to the health teacher. (Tr. III-81) K.W. also did not witness the alleged incident. (Tr. II-99) Although the health teacher testified that she did not know what that statement meant, nor did she ask the girls for an explanation (Tr. I-138-139), the hearing examiner believes the statement to be an attempt at representing the act of sexual intercourse which inaccurately describes the substance of the allegation contained within the charges, *sub judice*. However, the health teacher also testified that D.J. did explain that "***at one time she [D.J.] was alone in the room with a teacher ***he opened his fly and placed his penis in her [D.J.'s] hand.***" (Tr. I-130-131) This latter explanation does comport with the substance of the allegation herein.

Additionally, the health teacher testified that D.J. stated that "***Mr. Polito *** was in love with her [D.J.], that he wanted to date her, that he wanted to take her out.***" (Tr. I-154) Furthermore, when asked by the health teacher whether or not she, D.J., made any advancements to respondent, D.J. was to have replied that "***she had a strong crush on him, she really liked him.***" (Tr. I-155)

Subsequent to the girls' relating the incident, the health teacher testified that she advised if what they said were true, D.J. must tell her parents. D.J., however, rejected this advice. (Tr. I-133) After the girls departed, the health teacher attempted to locate the school principal and vice-principal. Failing this, the health teacher did locate the administrative assistant and reported to her what D.J. and K.W. stated to her. (Tr. I-133-134)

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D.J. testified that she remained in the school chorus after the alleged incident occurred on April 13, 1973 until her parents were informed, after which her participation in chorus ended. (Tr. I-47) However, the Monday following the alleged incident, she went to chorus and saw respondent. Nothing out of the ordinary occurred. However, on Tuesday, April 17, 1973, D.J. testified she had to go to respondent's classroom "*** to get the record for the solo and ask him a question on the song.***" (Tr. I-45) On direct testimony, D.J. testified that after the incident on Friday, she always made sure somebody was in respondent's classroom when she had to go there because "***I [D.J.] wanted somebody in there***." (Tr. I-45) However, on cross-examination, D.J. explained:

> "***when I was in there [the classroom] with Mr. Polito *alone* and we were talking about the songs***." (Tr. I-109) (*Emphasis supplied.*)

D.J. testified that she asked her friend K.W. to accompany her to respondent's classroom and that K.W. waited in the corridor immediately outside the classroom while she got the record and discussed her questions with respondent. (Tr. I-112) As D.J. and respondent were exiting the classroom, K.W. was to have said to D.J.: "***It's about time.***" (Tr. I-44, 109) D.J. explained that K.W. directed that remark to her, but respondent must have felt the remark was a sarcasm towards him. D.J. quoted respondent as saying to K.W.:

> "***'Get in the room, I want to talk to you.'***" (Tr. I-109)

Then he said to K.W.:

> "***'Whatever [D.J.] and I do after school is our business and keep your mouth shut and go home and wash your mouth out with soap.'***" (Tr. I-109-110)

D.J. testified that K.W. said to respondent:

> "***'I shouldn't be the one that should have to wash my mouth out.'***" (Tr. I-110)

K.W. left the classroom crying (Tr. I-113), and respondent was alleged to have stated to D.J.:

> "***'I'm sorry I talked to your friend that way.'***" (Tr. I-110)

Although D.J. testified she had finally resolved in her mind to inform her parents of what allegedly occurred on April 13, 1973 with respondent, she did not arrive at the determination until the day before her mother was informed of the incident by K.W., some two weeks later. (Tr. I-47) D.J. did explain what occurred after her mother had confronted her with knowledge of it. (Tr. I-46)

In regard to D.J.'s testimony that she informed K.W., during a telephone conversation, what occurred, K.W. substantiates that happening. (Tr. II-15)

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K.W., however, did testify that she told her own mother of the alleged incident on the following Monday, April 16, 1973. (Tr. II-16)

K.W.'s testimony regarding the occurrence of Tuesday afternoon, April 17, 1973, in which she was allegedly reprimanded by respondent is as follows:

> "***after chorus [practice] was over *** we [respondent, D.J. and K.W.] walked down to the music room***we went in, I [K.W.] walked in [the classroom] with her [D.J.] and then she went in to get the music and I went out to wait for her because Mr. Polito said he wanted to talk to her. And I made sure I went in with her before that so I knew if something would happen, that I would be with her and I went and waited outside and while he talked to her. And when they came out, I said to [D.J.], 'It's about time.' And Mr. Polito pulled me and [D.J.] into the room, sat us down at a desk and told me what me (sic) [respondent] and [D.J.] do after school is his business and I [K.W.] should keep my mouth shut. And I started to get up and he told me to go home and wash my mouth out and I told him it shouldn't be me and I shut the door and went upstairs.***" (Tr. II-17-19)

Respondent testified that during the concert's dress rehearsal, on April 13, 1973, D.J. had committed an obvious singing error which, he explained, may have been occasioned by D.J.'s absence from school the prior day when he changed a specific portion of the program. (Tr. II-119) In any event, subsequent to the dress rehearsal he returned to his own classroom to distribute report cards to designated pupils. After those pupils received their report cards and left, respondent asserted J.J. came in his classroom alone to get her practice record. Respondent testified that he was alone with D.J. for about ten or fifteen minutes (Tr. II-120) discussing the error she had made during the dress rehearsal. (Tr. II-119) After the conversation was completed, respondent averred they left the classroom. However, he was not certain whether he directly left the school building or whether he went back to the auditorium to see if the stage had been cleared of equipment. (Tr. II-123) Respondent did not recall where D.J. had gone when they left the classroom together. (Tr. II-123)

Respondent denied that during the conversation he admitted having with D.J. on April 13, 1973, he asked her to go to Mr. Thomas' classroom to see if he was there (Tr. II-127); he denied having D.J. check any storage room to see if a light was on (Tr. II-127, 130); he denied exposing his penis to D.J. (Tr. II-130); and he denied being in a storage area alone with D.J. (Tr. II-130) Although respondent admitted he perceived D.J. had an attraction for him (Tr. II-127), he categorically denied ever making any sexual advances towards her and denied ever exhibiting any emotional response to her attraction for him. (Tr. II-138)

In regard to the alleged incident with D.J. and K.W. on the following Tuesday, April 17, 1973, respondent explained:

> "***[D.J.] came down [to his classroom] to pick up the record *** we chatted for a few minutes and we walked out of the room and [K.W.] was out there [in the corridor] and *** [made] some sort of innuendo,

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[towards him and D.J.] specifically what it was, I don't remember. I called her to the room and I berated her as to her thoughts.***" (Tr. II-132)

In regard to what specifically K.W. was alleged to have said, respondent testified that he could not precisely recall but whatever she said it "***had a sly connotation, enough for me to get aggravated over it.***" (Tr. II-133)

On prior occasions, respondent testified, K.W. was to have made "***[g]eneral statements, never to me, just general statements which, again, I can't pinpoint what was said but enough that it had either a double meaning or something to the effect that you can read it more than one way.***" (Tr. II-133)

Respondent testified he first was informed of the allegations contained in the instant charges approximately four weeks after the date they were to have occurred. (Tr. II-131) He explained that the principal called him to the office one day after school and informed him that the parents of D.J. had reported the allegations against him as set forth herein. (Tr. II-131) The principal testified that this conference with respondent occurred on May 7, 1973, the same day he, the principal, was informed of the charges by the parents. (Tr. III-133)

Respondent testified that from the dates of April 13 until May 7, the day he was informed of the allegations against him, D.J. continued to work with him in the chorus with her solo, and continued her individual practice sessions with him. (Tr. II-131–132) It is pointed out that D.J. filed formal charges with the Board Secretary on or about June 11, 1973, and the Board suspended respondent from his teaching duties on June 25, 1973.

The principal testified in regard to his first acquiring knowledge of the allegations, as set forth herein, on May 7, 1973, the versions as provided by both D.J. and K.W. on May 7 and again on May 9, the statement given by respondent on May 7, and his subsequent investigation of the allegations. (Tr. III-129-180) The principal's testimony in regard to what had been reported to him by D.J. and K.W. regarding the incident of April 13, 1973, is substantially as already set forth herein with one major exception: K.W. reported that she was still standing in the corridor when D.J. and respondent exited from the classroom on April 13, 1973. (Tr. III-141)

The principal also testified that his investigation of the allegations herein showed that respondent, who had a private music lesson regularly scheduled for every Friday in another community (Tr. III-9), was fifteen minutes late for the appointment on April 13, a Friday.

It is noted here that five colleagues of respondent were called to testify regarding character traits and the veracity of D.J. and K.W. (Tr. III-35-37; 72-80; 91-95; 98-104; 117-121) The hearing examiner finds that the conclusions and opinions offered by these witnesses in regard to the character and veracity of either girl are based on trivial and insignificant events which had occurred. He further finds this testimony of no value for the determination to be made herein.

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One fellow teacher, however, who is a close friend of respondent (Tr. III-26, 111), testified regarding his observances of D.J. and K.W. in the following manner:

> "***they [D.J. and K.W.] used to talk with Mr. Polito, and a couple of times they used to make some remarks, you know, that could possibly be taken both ways, and I looked a couple of times and I gave Mr. Polito a look or two, that I couldn't believe it.***" (Tr. III-112)

D.J. does admit having an attraction to respondent (Tr. I-31, 102) and, in her view, was known as a "teacher's pet." (Tr. I-30) That respondent recognized D.J.'s attraction for him is only the first step in a teacher's responsibility towards dealing with pupils who become infatuated with their teachers. Respondent himself, on cross-examination, stated a general rule which teachers who find themselves in similar situations of being the objects of infatuation, should carefully follow:

> "***In hind sight, I'd say being alone with any child is bad judgment***." (Tr. III-25)

However, the determination to be made herein is whether the proofs offered by the Board would support a finding that respondent did, in fact, commit the actions as charged. In the final analysis, the sole factor upon which such a determination must be made is the credibility of the witnesses because the charges herein are limited to an incident which supposedly occurred on April 13, 1973. The incident which occurred on April 17, 1973, and which involved K.W. is not an issue requiring a finding of fact upon which a subsequent determination of the Commissioner would be made. Thus, the issue in the instant matter is that D.J. asserts respondent committed certain acts and respondent denies committing those alleged acts.

The Board, on June 2, 1973, and at the suggestion of D.J.'s parents, arranged for D.J. to take a polygraph test conducted by Scientific Lie Detection, Incorporated. Both parties filed Briefs as to the admissibility of the results of the test (P-1) for evidential purposes in this matter. Counsel for respondent points out, and it is not contested by the Board, that respondent did not consent to the polygraph test, and he did not consent to the admittance of the results of the test. If the accusor is allowed to submit the results of the test as evidential, respondent claims that he would be illegally coerced into submitting himself to polygraph testing. Also, respondent avers that he had no voice in selecting the polygraph examiner.

While the hearing examiner refers the determination of whether the polygraph results shall be considered evidential herein to the Commissioner, he recommends that the results not be allowed. This recommendation is based on the guidance of the New Jersey Supreme Court in *State v. McDavitt,* 62 *N.J.* 36 (1972) where Justice Sullivan stated, at page 47:

> "'***It [polygraph test result] is not direct proof of a defendant's guilt or innocence of the crime charged. It is opinion evidence by an expert and

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tends only to indicate whether or not the subject was telling the truth when tested.***" (*Emphasis supplied.*)

While the hearing examiner finds no basis upon which to conclude that D.J. does not believe in the truth of the allegations she brought forward here, he finds no basis to disbelieve respondent's calm, straight forward denial of the accusations herein. While respondent, by his own admission, may have used poor judgment regarding his scheduling of individual practice sessions for female pupils, particularly those at such an impressionable age as D.J., the hearing examiner is impressed with his candor.

Accordingly, the hearing examiner finds the proofs offered herein fail to substantiate the charges, *sub judice,* and recommends the dismissal of each and every charge against respondent, and further recommends his immediate reinstatement to his position as a teacher with the Board with all back pay which may have been withheld from him.

This concludes the report of the hearing examiner.

* * * *

The Commissioner had reviewed the report of the hearing examiner and the exceptions and objections pertinent thereto which have been filed by the Board. It is noted that such exceptions and objections are principally concerned with credibility and that the Board proposes, in this report, that the results of a polygraph test administered to D.J. be admitted into evidence subject to cross-examination of the expert who administered it.

However, the Commissioner cannot agree that in a proceeding of this kind such tests should be routinely given or administered. While the Court in *State v. McDavitt,* 62 *N.J.* 36 (1972) stated that the growing use of polygraph testing as a "***scientific tool cannot be doubted***" (at p. 45), the Court also made it clear that such testing "*** is not direct proof of a defendant's guilt or innocence ***" (at p. 47) and, thus, that a subjective determination in matters such as the one, *sub judice,* is still required. This subjective determination has been made by the hearing examiner, and the Commissioner holds it is clear, well-founded, and unequivocal.

In essence, the charges herein against respondent are grounded in the unsupported testimony of a pupil thirteen years of age, and they are denied by respondent. However, in many previous decisions the Commissioner has expressed the opinion that the testimony of school pupils must be used with great caution and particularly where, as here, such use requires a final adjudication grounded primarily on the basis of the testimony. *In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick,* 1971 *S.L.D.* 566; *In the Matter of the Tenure Hearing of Mary Louise Connolly, School District of the Borough of Glen Rock,* 1971 *S.L.D.* 305

Accordingly, the Commissioner directs the Board to restore respondent to his position of employment forthwith with all the emoluments which are his

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due, retroactive to the date of his suspension by the Board, subject only to a mitigation of damages as the result of other employment and earnings.

COMMISSIONER OF EDUCATION

June 25, 1974

Yoshiko Kelley,

Petitioner,

v.

Board of Education of the Borough of Alpine, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Sauer, Boyle, Dwyer and Canellis (George W. Canellis, Esq., of Counsel)

For the Respondent, Joseph R. Letcher, Esq.

This matter having been opened before the Commissioner of Education by formal Petition of Appeal and Answer and a conference of counsel being conducted at the State Department of Education building, Trenton, on October 31, 1972 and unsuccessful attempts being made to arrange for hearing dates in this matter; those dates being February 26, 27, and 28, March 2, May 16, May 30, and June 5, 1973; and

It appearing that the Board notified the Division of Controversies and Disputes of its intention to file a Motion for Summary Judgment; and

It appearing that on June 15, 1973, petitioner agreed to a Stipulation of Dismissal with prejudice by letter sent to respondent; and

It appearing that the Board of Education had caused a proposed Stipulation of Dismissal with prejudice to be sent to petitioner; and

It appearing that petitioner, contrary to its proposal regarding dismissal, did not join the proposed Stipulation; and

It appearing that on July 27, 1973, that Notice of Motion for Summary Judgment was filed by the Board in this matter; and

It appearing that on July 30, 1973, petitioner asserted the agreement to a Stipulation of Dismissal would provide for mutual releases would be acceptable; and

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It appearing that oral argument was set down for August 22, 1973; and

It appearing that at petitioner's request such oral argument was cancelled; and

It appearing that petitioner, by telephone on August 21, 1973, did not and does not intend to oppose the Board's Motion for Summary Judgment; and

It appearing that the Board's first separate defense in this matter is grounded on petitioner's failure to state a cause of action; and

It appearing that the affidavits filed in support of the Board's Motion for Summary Judgment corroborate the assertion that petitioner fails to state a cause of action; it is therefore

HEREBY ORDERED on this 27th day of June 1974 that the matter, *sub judice*, is dismissed with prejudice for failure by petitioner to state a cause of action upon which relief could be granted.

COMMISSIONER OF EDUCATION

Anne U. Clark,

Petitioner,

v.

H. Francis Rosen, Superintendent of Schools, and Board of Education of the City of Margate, Atlantic County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, McGahn & Friss (Patrick T. McGahn, Jr., Esq., of Counsel)

For the Respondents, Horn, Weinstein & Kaplan (Leonard C. Horn, Esq., of Counsel)

Petitioner, a teacher with tenure status, employed by the Board of Education of the City of Margate, hereinafter "Board," alleges that the Board's action taken July 14, 1971, abolishing the special class for educable, mentally retarded children, and transferring her to teach a class for neurologically impaired children was improper and, as a result, deprived her of employment rights.

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The Board answers that its actions with regard to petitioner have been legal and proper. The Board asserts that its action abolishing the special class for educable, mentally retarded children constituted a proper exercise of its discretion, and furthermore, that petitioner's refusal to accept a transfer to an alternative teaching assignment must be construed as a resignation by her from her position as a member of the teaching staff of the Margate School District.

Petitioner prays for relief in the form of an order of the Commissioner of Education directing the Board: (1) to reinstate her to a teaching position within the Margate School District; (2) to remunerate to her all salary and allowances from September 1, 1971 to the date of reinstatement; and (3) to remunerate her for reasonable counsel fees and costs as the result of this action.

Testimony and documentary evidence were adduced at a hearing held in this matter on May 30, 1973, and continued on October 30, 1973 before a hearing examiner appointed by the Commissioner at the office of the Atlantic County Superintendent of Schools, Mays Landing.

The report of the hearing examiner is as follows:

Petitioner has acquired a tenure status as a teaching staff member in the Margate School District prior to the beginning of the 1971-72 school year. She holds a permanent elementary teacher's certificate to teach grades kindergarten through eight, with an endorsement to teach special classes for the mentally retarded in the elementary and secondary schools. (Exhibit P-6)

Under date of March 10, 1971, petitioner received a written communication from the Superintendent of Schools advising her that her salary for the 1971-72 school year would be $11,892, which included a stipend of $300 above the regular salary step because she was assigned as a teacher of a special education class. (Exhibit P-1) By letter dated April 19, 1971 from the Superintendent of Schools, petitioner was notified that her assignment for the 1971-72 school year was as a teacher of a class of educable, mentally retarded children, located in the Union Avenue schoolhouse. (Exhibit P-2)

The minutes of the regular meeting of the Board held April 21, 1971, disclose that the Superintendent reported to the Board concerning his conference with parents of pupils enrolled in the educable class which was to be transferred to the Union Avenue schoolhouse from the Tighe School. (Exhibit R-12) The Superintendent reported that these parents desired to have their children remain at the Tighe School with children of their own ages, rather than have the class transferred to the Union Avenue School. The Board instructed the Superintendent to investigate the possibility of locating this special class in the nurse's room at the Tighe School for one year, the 1971-72 school year, and relocating the nurse's room in temporary quarters.

The minutes of the Board meeting held May 12, 1971 (Exhibit R-6) include a report by the Superintendent that the educable class currently housed in the Tighe School would be moved to the nurse's room in the Tighe School for

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one year only, and the nurse's room would be temporarily placed in the gymnasium office. The May 12, 1971 Board minutes also indicate that, beginning with the 1971-72 school year, the Tighe School would operate as a middle school housing grades six, seven, and eight.

At the regular meeting held June 9, 1971, the Board formally approved the establishment of a special education class for neurologically impaired pupils for the 1971-72 school year, which was to be housed in the Union Avenue schoolhouse. (Exhibit R-7)

Both petitioner and the Superintendent testified that petitioner was informed on June 18, 1971 of the Superintendent's decision to recommend that the Board formally abolish the special class for educable, mentally retarded pupils for the 1971-72 school year. (Tr. I-77; Tr. II-9) According to petitioner, at that time the Superintendent asked her to accept an assignment to teach a special class for neurologically impaired pupils for the 1971-72 school year, and petitioner replied that she did not want to teach a class for neurologically impaired pupils. (Tr. II-9) Petitioner testified that at a teachers' luncheon held the same day, she again told the Superintendent that she did not want to teach such a class. (Tr. II-9) The Superintendent testified that during his discussion with petitioner on June 18, 1971, he informed her that her class for educable pupils would have to be disbanded because there were only three eligible pupils to be assigned for the 1971-72 school year. (Tr. I-77) According to the Superintendent, he offered petitioner the position of either a teacher of a sixth grade class or the class for neurologically impaired pupils for the 1971-72 school year, and at that time, on June 18, 1971, petitioner told him she was not interested in anything but the educable class. (Tr. I-80-81)

Petitioner testified that she received a telephone call from the Superintendent on June 23, 1971, after the close of the academic year, and the Superintendent inquired what her decision was regarding his offer. Petitioner replied that her decision was the same as during their previous conversation, that she did not care to teach the class for neurologically impaired children. (Tr. II-10) Both petitioner and the Superintendent testified that, during this telephone conversation on June 23, 1971, petitioner requested the Superintendent to put his notification and offer in writing to her. (Tr. I-84; Tr. II-10) As a result of this telephone conversation, the Superintendent wrote the following letter to petitioner under date of June 30, 1971: (Exhibit P-7A)

> "As a result of the decreased enrollment in our educable class for the school year 1971-72, it will be impossible for us to have a class for the educable student. Knowing of your interest in this, I am offering to you another area of assignment. We will have a class for the younger neurologically impaired children, which I am certain that you can handle beautifully. We are all aware of your excellent abilities as a teacher, and the tremendous amount of out-put you get from your students. If you are not interested in accepting the N.I. class, I will be happy to assign you to a regular sixth grade class.

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"Please rest assured however, that if any time we were to again have a class for the educable student, you would have top priority for such assignment.

"Please let me know of your choice within the next week, so that I may complete my scheduling plans.

"Hopeing (sic) that you will have a most enjoyable summer."

The Superintendent prepared a memorandum dated June 24, 1971 (Exhibit R-11), concerning this matter of petitioner's educable class, which was distributed to members of the Board. This memorandum apparently was dictated on June 23, 1971, since in it the Superintendent refers to the fact that he had telephoned petitioner "this morning." The memorandum is quoted in entirety as follows:

"The Educable Class

"It has become more apparent in recent weeks that there are in Margate Schools an insufficient number of children to warrant the continuation of the educable class. Our older educables have either moved into the high school area, or have been placed in residental (sic) or regular study areas, and we have only three young educables. It is not economically feasable (sic) to operate a class for three students. There is an area in our special education program which seems to be demanding more and more class involvement, and that is the class for the neurologically impaired.

"Several weeks ago I approached Mrs. Clark, teacher of our educable class, with the fact that there is an insufficient number of students to justify an educable class next year, and offered her the N.I. class if she wished it, because it is within the area of her certification. She immediately responded that she did not wish to take the N.I. class. I then offered her a regular class, since she is properly certificated for regular class teaching. Mrs. Clark informed me that under no circumstances would she consider taking a regular class.

"Following this, I spoke to Mr. Mosca, keeping him up to date on the situation and he also, within the last several days has spoken with her, and has received the same answer which she gave to me. #1 - She is not willing to take the N.I. class. #2 - She is not willing to take a regular class.

Mr. Baruffi was consulted concerning this, and he assures me that it is not feasable (sic) for us to operate a class for only three students, and that Mrs. Clark is properly certificated to teach a class for the neurologically impaired. Following this conversation with Mr. Baruffi, I called Mrs. Clark this morning to ask her whether she would consider taking either the N.I., or a regular class. Her answer to me was, I want you to put it is writing, so that I will know what steps I should then take. I told her that teachers are subject to assignment by the administration, to any area within their proper certification. I did not state to her, that we have changed at least

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fifteen teachers this year, between building and building, grade and grade, and subject assignment. Of the fifteen or twenty teachers we have re-assigned, Mrs. Clark is the only one, to my knowledge, who has taken exception. Following this conversation with her, I called the County superintendent, to discuss the matter with him, because I realize the possible implications politically, having been told that Mrs. Clark has had her 'run-ins,' on this kind of situation with my predecessors. Dr. Winchell stated that although I was completely in order and proper proceedure (sic) to do this, that it might be a good idea to alert the school Board. This is being done because of possible political ramifications involved, in case her husband should either talk with Dr. Gorodetzer, the Mayor, Mr. Patty McGahn, etc.

"To this end I have prepared this statement for the Board." (Exhibit R-11)

In reply to the Superintendent's letter to petitioner dated June 30, 1971 (Exhibit P-7A), counsel for petitioner addressed a letter to the Superintendent under date of July 9, 1971. (Exhibit P-7) Pertinent parts of this letter are quoted as follows:

"This will acknowledge your letter of June 30, 1971, addressed to my client, Mrs. Anne U. Clark***. This letter was postmarked at Margate City on July 1st, 1971, and received by her on July 2, 1971. In your letter you informed Mrs. Clark that as a result of the decreased enrollment in the educable class for the school year 1971-1972, it would be impossible to have a class for the educable student, and you offered her another area of assignment. Please be advised that Mrs. Clark is not interested in any other area of assignment, either as a teacher of the neurologically impaired children, or in a regular sixth grade class. Mrs. Clark is only interested in fulfilling her contract with the Margate City Board of Education to teach the educable class in special education which was offered to her on March 10, 1971, and which she accepted.

"It is Mrs. Clark's position that she has a valid contract with the Margate City Board of Education to teach an educable class of mentally retarded children for the school year from the first day of September, 1971, to the thirtieth day of June, 1972, at a salary of $11,892.00

"***Mrs. Clark has been the teacher of this educable class for the mentally retarded children since February 13, 1962. Now, after nine and a half years, you request her to accept another assignment. This, four months after she was given a contract renewal for the school year 1971-1972, and after the termination of the 1970-1971 academic year on June 30, 1971.

"***Moreover, you did not inform Mrs. Clark that you were eliminating the educable class, and that you were substituting it with a class for the neurologically impaired children, until the last day of school on Friday, June 18th, 1971.

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"Your notice to Mrs. Clark comes too late, since it was not made known until after her 1970-1971 contract had expired and the school year was over. She has a binding contract for the school year 1971-1972, as teacher of an educable class in the Margate City Schools. She will hold the Margate City Board of Education to this contract and will insist on its performance. She is ready and willing to perform her duties as teacher of the educable class and will report for work to begin her contractual assignment when school opens in September."

The President of the Board testified that he had discussed petitioner's assignment for the 1971-72 school year with the Superintendent prior to the Superintendent's sending the letter dated June 30, 1971 (Exhibit P-7A) to petitioner. (Tr. I-69) The Board President testified that petitioner's husband and counsel for petitioner both attended the Board's regular meeting held July 14, 1971, and both addressed the Board regarding petitioner's teaching assignment for the 1971-72 school year. According to the Board President, petitioner was offered an assignment to teach either the special class for neurologically impaired pupils or a sixth grade class for the 1971-72 school year. (Tr. I-42, 46, 52, 56, 59-60, 71) The President testified that during the Board's July 14, 1971 meeting either petitioner's husband or her counsel rejected the Board's offer to assign petitioner to either the class for neurologically impaired pupils or a sixth grade for the 1971-72 school year. (Tr. I-63-64) At the time of the July 14, 1971 Board Meeting, the President testified, only these two teaching assignments were vacant for the 1971-72 school year. (Tr. I-51-52) The President also testified that during the July 14, 1971 Board meeting, counsel for petitioner several times threatened that he would take the matter of petitioner's assignment to Federal District Court. (Tr. I-60-61, 71, 75)

At the July 14, 1971 meeting the Board formally acted to abolish the special class for educable, mentally retarded pupils and to reassign petitioner for the 1971-72 school year. The minutes of the July 14, 1971 Board meeting (Exhibit R-9) include, *inter alia,* the following:

"A motion was made by Mr. Lippincott and seconded by Mr. Sinderbrand that due to decreasing enrollments in the Educable Class, the Educable Class be abolished for the 1971-72 school year.

"Yeas: Mr. Lippincott, Mr. Sinderbrand, Mr. Gager, Dr. Gorodetzer

"Nays: None

"A motion was made by Mr. Lippincott and seconded by Mr. Sinderbrand that due to the abolishment of the Educable Class, Mrs. Anne Clark is to be transferred to the Neurologically Impaired Class.

"Yeas: Mr. Lippincott, Mr. Sinderbrand, Mr. Gager, Dr. Gorodetzer

"Nays: None"

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As a result of the Board's action taken July 14, 1971, the Board Secretary sent the following notification, dated July 15, 1971 (Exhibit P-3), to petitioner:

> "The Board of Education at its regular meeting, on July 14, 1971 abolished the Educable Class from the program of the Margate City Schools for the 1971-72 school year. This action was taken because of the decreased student enrollment for this class.
>
> "The Board assigned you to the position, of teacher of the Neurologically Impaired class for the school year 1971-72.
>
> "Please confirm your acceptance in writing of this assignment, by Friday, July 23, 1971, so that the staffing requirements may be completed."

In reply to the Board's letter dated July 15, 1971 (Exhibit P-3), petitioner addressed the following communication to the President of the Board under date of August 3, 1971 (Exhibit P-8):

> "This will acknowledge receipt of a letter addressed to me by Helene Forgues dated July 15, 1971 and a copy of this letter sent by Registered Mail ostensibly by H. Francis Rosen on July 26, 1971. These letters were not received by me until August 2, 1971, when I returned home from a trip to Canada.
>
> "As you were advised by my attorney, Patrick T. McGahn, Jr., in his letter of July 9, 1971 and at the Board of Education Meeting on July 14, 1971, I am not interested in accepting a new contract to teach the Neurologically Impaired class for the school year 1971-1972.
>
> "I am only interested in carrying out the contract renewed with the Board of Education on March 10, 1971 as a teacher of an educable class in special education for the school year 1971-1972, at a salary of $11,892.00."

Copies of the above communication were also sent to the members of the Board, the Superintendent, the Board Secretary, and the Board's attorney.

The minutes of the Board meeting held August 11, 1971 (Exhibit R-8) disclose that petitioner's letter dated August 3, 1971, was read, and "no action was taken."

The President of the Board testified that no action was taken by the Board regarding petitioner's August 3, 1971 letter because the Board concluded that there was no action it could take. The President testified that the Board could not force petitioner to take an assignment other than an educable class, and the Board concluded that petitioner would not accept any assignment other than an educable class. (Tr. I-45, 47, 51, 54, 56) According to the President, petitioner refused the assignment offered her for the 1971-72 school year, and the Board took the position that by her refusal she removed herself from the Board's payroll. (Tr. I-58-59)

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While testifying as a witness called by counsel for petitioner, the Board President was asked whether another offer of an assignment would have been made to petitioner by the Board, assuming that petitioner would have made known to the Board her willingness to accept. The Board President answered as follows:

> "*** Every effort would have been made to give her another class. We showed that by offering her the two classes that were available at the time of the abolishment of the educable class. There wasn't any desire to fire Mrs. Clark. There wasn't any vendetta or vengence (sic). There was no reason for it. We just couldn't run a class for three children.***" (Tr. I-56)

Petitioner testified that her counsel had authority to send the letter dated July 9, 1971 (Exhibit P-7) to the Superintendent as her reply to the Superintendent's letter of June 30, 1971 (Exhibit P-7A), and she had discussed the contents of the July 9, 1971 letter (Exhibit P-7) with her counsel. (Tr. II-16)

Petitioner admitted that as of July 9, 1971, her position was that she would not accept either the class for neurologically impaired pupils, the sixth grade class, or any class other than the educable class and had so informed the Superintendent. (Tr. II-19)

According to petitioner, she did not receive the letter dated July 15, 1971 (Exhibit P-3) until August 2, 1971, when she and her husband returned from a vacation in Canada, but she did write the letter dated August 3, 1971. (Exhibit P-8) Petitioner testified that she had not spoken to the Superintendent, the Board or any other school official prior to writing her letter of August 3, 1971 (Exhibit P-8; Tr. II-21), or prior to September 7, 1971. (Tr. II-27)

Petitioner admitted that her position as of August 3, 1971, was that she only had interest in accepting an educable class for 1971-72. (Tr. II-21-22) Her testimony included the statement that, as a tenure teacher, she should have been offered additional teaching assignments, which she could reject if she did not care to accept them. (Tr. II-22) When petitioner was questioned as to what she intended by her letter of August 3, 1971, her reply was as follows:

> "*** I was still holding to my position that I had a valid contract to teach mentally retarded children. I knew as of that date, at the end of June there were six classified children, you can't dissolve children and I felt that when Mr. Rosen, [Superintendent] who was also an intelligent man as is the Board, when they realize they had six children on their hands they would continue the [educable] class.***" (Tr. II-23)

Petitioner expressed her opinion that the Board could not justify eliminating the educable class, because it retained a class for emotionally disturbed pupils with a very small enrollment. (Tr. II-23)

On September 7, 1971, the first school day of the academic year, petitioner, accompanied by her attorney and a certified shorthand reporter,

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went to the Tighe School. The principal was not at the school, and petitioner telephoned him at his home and requested to see him. When the principal entered his office, petitioner's attorney told him that petitioner was prepared to go to work. The principal replied that there was no teaching assignment for petitioner at the Tighe School, and advised petitioner to see the Superintendent. In the transcript made of this conference (Exhibit R-13), the following questions were asked by petitioner's attorney and answered by petitioner:

Q "***Are you ready to go to work?

A "I am ready, willing and able to go to work.

Q "You are going to work under what?

A "Under my contract as of March the 10th.***"

(Exhibit R-13, at p.3)

Petitioner then proceeded to the Superintendent's office at the Granville Avenue School. In the presence of the Superintendent, her attorney, and the stenographer, petitioner repeated that she was ready, willing and able to go to work according to her March 10 contract for the 1971-72 school year. (Exhibit R-13, at p.4) The Superintendent informed petitioner that there was no position available for her in the Margate School District. Petitioner then read to the Superintendent her letter dated August 3, 1971. (Exhibit R-13, at pp. 4-6) Under cross-examination, petitioner testified that her sole purpose in reporting to school on September 7, 1971, was to state that she was ready and able to perform her contract as a teacher of the educable class. She testified that she did this even though she knew the educable class had been dissolved. (Tr. II-27) When questioned whether she went to the school on September 7, 1971 to take whatever position might be available, petitioner testified that she probably would have since she had not heard from the Board and she wanted to fulfill her contract. (Tr. II-27-28) Petitioner further testified that her attorney had verbally informed the Board at the July 14, 1971 meeting that they had to assign her to a class and, if she rejected the assignment, the Board had to reassign her until she received the position she desired. (Tr. II-30)

Petitioner was asked whether the letter notification regarding her 1971-72 salary, dated March 10, 1971 (Exhibit P-1), which she referred to as a contract, made mention of anything other than that she was a teacher of a special class. In reply, petitioner testified that the contract did not specify an educable class, but she had been teaching the educable class for nine and one-half years, and she had informed the Superintendent that she wanted to continue teaching that class. (Tr. II-33)

Petitioner testified that she was aware from the Superintendent's letter dated April 19, 1971 (Exhibit P-2), that in some instances it was necessary to reassign teachers, but she did not believe that her class was receiving the same consideration as others. She testified that she was fighting for her class to have the same advantages as others, and her class was being "pushed around." (Tr.

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II-34-35) Petitioner testified that she did not "sit back" between August 3, 1971, and September 7, 1971. In her opinion, it was the Board that did nothing during this period. (Tr. II-37) Petitioner testified that she had the right as a tenure teacher to expect that the Board would continue to offer her reassignments, even though she had not given any indication that she would accept any class other than an educable class. (Tr. II-38)

By letter dated September 10, 1971 (Exhibit P-9), counsel for petitioner wrote the principal of the Tighe School, charging that his actions constituted a breach of contract, and demanding that petitioner be restored to her position or be paid the salary due her under her contract. The principal replied by letter dated September 16, 1971 (Exhibit R-2), stating that petitioner was not assigned to his school for the 1971-72 school year, and therefore he was not her principal. By letter of September 20, 1971 (Exhibit P-10), counsel for petitioner requested that the principal forward counsel's September 10 letter (Exhibit P-9) to the Superintendent, because petitioner wished to appeal the principal's rejection of her grievance. Counsel for petitioner also addressed a letter dated September 20, 1971 to the Superintendent (Exhibit P-11), enclosing a copy of petitioner's grievance and requesting that the Superintendent take appropriate steps under the Board's grievance policy.

The Superintendent replied to the letter of September 20, 1971 (Exhibit P-11) by writing a letter to petitioner's counsel under date of September 30, 1971. (Exhibit R-3) In his letter, the Superintendent stated that because petitioner had rejected in writing the Board's action assigning her to teach a class of neurologically impaired children, he could not consider petitioner a member of the teaching staff, nor accept her utilizing the grievance procedure. The Superintendent further stated that, in view of petitioner's past association with the Board, he would recommend that the grievance procedure provided for members of the staff be extended to petitioner.

The Board Secretary notified counsel for petitioner by letter of October 21, 1971 (Exhibit R-4) that the Board would meet with petitioner on Tuesday, October 26, 1971, to hear her grievance. The transcript of that conference has been made part of the record in this matter. As a result of the grievance procedure, a letter under date of November 1, 1971, was sent to counsel for petitioner by the President of the Board. (Exhibit R-1) This letter is reproduced in pertinent part as follows:

> "***We wish to inform you that we have reviewed in detail all of the exhibits which you marked for identification during the course of the hearing of October 26, 1971. Furthermore, the Board has considered and reviewed the grievance of Mrs. Clark as presented to it at this hearing.
>
> "Please be advised that it is the decision of the Board that your client's grievance is without merit. For good and sufficient reason, pursuant to statute, the Board of Education dissolved the Educable Class which Mrs. Clark desired to teach, and offered her another position in the category of 'special education.' It was the thinking of the Board and the

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Superintendent of Schools at that time that Mrs. Clark was well qualified to teach the neurologically impaired children and that, in all probability she, more than anyone there, would want to have the class in view of her past experience in teaching the educable class.

"Mrs. Clark declined the offer to teach the neurologically impaired children and, furthermore, by her actions both individually and through you as her attorney, declined the offer to teach a regular sixth grade class. Reference is, of course, made to the letter of Mr. Rosen of June 30, 1971 which you have marked C-7 for identification in which this offer was clearly and unambiguously made by Mr. Rosen in his capacity as Superintendent of Schools. Your letter to Mr. Rosen of July 9 informed him that your client was only interested in teaching the educable class and was not interested in any other area of assignment, 'either as a teacher of the neurologically impaired children, or in a regular sixth grade class.'

"Furthermore, your client wrote a letter to me as President of the Margate City Board of Education dated August 3 in which she again stated that she was not interested in teaching the neurologically impaired class and was only interested in carrying out the contract as a teacher of an educable class in special education for the school year 1971-72.

"Never at any time did your client indicate that she was interested in teaching a sixth grade class, that she was interested in teaching any other class for which she admits she was qualified between kindergarten and eighth grade. To the contrary, your client steadfastly maintained both individually and through you as her representative that she was interested in only one assignment, that of the educable class. Since for good and sufficient reason, the educable class had to be dissolved, your client in effect informed us that she was not interested in being a member of the Margate City teaching staff. Therefore, in effect, your client voluntarily made the decision not to participate as a teacher in the Margate City School System.

"We do not find that the Board of Education deprived Mrs. Clark of anything to which she was legally entitled nor do we find that Mr. Rosen or any representative of the Margate School System in any way improperly deprived Mrs. Clark of any of her legal and contractual rights with the Margate City Board of Education.

"This letter to you is not intended to be an all-inclusive review of the facts involved, but is merely intended to review briefly some, but by no means all of the facts which were presented to the Board at the hearing on October 26, 1971.

"Accordingly, the Board finds that Mrs. Clark's grievance is without merit."

The school psychologist for the Margate School District testified that the neurologically impaired class which was organized for the 1971-72 school year,

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and which petitioner was assigned to teach, was not a difficult class to control, and was no more difficult to teach than any educable class that he had seen in operation. (Tr. I-144) This school psychologist testified that he was newly employed in the school district, and since petitioner's educable pupils had moved out of the school district because of their chronological ages, he had not had the opportunity to observe petitioner's former educable class. (Tr. I-141)

The Superintendent testified that as of September 8, 1971, there were approximately eight nontenure teachers in the school system, including teachers of a neurologically impaired class, art, fourth grade, second grade, sixth grade, a class for emotionally disturbed pupils, physical education, reading, kindergarten, French, Spanish, and industrial arts. (Tr. I-91-92)

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and studied the written exceptions, objections, and replies thereto which have been filed by counsel. The Commissioner observes petitioner's contentions that as a tenured teaching staff member she was entitled, in the summer of 1971, to be placed on the basis of seniority in a position that she deserved (Tr. II-30) subsequent to the time the Board officially abolished her position as a teacher of an educable class. She avers such entitlement was not recognized by the Board in a legal and timely manner and that she should now be reinstated in a teaching position with full "back pay and allowances" retroactive to the date of September 1, 1971.

In support of this argument she cites her testimony at the hearing, *ante,* and the testimony of the President of the Board and the Superintendent of Schools. However, the Commissioner finds no merit in such an interpretation of the record since it is clear that petitioner, as a tenured employee of the Board, was offered two positions of employment prior to the time when her own teaching position was officially abolished by action of the Board on July 14, 1971, and she was reassigned to one of them subsequent thereto. (R-9) This reassignment was to a class for neurologically impaired children which is within the scope of her certification. However, that reassignment was categorically refused by petitioner (P-8), and she stated again, as she had previously, that she was "only interested" in assignment as a "teacher of an educable class."

Thus, the principal facts are clear in this matter and may be stated succinctly as follows:

1. Petitioner was a teacher with a tenure status assigned to an educable class when her position was abolished by an official action of the Board in July 1971 pursuant to statutory authority. (*N.J.S.A.* 18A:28-9)

2. At that juncture, petitioner was formally and properly reassigned to

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another position which she was qualified to fill. (*N.J.S.A.* 18A:28-9 *et seq.*)

3. Petitioner refused the newly assigned position.

This sequence of events clearly supports the conclusion that petitioner abandoned her position and her rights to tenured employment. The Commissioner so holds.

This determination is grounded on the long-held principal that tenured teachers have no entitlement to a specific position of employment, but may be transferred by formal action of the local board of education to another position within the privileges of their teaching certificates. As the Commissioner said in *Josephine DeSimone v. Board of Education of the Borough of Fairview, Bergen County,* 1966 *S.L.D.* 43:

> "*** The protection afforded petitioner by the tenure laws is in her position as teacher. As a teacher she has no claim to a particular class or grade or school but may be assigned by her employer to teach within the scope of her certificate. *Greenway v. Camden Board of Education,* 1939-49 *S.L.D.* 151, affirmed State Board of Education 155, affirmed New Jersey Supreme Court 129 *N.J.L.* 46 (1942) As a teacher under tenure she could not be dismissed or suffer a reduction in salary without cause, but she could be transferred to other teaching positions for which she was qualified. A transfer is not a demotion or a dismissal. *Cheeseman v. Gloucester City Board of Education,* 1 *N.J. Misc.* 318 (*Sup. Ct.* 1923); *Downs v. Hoboken Board of Education,* 12 *N.J. Misc.* 345 (*Sup. Ct.* 1934), affirmed 113 *N.J.L.* 401 (*E. & A.* 1934) (at p. 47)

See also *Abigail J. Williams v. Board of Education of the Borough of Madison,* 1938 *S.L.D.* 552 (1933); *Lelia Carpenter v. Board of Education of the City of Hackensack,* 1938 *S.L.D.* 593 (1933), affd. State Board of Education, 1938 *S.L.D.* 595 (1934).

The statutes of reference herein which must be read *in pari materia* are *N.J.S.A.* 18A:28-9, 10, 11, and 12 which read in their entirety as follows:

N.J.S.A. 18A:28-9

> "Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article."

N.J.S.A. 18A:28-10

> "Dismissals resulting from any such reduction shall not be made by reason

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of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board."

N.J.S.A. 18A:28-11

"In the case of any such reduction the board of education shall determine the seniority of the persons affected according to such standards and shall notify each such person as to his seniority status, and the board may request the commissioner for an advisory opinion with respect to the applicability of the standards to particular situations, which request shall be referred to a panel consisting of the county superintendent of the county, the secretary of the state board of examiners and an assistant commissioner of education designated by the commissioner and an advisory opinion shall be furnished by said panel. No determination of such panel shall be binding upon the board of education or any other party in interest or upon the commissioner or the state board if any controversy or dispute arises as a result of such determination and an appeal is taken therefrom pursuant to the provisions of this title."

N.J.S.A. 18A:28-12

"If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States or of this atate, subsequent to September 1, 1940 shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service."

Thus, when the Board abolished petitioner's position of employment because "*** in the judgment of the board *** it was advisable "*** because of [a] reduction in the number of pupils ***" (*N.J.S.A.* 18A:28-9), the Board had an obligation to transfer petitioner to another vacant position for which she was qualified, or the right to dismiss her if there was no such vacancy. (*N.J.S.A.* 18A:28-10) In this case, the Board did not exercise its authority to dismiss petitioner, and consequently petitioner's entitlement to be placed on a seniority list in the event of such dismissal (*N.J.S.A.* 18A:28-11) was never a factor. Instead of being dismissed by the Board, petitioner was legally reassigned to another teaching position for which she was qualified.

In summary, the Commissioner determines that, pursuant to law (*N.J.S.A.* 18A:28-9), the Board legally abolished petitioner's specific position of employment as a teacher of a class of educable mentally retarded pupils (R-9); offered her two other positions which she declined to accept; transferred her by

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formal resolution to a teaching position which she subsequently refused (P-8); and that such refusal constitutes abandonment of her tenured entitlement. Accordingly, the instant Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 28, 1974

Pending before State Board of Education

Board of Education of the City of Burlington,

Petitioner,

v.

Board of Education of the Township of Edgewater Park, Burlington County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, John E. Queenan, Jr., Esq.

For the Respondent, Steven Warm, Esq.

Petitioner, the Board of Education of the City of Burlington, hereinafter "Burlington City Board," alleges that the Board of Education of the Township of Edgewater Park, hereinafter "Edgewater Park Board," has improperly refused to pay the regular amount of monthly tuition billed for its pupils enrolled in the Burlington City Board's High School, under the terms of the sending-receiving relationship between the two school districts.

Respondent Edgewater Park Board, denies that its actions have been improper and asserts that there exists a binding contract between the two Boards which requires that Edgewater Park receive a ten percent discount on the monthly per pupil tuition cost for high school purposes. The Edgewater Park Board avers that the Burlington City Board is attempting to void the provisions of a contract by which it is bound until the date of June 20, 1976.

The Burlington City Board prays for relief in the form of an order of the Commissioner of Education directing the Edgewater Park Board to pay a balance due on monthly tuition bills presented since January 1, 1972.

A hearing in this matter was conducted by a hearing examiner appointed

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by the Commissioner at the office of the Burlington County Superintendent of Schools, Mount Holly, on May 25, 1973. The report of the hearing examiner is as follows:

The Burlington City Board and the Edgewater Park Board had a sending-receiving relationship prior to the 1966-67 school year whereby Edgewater Park sent its ninth-grade pupils to Burlington City's junior high school, and its tenth, eleventh, and twelfth-grade pupils to Burlington City's high school. The record discloses that, during 1964, the two Boards were operating under a sending-receiving agreement which was to expire in June 1966. As the result of negotiations between the two Boards, an agreement was reached on August 17, 1964 (Exhibit J-1) for a new sending-receiving relationship for a ten-year period beginning September 1, 1966, and ending June 30, 1976. This agreement (Exhibit J-1) is set forth in entirety as follows:

"THIS AGREEMENT, made on the 17th day of August, 1964, between the BOARD OF EDUCATION OF THE CITY OF BURLINGTON, County of Burlington and State of New Jersey and the BOARD OF EDUCATION OF THE TOWNSHIP OF EDGEWATER PARK, County of Burlington and State of New Jersey;

"WHEREAS, the Board of Education of the City of Burlington is now furnishing high school education for the pupils of the school district of the Township of Edgewater Park pursuant to the provisions of NJSA 18:14-7 (sic); and

"WHEREAS, the Board of Education of the City of Burlington now desires to enter into a ten year sending and receiving district contract with the Board of Education of the Township of Edgewater Park, the said period of ten years commencing with the date of September 1, 1966 and terminating as of June 30, 1976, and said Board having passed a resolution dated June 29, 1964 authorizing the appropriate officers of said Board of Education of the City of Burlington to execute said ten year contract; and

"WHEREAS, the Board of Education of the Township of Edgewater Park has also passed a resolution agreeing to send their pupils through grades 9 to 12;

"NOW, THEREFORE, the parties hereto in consideration of the convenants set forth hereinafter, agree as follows:

"1. The Board of Education of the City of Burlington agrees to provide high school education for all the pupils, Grades 9 through 12, of the school district of the Township of Edgewater Park for a term of ten years commencing September 1, 1966 and terminating as of June 30, 1976.

"2. The Board of Education of the Township of Edgewater Park agrees that it will not withdraw its pupils or provide facilities for them in its own district or any other school district for a period of ten years as aforesaid, except that the Board of Education of the Township of Edgewater Park

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upon giving the Board of Education of the City of Burlington two years' notice in writing may withdraw the 9th grade pupils prior to the termination of this agreeement."

Prior to the adoption of this mutual agreement (Exhibit J-1), the Burlington City Board adopted a resolution under date of June 29, 1964 (Exhibit P-1) authorizing the agreement pursuant to then *N.J.S.A.* 18:14-7.3 (now *N.J.S.A.* 18A:38-20). This resolution (Exhibit P-1) reads in its entirety as follows:

"WHEREAS, The Board of Education of the City of Burlington has, by resolution, terminated the sending-receiving relationship with another school district, affective (sic) at the close of the 1965 school year; and

"WHEREAS, This action was necessary because the Board of Education of the City of Burlington had determined an inability to further accommodate the increasing enrollment from this sending district; and

"WHEREAS, The Board of Education of the City of Burlington, in the interest of maintaining the present comprehensive high school program, has elected to retain the school district of Edgewater Park Township as its only sending district; and

"WHEREAS, The Board of Education of the City of Burlington now desires to enter into a ten-year sending-receiving district contract with the Board of Education of Edgewater Park Township to assure an adequate pupil enrollment in order to sustain the aforementioned comprehensive program; now therefore be it

"RESOLVED, That the Board of Education of the City of Burlington hereby desires to enter into a contract to educate all of the secondary school pupils, Grades 9 through 12, from the sending district of Edgewater Park Township and that said contract include these provisions:

"1. To extend for a period of ten (10) years, commencing with the date of September 1, 1966, and terminating as of June 30, 1976;

"2. To agree to the withdrawal of the 9th Grade pupils from this contract upon written request from the Board of Education of Edgewater Park Township to the Board of Education of the City of Burlington, at least two (2) years prior to the desired termination date for the sending/receiving of 9th Grade pupils;

"3. To allow the Board of Education of Edgewater Park Township a discount of 10% of the annual per pupil cost, determined according to statute, in establishing the cost of tuition each year for the duration of the contract;

"4. To encourage succeeding Boards of Education of the City of

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Burlington to perpetuate all provisions of this resolution to its established termination date of June 30, 1976; now therefore be it further

"RESOLVED, That upon the school districts so involved in this contract mutually agreeing to the terms of such contract, in accordance with NJSA 18:14-7 (sic) the proper officers of the Board of Education of the City of Burlington are hereby authorized to execute the aforesaid contract."

The Edgewater Park Board adopted a resolution at a meeting held August 17, 1964 (Exhibit R-1), which incorporated *in toto* the Burlington City Board's resolution (Exhibit P-1) and added a concurrence together with authorization to execute the ten-year agreement. (Exhibit J-1)

Thereafter, the two Boards continued in a mutual sending-receiving relationship in accordance with the agreement (Exhibit J-1), beginning September 1, 1966. For the school years 1966-67 through 1970-71, a period of five years, the Edgewater Park Board received a ten percent discount on each monthly tuition bill for its pupils enrolled in grades nine through twelve in the Burlington City High School. This practice continued during the first half of the 1971-72 school year. At its regular meeting held January 10, 1972, the Burlington City Board took the following action in regard to the tuition rate to be charged to the Edgewater Park Board (Exhibit P-5):

"***it was moved by Mr. Levin with a second by Mrs. Laforsh to terminate the ten per cent discount arrangement effective January 1, 1972; further, instructing the Secretary, assisted by the Board Solicitor, to prepare a letter to the Edgewater Park Township Board of Education advising of this decision.

"Motion carried.

"In conjunction with the previous motion, it was also moved by Mr. Levin, with a second by Mrs. Laforsh, authorizing the Secretary to so advise the Edgewater Park Township Board of Education that the estimated annual per pupil tuition rate to be charged during 1972-1973 would be $1,300.00.

"Motion carried.***"

The secretary of the Burlington City Board sent a communication dated January 11, 1972 to the Edgewater Park Board (Exhibit P-2), advising that Board of the change in the Burlington City Board's policy regarding the billing of tuition. This letter reads as follows:

"You are hereby advised that as of January 1, 1972 the tuition rate per pupil for pupils attending Burlington City High School will be $119.40 per month as determined by audit of actual costs for the 1970-1971 school year.

"We have been advised by our Solicitor, after his meeting with your

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Superintendent and Solicitor, that we must collect the aforesaid amount per pupil."

In accordance with the second motion adopted by the Burlington City Board on January 10, 1972 (Exhibit P-5), the secretary sent another letter to the Edgewater Park Board dated January 11, 1972 (Exhibit P-3) notifying that Board of the tentative tuition rate for the 1971-72 school year and the estimated tuition rate for the 1972-73 school year. This letter is reproduced in full as follows:

"The following is a tabulation of per pupil costs, actual and estimated for the Burlington City High School during the previous year, the current year, and the projection of costs for 1972-1973. The purpose of this tabulation is to furnish your district with the necessary tuition cost information for the preparation of your school budget for 1972-1973.

Estimated Cost 1970-1971	Actual Cost 1970-1971	Tentative Rate 1971-1972	Estimated Rate 1972-1973
$1,173.00	$1,194.00	$1,194.00	$1,300.00

"It should be noted that the tuition rate for 1972-1973 is an estimate based on projected per capita costs of the 1971-1972 school year and in accordance with Rules of the State Board of Education in the matter of tuition in public schools, will be adjusted when actual student per capita costs are determined for 1971-1972.

"Your acceptance of the tentative tuition rates to be charged for the 1972-1973 school year will be binding under the terms of our contract unless word to the contrary is received within thirty days from the date of this letter."

At its regular meeting held January 17, 1972, the Edgewater Park Board voted to direct its attorney to notify the Burlington City Board that it would not accept the change in tuition policy stated by the Burlington Board in its letter of January 11, 1972. (Exhibit P-2)

The reply of the Edgewater Park Board was made by its attorney by letter dated January 19, 1972, addressed to the secretary of the Burlington City Board. (Exhibit R-2) This reply reads as follows:

"Your letters of January 11, 1972, addressed to the Board of Education of the Township of Edgewater Park have been directed to me for reply.

"This matter was fully reviewed at the Regular Meeting of the Edgewater Park Board of Education on Monday night, January 17, 1972. As a result of the review, I was instructed to communicate with you advising you that the Board of Education of the Township of Edgewater Park does not feel that it can accept the increase as proposed. The Board of Education of the Township of Edgewater Park takes the position that the contract entered

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into between Edgewater Park and Burlington City in June of 1964 is binding and in force. Accordingly, the Board of Education of the Township of Edgewater Park will remit in accordance with the terms of that agreement.

"In your letter of January 11, 1972, you indicated as follows: 'Your acceptance of the tentative tuition rates to be charged for the 1972-1973 school year will be binding under the terms of our contract unless word to the contrary is received within thirty days from the date of this letter.' This is rather confusing. We agreed to be bound by the terms of the contract and will remit in accordance therewith.

"It should also be noted that we were advised by another letter under the same date that as of January 1, 1972, tuition would be $119.40 per month. This is also a bit confusing inasmuch as it is an attempt to make retroactive an increase. We would appreciate further clarification on this.

"In conclusion, let me again state that it is the position of the Board of Education of the Township of Edgewater Park that they agreed to be bound by the terms of the contract hereinabove referred to."

The present Superintendent of Schools of the Burlington City School District, who has occupied that position since July 1967, testified that the Board of Education membership had changed over a four-year period ending 1971, so that none of the members remained from the 1964 Board which had approved the sending-receiving agreement (Exhibit J-1) and the accompanying resolution. (Exhibit P-1; Tr. 7, 16) According to the Superintendent, the Board members questioned the ten percent tuition discount for Edgewater Park pupils during the process of computing the anticipated tuition income to be included in the proposed 1972-73 school budget. (Tr. 7, 16) The Superintendent testified that the Board members examined the ten-year agreement (Exhibit J-1) and the resolution (Exhibit P-1) and subsequently, at the regular meeting held January 10, 1972, the Board formally acted to discontinue the ten percent tuition discount to Edgewater Park. (Tr. 8)

The former Superintendent of Schools of the Burlington City School District, who had been in that position at the time the ten-year agreement was negotiated, testified that the Burlington City Board had previously given notice to the Burlington Township Board that because of the rapid growth of pupil enrollment from Burlington Township School District, the Burlington City Board could not accommodate the Township pupils after the 1963-64 school year. This witness also testified that the Burlington City Board proposed to make an addition to its new junior high school and convert that schoolhouse into a four-year high school. The Burlington City Board desired to continue its sending-receiving relationship with the Edgewater Park Board in order to build the type of schoolhouse and offer the kind of diversified educational program which the Burlington City Board was planning. The former Superintendent testified that the Burlington City Board had conferences with the Edgewater Park Board and encouraged that Board to enter into a ten-year agreement. The

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result of the communications and negotiations between the two Boards, he testified, was the agreement (Exhibit J-1) and the resolution adopted by the respective Boards. (Exhibits P-1, R-11; Tr. 18-19)

A letter marked in evidence at the hearing (Exhibit P-6) discloses that, under date of March 18, 1964, the secretary of the Burlington City Board wrote to the secretary of the Edgewater Park Board, confirming a meeting between the two Boards which was then planned for April 13, 1964 at a school in Edgewater Park.

The former Superintendent further testified that the Burlington City Board desired a ten-year agreement with Edgewater Park, and that the Edgewater Park Board wanted some financial consideration as an inducement to enter into a ten-year sending-receiving relationship. He testified that the ten percent discount was discussed by the two Boards and was finally included in the two resolutions (Exhibits P-1, R-1), but it was the position of the Burlington City Board at the time that it could not legally bind succeeding boards in fiscal matters such as these. According to the former Superintendent, this advice had been expressed to the Burlington City Board by the Burlington County Superintendent of Schools. (Tr. 21-22, 31) The former Superintendent testified that he and the Board secretary drafted the resolution adopted by the Burlington City Board (Exhibit P-1) (Tr. 33), and it was his understanding at the time that each Board annually had the right to determine the tuition rate, therefore the tuition discount was included in the resolution (Exhibit P-1) but was omitted from the agreement. (Exhibit J-1; Tr. 25-26, 29, 32-33) The former Superintendent testified that it was the intention of the two Boards at the time the agreement was made that the Edgewater Park Board receive the ten percent discount for each of the ten years the agreement encompassed. (Tr. 36)

The former County Superintendent testified that he had meetings with each of the two respective Boards, with the two Boards together, and with the Superintendents of both school districts to discuss the matter of their sending-receiving relationship. (Tr. 41) This witness testified that he had advised both Boards not to include the ten percent tuition discount in their ten-year agreement because he did not believe that the Burlington City Board could legally bind its successor boards to such a provision. (Tr. 42-43, 48, 50)

The former County Superintendent testified that, in his judgment, the Burlington City Board's resolution (Exhibit P-1) was an expression of its opinion to succeeding boards that the ten percent discount should be given to Edgewater Park. (Tr. 49-50, 55) He also testified that, to his knowledge, the Edgewater Park Board entered into the ten-year agreement on the basis that it would receive ten percent discount for each of the ten years covered by the agreement. (Tr. 55)

A former member of the Edgewater Park Board during the time the negotiations were held and the agreement signed in 1964, testified that, prior to 1960, he had also been a member of the Burlington City Board, and therefore he was the principal negotiator for Edgewater Park in the matter of the sending-receiving agreement. This witness testified that he and a member of the

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Burlington City Board conducted the final negotiations, and the Edgewater Park Board accepted the offer of a ten percent tuition discount as the inducement for entering into a ten-year sending-receiving relationship with the Burlington City Board. (Tr. 64, 72) This former Board member testified that he did not know of any legal impediment to an agreement providing for a ten percent discount, prior to the preparation of the agreement and the two resolutions. He testified that he did become aware of a legal problem in this regard at a later date, but he could not recall the precise time that the problem was raised. (Tr. 66-68) This former Board member could not recall having read the agreement (Exhibit J-1) or the resolution (Exhibit R-1) at the time the Edgewater Park Board voted to approve both. (Tr. 76)

The former President of the Edgewater Park Board at the time the negotiations were conducted and the agreement executed testified that the Edgewater Park Board was not interested originally in a long term sending-receiving relationship with the Burlington City Board. He testified that the Edgewater Park Board had been concerned with the possibility that its pupil enrollment might increase to an extent that would require the school district to erect its own high school. He also testified that the Edgewater Park Board favored a four-year high school in Burlington City, rather than separate junior and senior high schools, so that the Edgewater Park Board's pupils would not be required to attend two secondary schools in Burlington City. (Tr. 75)

According to the former Board President, the Edgewater Park Board decided to pursue the course of securing some financial inducement from the Burlington City Board, as well as an affirmative decision that Burlington City would erect and conduct a four-year high school. (Tr. 76) This witness testified that these efforts culminated in the meeting between the two Boards where the ten percent discount arrangement was agreed to by both parties. (Tr. 76) This former Board President testified that it was his understanding at the time the agreement was approved that the Edgewater Park Board would receive a ten percent tuition discount for the period of ten years encompassed by the agreement. (Tr. 76-78) This witness could not recall having been advised by either the former County Superintendent or anyone else that there was a legal impediment to the intention that the ten percent tuition discount be binding for ten years. (Tr. 81, 83)

In its Brief, the Burlington City Board argues that the agreement does not provide for a ten percent tuition discount for the sending district's pupils, and that the resolution adopted by it clearly is not binding upon boards succeeding the one which originally adopted the resolution. (Exhibit P-1) The Burlington City Board also asserts that the 1964 Board had no legal authority to bind succeeding boards for a ten-year period to the provision of a ten percent tuition discount.

The Edgewater Park Board argues in its Brief that the language of the agreement (Exhibit J-1) and the two resolutions (Exhibits P-1, R-1), taken together, clearly indicates that the intention of the parties was to provide the ten percent tuition discount for Edgewater Park for the ten-year life of the agreement. The Edgewater Park Board further asserts that the parol evidence in

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this case supports the conclusion that both parties had every intention of perpetuating the ten percent discount for the ten-year period. The Edgewater Park Board also insists that there is no statutory proscription against the parties entering into an agreement which guaranteed the ten percent tuition discount for the ten-year life of the sending-receiving relationship.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner, and observes that the parties have waived receipt of the report as provided by *N.J.A.C.* 6:24-1.16.

In the judgment of the Commissioner, the facts in this case are clear that the Burlington City Board desired to provide an arrangement with the Edgewater Park Board whereby the latter would receive a ten percent discount on tuition costs for its pupils enrolled in the Burlington City Board's high school during each of the ten academic years beginning September 1, 1966, and ending June 30, 1976. It is equally clear that the Burlington City Board believed that it could not bind its successor boards to such a ten percent discount provision and therefore such provision was omitted from the formal agreement. (Exhibit J-1) Further evidence of the Burlington City Board's position and intention at the time is shown by the language contained in its authorizing resolution (Exhibit P-1), wherein it stated its intention as follows:

> "*** 3. To allow the Board of Education of Edgewater Park Township a discount of 10% of the annual per pupil cost determined according to statute, in establishing the cost of tuition each year for the duration of the contract;
>
> 4. To encourage succeeding Boards of Education of the City of Burlington to perpetuate all provisions of this resolution to its established termination date of June 30, 1976 ***."

The testimony of witnesses on behalf of the Edgewater Park Board clearly establishes the fact that the Board's intention, at the time the agreement (Exhibit J-1) was signed, was to receive a ten percent tuition discount for each of the ten academic years encompassed by the agreement. These witnesses had only vague recollections regarding any discussions concerning a legal impediment to a binding provision for a ten percent discount for ten years. This is not unusual considering that they were attempting to recall events distant by almost ten years, which they probably had no reason to recall until the time the instant litigation ensued.

The former County Superintendent's testimony disclosed a stronger recollection of the 1964 events, which also is not unusual, considering that he had discussed the problem more frequently with the two Boards and their then

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Superintendents, and he was the individual who had first suggested that the Burlington City Board might not be legally empowered to bind its successors to the discount provision.

The precise question before the Commissioner is whether the action taken by the Burlington City Board of Education on January 10, 1972, which terminated the ten percent discount from the monthly tuition charged to the Edgewater Park Board of Education, was a legal and proper action. Stated another way, the issue is whether or not the Burlington City Board is bound to provide the ten percent discount to the Edgewater Park Board for the remaining duration of their sending-receiving agreement until June 30, 1976.

Sending-receiving relationships between various local boards of education in this State have been both formed and terminated ever since the creation of our local school districts. The comprehensive education law enacted as *L.* 1903 (2d *Sp. Sess.*), *c.* 1, recognized this fact and made limited provision for such arrangements. *R.S.* 18:14-7 The statutory provisions for a ten-year contractual relationship between sending and receiving school districts are much more recent. *R.S.* 18:14-7.3, enacted as *L.* 1953, *c.* 270, § 1, effective July 25, 1953, provided that whenever a local board of education finds it necessary to provide additional school facilities for high school pupils both from its own district and another school district, it may as a condition to the provision of such additional facilities enter into an agreement with the board of education of the sending district for a term not exceeding ten years whereby it agrees to provide such education to the pupils of the sending district during the term of the agreement. This statute was amended by *L.* 1967, *c.* 205, § 2, to include elementary as well as high school pupils and facilities. These provisions were incorporated into the latest general revision of the education law made in 1968, Title 18A, Education, in substantially unaltered form as *N.J.S.A.* 18A:38-20, which reads as follows:

> "Whenever a board of education, now or hereafter furnishing elementary and high school education or either thereof for the pupils of another school district, finds it necessary to provide additional facilities for the furnishing of education to such pupils, it may, as a condition precedent to the provision of such additional facilities, enter into an agreement with the board of education of such other district for a term not exceeding 10 years whereby it agrees to provide such education to the pupils of such other district during the term of said agreement except as provided in this article, and that the sending district will provide for the payment of tuition in accordance with section 18A:38-19."

N.J.S.A. 18A:38-21 (formerly *R.S.* 18:14-7.4) makes provision for the termination of a sending-receiving agreement by the Commissioner on a sufficient showing that the receiving district can no longer provide school facilities for the pupils from the sending district, or that the board of education of the receiving district is not providing school facilities and an educational program suitable to the needs of the pupils of the sending district. Permission for termination may also be obtained on a showing that the receiving district will not be seriously affected educationally or financially by the withdrawal of pupils

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from the sending district. Procedures for termination of a sending-receiving relationship under such circumstances are set forth in *N.J.S.A.* 18A:38-22.

The present statute which authorizes the receiving boards of education to determine the tuition rate to be paid by the board of education of the sending district is *N.J.S.A.* 18A:38-19. These provisions were formerly part of *R.S.* 18:14-7, which derived from *L.* 1933, *c.* 301, § 1, 2, pp. 808 - 809, suppl. to *L.* 1929, *c.* 281, p. 664, which is amendatory of *L.* 1903 (2d *Sp. Sess.*), *c.* 1, p.5.

The controlling statute, *N.J.S.A.* 18A:38-19, reads as follows:

> "Whenever the pupils of any school district are attending public school in another district within or without the state, pursuant to this article, the board of education of the receiving district shall determine a tuition rate to be paid by the board of education of the sending district to an amount not in excess of the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the state board, and such tuition shall be paid by the custodian of school moneys of the sending district out of any moneys in his hands available for current expenses of the district upon order issued by the board of education of the sending district, signed by its president and secretary, in favor of custodian of school moneys of the receiving district."

The State Board of Education has provided a detailed method for annually determining the actual costs per pupil enrolled in high school, *N.J.A.C.* 6:20-3.1; junior high school, *N.J.A.C.* 6:20-3.2; a new school, *N.J.A.C.* 6:20-3.3; classes for educable mentally retarded children, *N.J.A.C.* 6:20-3.4; classes for trainable mentally handicapped children, *N.J.A.C.* 6:20-3.5; classes for physically handicapped children, *N.J.A.C.* 6:20-3.6; and classes for handicapped children enrolled in nonpublic schools, *N.J.A.C.* 6:20-4.1.

These rules permit a sending board and receiving board to agree to a tentative tuition rate based upon the estimated cost per pupil for the ensuing school year, as reflected in the proposed school budget of the receiving district. If the two boards cannot reach such agreement by January 1 of each year, then the tentative tuition rate for the ensuing school year shall be based upon the actual cost per pupil for the immediately preceding completed school year. When a tentative tuition rate is utilized, provision is further made by the rule for either adjustment payments by the sending board or reimbursement payments by the receiving board, as the case may be. *N.J.A.C.* 6:20-3.1 It is noteworthy that, in the case of overpayments by the sending board, the receiving board, the rule states that the receiving board "shall credit" the overpayment toward the next ensuing school year. By contrast, in the instance of underpayment by the sending board, the receiving board "may" charge the sending board all or part of the amount by which the actual cost per pupil exceeded the tentative rate. *N.J.A.C.* 6:20-3.1, § 3, 4

In the instant matter, the Burlington City Board decided on January 10, 1972, to substantially follow the above described procedures in regard to its

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tuition rate for high school purposes, including the elimination of the ten percent tuition discount for Edgewater Park pupils.

The issue in the matter herein controverted has been previously considered by the Commissioner in the case of *Board of Education of the Township of Sparta v. Board of Education of the Town of Newton, Sussex County,* 1939-49 *S.L.D.* 30 (1946), affirmed State Board of Education, 1939-49 *S.L.D.*, 32 (1947). In that case, the Sparta Board applied for termination of its relationship with the Newton Board and requested a change of designation for its pupils on the grounds that the Newton Board has discontinued its policy of charging a tuition rate less than the actual cost per pupil, which it had followed over a period of years. The Commissioner denied a change of designation for the Sparta Board's pupils, and commented as follows regarding the tuition rate policy:

> "*** The policies of boards of education with respect to charging the full amount of tuition sometimes change with the advent of new board members and local pressure. It is so well established as to require no citation of authority that a board of education cannot bind its successor without legislative authority. No authority exists for a board of education to fix a tuition rate beyond the period of one year. ***" (at p. 32)

In more recent cases, the Commissioner has considered issues concerning the authority of local boards to bind a successor board. In *Henry S. Cummings v. Board of Education of Pompton Lakes et al.,* 1966 *S.L.D.* 155, the Commissioner pointed out the well-established maxim that a local board of education is a noncontinuous body whose authority is limited to its own official life and whose actions can bind its successors only in those ways and to the extent expressly provided by statute. In *Cummings, supra,* the Commissioner held that local boards of education may utilize the provisions of *N.J.S.A.* 18A:17-15 and proffer a multiple-year employment contract to a new superintendent only when there is a vacancy in that position and at no other time.

In *Edmond M. Kiamie v. Board of Education of the Township of Cranford, Union County,* 1974 *S.L.D.* 218 (decided February 19, 1974) the Commissioner applied the principle stated in *Cummings, supra,* with respect to an issue of a multiple-year contract under *N.J.S.A.* 18A:17-15 for the then Superintendent of Schools. The Commissioner cited *Skladzien v. Board of Education of the City of Bayonne,* 12 *N.J. Misc.* 603 (*Sup. Ct.* 1934), affirmed 115 *N.J.L.* 203 (*E. & A.* 1935); and *Evans v. Board of Education of Gloucester City,* 13 *N.J. Misc.* 506 (*Sup. Ct.* 1935), affirmed 116 *N.J.L.* 448 (*E. & A.* 1935) as authority for his determination.

The issue of the life of a board's policy on purchasing was raised in the case of *In the Matter of the Tenure Hearing of Carmen T. Perrapato, School District of the City of Garfield, Bergen County,* 1974 *S.L.D.* 525 (decided May 10, 1974). In *Perrapato, supra,* the Commissioner determined that the Board's failure to readopt its purchase policy at the annual reorganization meeting vitiated the policy. The Commissioner cited the following statement from *Skladzien, supra:*

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> "*** A new board comes into being each year since, as here, the term of three members expires each year and, whether new persons are appointed to complete the board or the personnel remains the same, in fact and in law it is a new board of education. Such board is not therefore a continuous body for that reason. It has all of the indicia of non-continuous bodies. It organizes in February of each year, adopts rules for its own administration each year, is completed each year by the selection of three members in the place and stead of those three whose terms have expired. ***" (at p. 604)

It could be argued that the authority bestowed upon local boards of education by the legislative enactment of *N.J.S.A.* 18A:38-20 (formerly *R.S.* 18:14-7.3, enacted as *L.* 1953, *c.* 270, § 1) permitting a ten-year agreement between a sending board and a receiving board, when considered *in pari materia* with *N.J.S.A.* 18A:39-19 which provides for the setting of a tuition rate, is authority for a binding agreement regulating the tuition policy over the ten-year life of such a contract. The Commissioner cannot reach such a conclusion. The history of sending-receiving relationships has from time to time resulted in additional legislation. This is precisely how *N.J.S.A.* 18A:38-20 came to be law. Had the Legislature intended to cloak local education boards with authority to bind successor boards to permanent tuition policies extending the entire life of ten-year agreements, it could easily have done so when *N.J.S.A.* 18A:38-20 was adopted. That the Legislature did not enact such a provision in clear language is adequate reason to conclude that it did not intend to permit local education boards to exercise such a far-reaching discretion regarding tuition policies, and the Commissioner so holds.

As was previously quoted from *Skladzien, supra,* local boards are non-continuous bodies, and each board is responsible to the citizens and taxpayers for the wise and prudent management of the fiscal affairs of the school district, including the annual school budget. When, as in this case, each board must annually determine the amount of tuition funds to be included as anticipated revenue for the succeeding year, and the total of such tuition revenue is calculated by the product of the tuition rate times the number of pupils received, the board must have authority to set the annual tuition rate. Otherwise, a board could be trapped for a decade with a totally unsound tuition policy which could be financially ruinous for the school district.

One other point must be considered at this juncture. The action of the Burlington City Board which rescinded the ten percent tuition discount was taken on January 10, 1972, and was intended to be effective January 1, 1972. At that point in time both Boards were halfway through the 1971-72 school year. The Burlington City Board's 1971-72 school budget included pre-established anticipated tuition revenues, and the Edgewater Park Board's 1971-72 school budget contained a fixed amount of funds to be expended for tuition purposes for the school year. Furthermore, when both Boards adopted their 1971-72 school budgets, Burlington City knew what amount of tuition revenue it could anticipate and the tuition rate upon which such revenue was based. The Edgewater Park Board also knew what amount it was required to

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budget for tuition expenditures to Burlington City, based upon a known tuition rate.

Under these circumstances the two Boards had entered into a tacit contract for the 1971-72 school year. The Edgewater Park Board offered a certain number of pupils for enrollment in the Burlington City High School for the 1971-72 school year, and the pupils in question were accepted and enrolled by the Burlington City Board. Both districts planned and adopted school budgets for the 1971-72 school year which were based upon a number of pupils times a known tuition rate. There was a presumption that these terms of the unwritten agreement would continue until the end of the 1971-72 school year.

Therefore, the Edgewater Park Board was justified in relying upon the continuance of the terms of the 1971-72 arrangement until the close of the school year. The Commissioner finds that the equitable doctrine of estoppel by conduct must be invoked to insure fair play and preserve the conditions of the financial arrangements made by both Boards of Education for the 1971-72 school year, insofar as the tuition rate is concerned. *Board of Education of the Borough of Lodi v. Board of Education of the City of Garfield,* 1938 *S.L.D.* 815 (1927), affirmed State Board of Education, 1938 *S.L.D.* 817 (1927)

In summary, the Commissioner finds and determines, for the reasons hereinbefore stated, that the Board of Education of the City of Burlington is not bound to provide a ten percent tuition reduction for the pupils from the Edgewater Park School District as set forth in its original resolution (Exhibit P-1) with the single limitation that a change in the tuition policy may not be made during the course of a school year and without prior notice to the Edgewater Park Board. Accordingly, the action taken by the Burlington City Board on January 10, 1972, changing the tuition policy effective January 1, 1972, is hereby set aside.

The Board of Education of the City of Burlington may, at this juncture, provide notice to the Edgewater Park Board of Education regarding whether it now intends to eliminate the ten percent tuition discount for the 1974-75 school year.

COMMISSIONER OF EDUCATION

June 28, 1974

Pending simultaneously before State Board of Education and Superior Court of New Jersey

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Eleanor Cossaboon,

Petitioner,

v.

Board of Education of the Township of Greenwich, Cumberland County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Okoniewski, DiStefano & Bronkesh (Noah Bronkesh, Esq., of Counsel)

For the Respondent, Lummis, Kleiner, Moore & Fisher (Jay R. Moore, Esq., of Counsel)

Petitioner, a nontenured teaching staff member employed from April through June of 1973 by the Board of Education of the Township of Greenwich, hereinafter "Board," asserts that the Board, having provided her with a letter of intent to employ her for the 1973-74 school year, improperly withdrew the letter of intent and refused to employ her for the stated period. Petitioner prays for reinstatement to a teaching position with salary benefits pursuant to the contract which she alleges was in effect for the 1973-74 school year.

The Board, while admitting that it refused to employ petitioner for the 1973-74 academic year, denies any improper or illegal action on its part, or that a contract at any time existed between the Board and petitioner for the 1973-74 school year.

The matter is jointly submitted by the parties for Summary Judgment by the Commissioner of Education.

Petitioner was employed on April 1, 1973 at a per diem rate as a substitute teacher for the remainder of the 1972-73 school year. On April 5, 1973, petitioner, along with certain other teaching staff members, was mailed a written offer of employment for the 1973-74 school term which stated, *inter alia:*

> "***This is to inform you that the Greenwich Township Board of Education at its meeting of *April 5, 1973* voted to (re-employ/~~not re-employ~~) you for the 1973-74 school year. Since the Board of Education and the Teachers' Negotiating Team have not settled the contract for 1973-74, it is impossible at this time to mail you a formal contract. ***You are assured, however, that your salary for the 1973-74 year will be the amount agreed to in the negotiations, by the wage scale.***" (Exhibit "A")

Petitioner accepted in writing the offer of employment on or about April 10, 1973. Thereafter, on July 6, 1973, the Board notified petitioner as follows:

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"***At a regular meeting held on July 5, 1973, the Greenwich Township Board of Education elected to withdraw the letter of intent to rehire that was issued to you.***" (Exhibit "B")

Petitioner argues that her acceptance in writing of the Board's letter of intent to reemploy her resulted in the formation of a binding contract, and that the Board's unilateral withdrawal of its letter of intent was *ultra vires* and a breach of contract.

Additionally, petitioner asserts that the Board acted pursuant to *N.J.S.A.* 18A:27-10 in notifying her of its intent to employ her for the succeeding school year and is therefore estopped from denying to petitioner the protection guaranteed by the cited statute.

Petitioner further contends that her alleged improper dismissal entitles her to benefits of salary from September 1, 1973 until the expiration of the contract pursuant to *N.J.S.A.* 18A:6-30.1. In this regard petitioner holds that, in absence of a written contract, there can be no termination clause, and she is entitled to compensation for the entire 1973-74 school year. Petitioner argues that, in any event, no notification of termination was ever given, but merely the Board's letter withdrawing the previous letter of intent to rehire.

Finally, petitioner asserts that the Board's notice of intent to rehire and its subsequent withdrawal worked to her disadvantage in that she had made no effort in the interim to seek employment and thereafter found it too late to obtain employment elsewhere.

The Board admits that it was motivated in April to notify petitioner of its intent to rehire her for the 1973-74 school year by a misinterpretation of *N.J.S.A.* 18A:27-10, which reads in part as follows:

"On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member *continuously employed by it since the preceding September 30* either

"a. A written offer of a contract for employment for the next succeeding year***, or

"b. A written notice that such employment will not be offered." (*Emphasis supplied.*)

The Board asserts that, at the time, it mistakenly believed that petitioner had to be notified prior to April 30, 1973 of the Board's decision to rehire or not rehire her for the succeeding school year. Thus, after petitioner had been in its employ only five days, the Board felt compelled to act at its regular April meeting and issued the April 5, 1973 letter of intent to reemploy petitioner for the 1973-74 school year.

Subsequently, the Board reversed its position. In this regard it states:

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> "***After having employed the petitioner for slightly less than three months and at the next preceding Board meeting following the school term, the Board voted to withdraw the letter of intent previously issued, after having had an opportunity to fully evaluate the various alternatives available to the Board.***" (Brief of Respondent, at p. 3)

and,

> "***The Board certainly had a right to revoke that which it had no power to grant in the first place.***" (Brief of Respondent, at p. 4)

The Board further argues that if the letter of intent does indeed create any obligation on the Board's part, it merely binds the Board to the terms of its standard teachers' contract which contains this clause:

> "***'It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other 60 days notice in writing of intention to terminate the same, but that in the absence of any provision herein for a definite number of days notice, the contract shall run for the full term named above.'***" (Brief of Respondent, at p. 5)

Finally, the Board argues that its July 6, 1973 notice of withdrawal of its intent to reemploy petitioner was made in timely fashion with due regard for petitioner's opportunities to search for employment elsewhere. The Board contends that if such notice had been given at a later time during the 1973-74 school term, it would have created a greater disadvantage for petitioner than that which resulted from notification during the early part of the summer vacation period. In support of this contention, the Board submits the affidavit of the Board's administrative principal giving the results of a survey of employment opportunities within commuting distance of Greenwich Township. This survey purports to show that one or more teaching staff vacancies existed after July 9, 1973 in eleven of the thirteen school districts surveyed, and that petitioner made application to only five of these school districts for employment.

* * * *

The Commissioner has reviewed the entire record of the instant matter, including the arguments of law advanced by the respective parties. He will first consider whether a contract for the 1973-74 school year did exist at any time between petitioner and the Board. The Board's letter of April 5, 1973, *ante,* was an offer of employment which required petitioner to submit, no later than May 1, 1973, a written notice of her intent to accept or reject such employment in the Greenwich Township School District for the ensuing 1973-74 school year. Once the employment was offered and accepted, the action of the parties effectively established a contractual relationship. Thus, a contract did indeed exist, and the Commissioner so holds. The Commissioner is constrained to observe that a more appropriate procedure would have been for the Board to have offered to teaching staff members actual written contracts with benefits equal to those of the current year, subject to such changes as the completed

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negotiations would require in salary or other provisions. Such procedure is in frequent use, and should be followed in future years. In any event, in the matter herein controverted, the end result was that on or about April 10, 1973, following her written acceptance of the Board's offer of employment, petitioner and the Board by their own acts effected a contract of employment for the 1973-74 academic year.

The question then arises as to the provisions of petitioner's employment contract in the absence of a written document, particularly with reference to a termination clause. The Commissioner observes that the same letter sent to petitioner was sent to all other members of the teaching staff of the Greenwich Township School District whom the Board desired to reemploy. He further observes that it is a consistent and common practice of the Greenwich School Board to incorporate into its teaching contracts a sixty-day notification clause permitting termination by either party.

The Commissioner holds that the terms of petitioner's employment contract were those which generally prevailed within the Greenwich Township teacher contracts and that the substance of such generally prevailing contracts applied in the absence of the signed written document. To hold otherwise would, taken to its logical conclusion, render meaningless the numerous contract provisions for all similarly situated teaching staff members. For example, contract provisions for names of parties, dates, salaries, certification, and signatures would be non-existent in similar circumstances.

Accordingly, the Commissioner holds that both the Board and petitioner were bound to the sixty-day notice of termination clause which consistently applied in all standard teaching staff contracts. This clause must be considered as part of the terms of the unwritten employment contract in existence after April 10, 1973. That the Board, through nescience, was unaware of the fact that it had created a contractual relationship with petitioner is apparent. On July 6, 1973, the Board, by letter, withdrew its intent to rehire petitioner, an act which the Commissioner holds was tantamount to the giving of notice to terminate her employment for the 1973-74 academic year. Such letter was received by petitioner on July 10, 1973, which date the Commissioner determines was the effective date of notification of termination of her employment. Sixty days thereafter places the effective date of termination of employment at September 8, 1973, according to the terms of the unwritten contract. Accordingly, petitioner is entitled to her salary until that date in accordance with the Board's salary policy.

The Commissioner finds that both the Board and petitioner were in error in their interpretation of *N.J.S.A.* 18A:27-10. The Board was under no obligation to petitioner to notify her prior to April 30, 1973, either that she would or would not be rehired for the ensuing year, because she had not been employed by the Board from the previous September 30. The statute, *N.J.S.A.* 18A:27-10, requires written notification only to teaching staff members continuously employed since the preceding September 30. The Board's argument that it had "a right to revoke that which it had no power to grant in

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the first place" is in error. Although it is true that *N.J.S.A.* 18A:27-10 did not require notification to petitioner of her employment status prior to April 30, 1973, the Board was empowered to notify her at any time prior to or after April 30 of its intent to employ or reemploy her, if it so desired.

Petitioner in turn fallaciously argues that in view of *Aitken v. Board of Education of the Township of Manalapan,* 1974 S.L.D. 207 (decided February 5, 1974) petitioner is entitled to reinstatement with full pay. However, in *Aitken* the Board was required to and failed to act in accord with *N.J.S.A.* 18A:27-10. In the instant matter, the Board was not required to notify petitioner, and this factual difference clearly distinguishes this case from *Aitken.*

Petitioner argues that in the matter of *Celina G. David v. Board of Education of the Borough of Cliffside Park, Bergen County,* 1967 *S.L.D.* 192, 194, the Commissioner recognized the difficulty teachers experience in finding positions after the beginning of the summer recess. Such is true and doubtless such difficulties are accentuated in the circumstances of the current employment market. The fact remains that in *David* the Board was ordered to pay petitioner her back salary because of her illegal dismissal as a tenure employee without certification of charges and a hearing thereon, rather than her assumed difficulty in seeking employment after July 16, 1964. Such difference distinguishes *David* from the instant matter.

With regard to petitioner's avowal that she was placed at a disadvantage in having to seek employment elsewhere, the Commissioner finds that the Board is obligated only to fulfill the terms of the employment contract. The same reasoning would prevail for petitioner that had she chosen to give notice of termination. It is unfortunate that any notification of termination, whether caused by unfavorable evaluations, staff reduction, or other reasons, may result in a temporary disadvantage to the individual who is terminated. Such temporary disadvantage is likewise frequently worked upon local boards of education and pupils by termination notices given by teaching staff members. Yet, such temporary disadvantages must be permitted in the interest of reasonable flexibility for both boards and teaching staff members in order that both may fulfill their ultimate goals in our highly mobile society.

For the foregoing reasons, the Commissioner denies petitioner's prayer for reinstatement but orders the Board of Education of the Township of Greenwich to pay petitioner her salary from September 1, 1973 through September 8, 1973 at the rate of eight-thirtieths (8/30) of her monthly rate of pay as a regular teacher considering her years of experience. Additionally, she is to receive such other emoluments as may be consistent with the Board's policies.

COMMISSIONER OF EDUCATION

June 28, 1974

State of New Jersey
Department of Education
225 West State Street
Trenton, N.J. 08625

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